

VYTAUTAS MAGNUS UNIVERSITY

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**A LEGAL JUSTIFICATION OF ACADEMIC FREEDOM
AS A FUNDAMENTAL RIGHT:
CHARTING VAGUENESS FOR MORE CLARITY**

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VYTAUTO DIDŽIOJO UNIVERSITETAS

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**AKADEMINĖS LAISVĖS KAIP PAGRINDINĖS
TEISĖS ĮTVIRTINIMAS: VISAPUSIŠKĄ TEISINĘ APSAUGĄ
ĮGALINANČIO APIBRĖŽTUMO PAIEŠKOS**

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ABBREVIATIONS

AAUP	American Association of University Professors
CESCR	United Nations Committee on Economic, Social and Cultural Rights
CODESRIA	Council for the Development of Social Science Research in Africa
CoE	Council of Europe
CRUS	Conference of Chancellors of the Swiss Universities
EC	European Community
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EHEA	European Higher Education Area
ET 2020	Education and Training 2020 strategic framework
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
EUA	European Universities Association
EURATOM	Treaty establishing the European Atomic Energy Community
GATS	General Agreement on Trade in Services
HEI	Higher Education Institution
HRC	Human Rights Committee
IAU	International Association of Universities
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
KTU	Kaunas University of Technology
LERU	League of European Research Universities
LSMU	Lithuanian University of Health Science
OECD	Organization for Economic Co-operation and Development
R&D	Research and development
TEU	Treaty of Maastricht on European Union

TFEU	Consolidated version of the Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UNESCO	United Nations Educational, Scientific and Cultural Organization
US/USA	United States of America
VMU	Vytautas Magnus University
WUS	World University Service

INTRODUCTION

The rationale of the legal issue of the research. Academic freedom is perceived as of “transcendent value”¹ not merely to members of the academic community but to society at large, but it is considered as a prerequisite for higher education to become the key in building and sustaining our future. Generally perceived as a right of each member of the academic community, academic freedom is a quite popular topic among academics and not necessarily always and exclusively by experts in this field. There exist numerous international scholarly publications that analyze the concept and the origin of academic freedom as a principle, and they particularly highlight its fundamentality and the widely undisputed necessity for its protection. Academic freedom has been introduced in a praising manner on so many occasions that it is very much unnecessary to focus the research once again on the significance of academic freedom within the academic community and towards its relevance for the common good of society. Instead, this research will offer an analysis of the relatively undeveloped and often confusing judicial recognition of academic freedom by disclosing complex issues of justification of its protection as a fundamental right.

Academic freedom is a legal concept which has found its position in numerous European constitutions, and national and institutional higher education regulation. Its paramount importance and the need for its protection are underlined in various international conventions and other international and regional documents. The most significant reference to academic freedom can be found in Article 13 of the Charter of Fundamental Rights of the European Union (hereinafter EU Charter) which indicates that “academic freedom shall be respected”.² Moreover, even though academic freedom is not explicitly provided for in every constitution or international convention, its protection is often implied by other fundamental rights. A good and certainly representative example is the European Convention on Human Rights (hereinafter ECHR) which does not include a specific provision on academic freedom. However, the European Court of Human Rights (hereinafter ECtHR) has brought issues regarding academic freedom within the ambit of ECHR, in particular under Article 10, which guarantees the right to freedom of expression. The fact that academic freedom does not have a commonly accepted definition and that it entails a number of different aspects on which there is no overall agreement as well, often results in its cumbersome application. This becomes especially apparent from the varying interpretations the concept has received in different international documents,

¹ *Keyishian v. Board of Regents*, U.S. Supreme Court (1967, 385 U.S. 589).

² *Charter of Fundamental Rights of the European Union*, Official Journal of the European Union (2012/C 326/02), art. 13.

legislations and jurisprudence. They all demonstrate the lack of a systematic approach to academic freedom and offer only little clarity on what exactly this concept covers. As a consequence, the concept of academic freedom raises a number of issues regarding its protection, in particular in relation to its subject matter and its nature.

First, it is difficult to argue reasonably for its significance while its conceptions still remain very much elusive. Consequently, in order for legal provisions such as Article 13 of the EU Charter to have a weighty and positive impact on safeguarding academic freedom, the latter cannot be of inconsistent and puzzling character.

Second, the lack of a clear perception of academic freedom leads to its reluctant application in judicial proceedings, and rather leads to bringing a claim and deciding a case under the violation of other fundamental rights, such as freedom of expression. And although a public speech or utterances do not need to have an academic context in order to be protected under Article 10 of ECHR, the academic context in which such expression takes place must be evaluated as it can be decisive in concluding whether certain speech or activities of academics should be protected under the right to academic freedom, and which otherwise might not be considered as an infringement under Article 10 as a “normal” expression.

Third, as the scope and rationale of academic freedom are not obvious, it is not clear whether all dimensions of academic freedom fall under the ambit of other fundamental rights. Accordingly, a comprehensive protection of the right to academic freedom is not necessarily guaranteed.

Fourth, not having a coherent view on and an unambiguous legal concept of academic freedom results in its inconsistent incorporation in national and institutional legislation and policies. The different scope of academic freedom in various countries and universities may lead to fundamental changes in academic practices as a result of “judicial restraints, limits and requirements”.³

Fifth, as academic freedom is inseparably related to the purpose of higher education, accordingly it must come in line with the standards of the academic profession. In order for academic freedom not to become a handy privilege assumed by members of the academic community as a “God-given right”,⁴ a clearer and more precise concept of academic freedom would allow the proper balance between the rights and responsibilities of academics to be kept.

As there have been a number of attempts to define the concept, this research is not

³ Jogchum Vrieling, Paul Lemmens, Stephen Parmentier and the League of European Research Universities (LERU) Working Group on Human Rights, “Academic Freedom as a Fundamental Right,” *Procedia - Social and Behavioral Sciences* Vol. 13, (2011): 4 // DOI: 10.1016/j.sbspro.2011.03.009.

⁴ Matthew W. Finkin and Robert C. Post, *For the Common Good: Principles of American Academic Freedom* (New Haven and London: Yale University Press, 2009), 6.

exclusively dedicated to, however adds noteworthy to providing a more comprehensive and clarifying concept of academic freedom. Through the analysis of scholarly works in the field, documents adopted by various international and regional academic communities, international conventions and jurisprudence, it concentrates on highlighting the complexity of issues falling under the umbrella of academic freedom which seems to have an intertwined character. As Altbach has noted, “[a]cademic freedom seems a simple concept, and in essence it is, but it is also difficult to define”.⁵ Furthermore, the recognition of higher education as one of the major drivers towards strengthening and building upon the intellectual, cultural, social and technical dimensions for Europe and the continuous changes in higher education systems add to the diversity of issues are conditions for and are conditioned by the concept of academic freedom. In this respect, one of the main issues raised in this dissertation is whether the existing international, European and national, i.e. Lithuanian, regulation ensures adequate protection of academic freedom as a human right.

Relevance of the research. Higher education is entrusted with the mission to contribute to a nation’s public, cultural and economic prosperity, to provide support and thrust for “a full life of every citizen <...>, and satisfy the natural thirst for knowledge.”⁶ The public educational system has been referred to as “a genius of our democracy”⁷, as it develops the minds and the character which will determine the future of a nation. Academic freedom plays a crucial role in this process as free teaching, research, inquiry and academic debate help to ensure the dissemination of knowledge and pursuit of truth.

Evolving higher education systems are highly influenced and shaped by today’s key trends and challenges, such as *Europeanization, internationalization, commercialization, globalization, massification, etc.* European countries are actively engaged in making European higher education more attractive and more competitive. Regional collaboration in the area of European higher education is the most striking example of major transformations and reforms. It is necessary to acknowledge that higher education gradually shifts from its traditional role as a public good towards its modern role as a tradable commodity or service. In the ambit of today’s environment it is highly relevant and important to closely examine the longstanding values of higher education.

The traditional understanding of academic freedom was mainly related to the importance

⁵ Philip G. Altbach, “Academic freedom: International realities and challenges,” *Higher Education* Vol. 41, No. 1 (March 2001): 206 // DOI: 10.1023/A:1026791518365.

⁶ *Law on Higher Education and Research of the Republic of Lithuania*, Official Gazette (2009, no. 54-2140), preamble.

⁷ *Keyishian v. Board of Regents*, *supra* note 1.

of safeguarding the academic community from incitements to impose the truth through authoritative selection. Today we observe a variety and an increasing number of violations of academic freedom. In some parts of the world academics are being harassed, prosecuted, convicted or even killed for their speech or utterances. In other countries infringements of academic freedom are more confined to limitations concerning what and how to teach, what to research, what and where to publish or not to publish. Today it is also important to recognize other forms of potential violations of academic freedom, which are not necessarily easily identifiable. Accordingly, in order to have an overall grasp of the legal justification of academic freedom, it is necessary to evaluate its assertion at different levels and identify its potential threats. Thus, this research concentrates on analyzing academic freedom as a human right, as a value perceived by the international community of higher education institution (hereinafter HEIs), by the United Nations Educational, Scientific and Cultural Organization (hereinafter UNESCO), the European Union (hereinafter EU), the Council of Europe (hereinafter CoE) and the Bologna Process. Although today academic freedom is, explicitly or implicitly, given the status of a human right, it is quite difficult to imagine its adequate protection without a clear concept. It can be argued that in order to safeguard academic freedom, even under the claim of violation of freedom of expression, it is necessary to evaluate academic context for which conceptual clarity of academic freedom is prerequisite. For this reason the research includes an in depth analysis of international and regional documents and laws which in one way or another address the issue of academic freedom in order to develop a more thorough understanding of the academic context in which the principle operates. The analysis is also intended to demonstrate the potential threats to academic freedom which may be “inspired” by recommendations, strategies and other documents adopted in the sphere of European higher education.

European countries are chasing the aims set in higher education policies and strategies established by the EU and the Bologna Process. Accordingly, national governments, as well as HEIs, react by adopting various policies, strategies, programmes and regulations. In addition, HEIs face external challenges, and have to adapt to various changes and requirements, for example seeking alternative funding, encouraging collaboration with private companies, increasingly focusing on commercial activities, encouraging growth in scientific research and focusing on measuring and comparing academic performance and productivity. Although members of the academic community may not directly face the limitations in their academic activities, institutional policies and practices might intentionally, albeit indirectly, impact on the work and related activities of academics towards the pursuit of certain aims of their institution. It can be argued that it is timely and highly relevant to carefully evaluate the possible impact of these developments in higher education systems on academic freedom.

It is also very important to note that academic freedom is understood not only as a right but also as a responsibility of members of the academic community. That shows the dual character of academic freedom and requires a certain balance in higher education regulation. If academics are expected to perform certain duties in order to contribute to the fulfillment of the mission of higher education, other actors within the system of higher education system must be obliged to provide appropriate conditions for the exercise of these duties. It can be argued that legal regulation of higher education must include not only provisions underlining the significance of academic freedom and encouragements to respect it, but also the provisions setting certain responsibilities and limitations to the activities of the state institutions, universities and the private sector that could to interfere with academic freedom. In this respect, the analysis of the documents which do not necessarily discuss the matter of academic freedom but address the issues of higher education and research in general is highly relevant. It provides an overview of whether the balance between academic freedom as a right and between academic freedom as a responsibility is ensured.

Practical application of the research. The research exposes the quite inconsistent subject manner of academic freedom, and the lack of a common understanding over the question of what academic freedom does, and what it does not cover. Our concern in this sense is twofold. First, in the absence of a more explicit conceptual clarification, the mere desirability of academic freedom results in a much more complicated application and insufficient protection. Second, contemporary controversies in higher education, including a variety of sanctions applied for academic speech and utterances, various challenges academics face arising from European, national and institutional higher education strategies, policies and regulation, strikingly demonstrate a strong need for an adequate protection of academic freedom as a human right. In this regard, it can be argued that this research provides guidance for more explicit and comprehensive conception of academic freedom which would allow legislators, governments, HEIs and the courts ensure the necessary level of protection for academic freedom. Furthermore, as a practical application of academic freedom requires conceptual precision, the research presents the main criteria that lack more clarity or accuracy, and which will be elaborated in more detail throughout the entire research, something that is necessary to ensure the effective application and protection of academic freedom. It should be noted that clarification is mainly needed in regard to whether academic freedom applies to the speech and utterances:

1) undertaken (a) by an academic (b) inside the HEI which relates to the (c) area of that individual's expertise, or (d) academic matters in general, or (e) matters of public concern.

2) undertaken (a) by an academic (b) outside the HEI which relates to the (c) area of that individual's expertise, or (d) academic matters in general, or (e) matters of public concern.

Criteria (a) means that the speech or utterances were undertaken by an academic. Although, at first glance, it seems obvious that academic freedom applies only to activities performed by the members of academic community, it is quite common that a person combines academic activity with another profession or occupation, or simply can be acting in its capacity of a private citizen. One example could be a person who is an academic and, at the same time, holds a position as a judge. If such a person criticizes or expresses his or her opinion on the judicial system of the country, but as an academic he or she is teaching and undertaking research in the field of civil law, there is no clear-cut answer to the question whether this person can benefit from the privilege granted by academic freedom in relation to his or her expression. There is no doubt that such person is an expert in both, civil law and constitutional law and/or administrative law, but the issue is whether he/she deserves the protection of academic freedom when speaking as a citizen. If we follow this assumption, the situation could arise that out of two judges who are both criticizing their country's judicial system, and one of them is considered to be an academic (e.g. because of adjunct teaching activity) and the another is not, both, while expressing their opinion about the exact same topical issue, deserve a different level of protection. Such distinctions also come to play and can raise concerns as to the applicability of protection under academic freedom when an academic is speaking as a citizen on public matters on which he/she has little or no experience and/or knowledge.

If we say no, that means that they both, as citizens, can claim freedom of expression, however it loses academic context in the relationship between an academic and HEI, i.e. in relation of employer and employee. Then the question is simply whether the HEI under the employment contract acquires a right to limit an academic's freedom of expression as a citizen. In such case the core idea of freedom of extramural speech suggests that the expression of academic acting as a citizen cannot constitute a ground for dismissal is neglected. Another issue in this sense is that sometimes it may be difficult to distinguish whether a person is acting as an academic or as a citizen.

The complex nature of criterion (a) is also closely related to criterion (b) which makes a distinction between speech or utterances undertaken inside or outside the HEI. There is not much debate in regard to activities undertaken within the HEI. It is either teaching, or research, or intramural speech, and they all seem to fall under the scope of academic freedom. Freedom of extramural expression seems to be a bit more complex. As it refers to speech made by academics as citizens, which is not related to their scholarly expertise and usually relates to matters of public concern, the question is often being raised whether, how and why such speech

is protected under academic freedom. However, it is worth mentioning that today it is not always easy to draw a clear line between what we call inside and outside the university. For example, an academic having his/her own website where personal information or comments which are not related to academic matters are posted and appear alongside with teaching or research material: would this constitute speech within or outside of the HEI?

Criterion (c), i.e. area of one's expertise, mainly refers to freedom of research, publication and teaching. The first category (i.e. inside the HEI) covers academic utterances in the classroom, research and publications with an institutional affiliation. The second category covers utterances undertaken by an academic outside the HEI. That can include teaching, research and publication that relates to scholarly expertise, however performed without institutional affiliation. Accordingly, it is not clear whether academic freedom is applicable in both scenarios. If this was the case, then it is also unclear what is the difference when expression is performed by a person who is not an academic and why such persons deserve a different level of protection compared to "regular" citizens. The main argument could rest on the premise that academic freedom is applicable in the relation between the academic and the HEI in order to protect an academic from undue dismissal from the institution. But then what is the difference if academic publishes research or a book which reproduces a doctoral thesis which on a request by a third party, the national courts order the seizure of the book.⁸ In this case the issue arises not because the HEI criticizes the content of the book or because it dismisses the academic from the institution. It is because of the relation between the author of the book and a third party who takes issue with the content of the book. In this respect, the question is whether academic freedom also applies in such circumstances.

Slightly different from the ones mentioned above is criterion (d), which is related to academic matters in general. That means that an academic is expressing an opinion or a view in regard to a higher education institution, its activities, or the higher education system in general. Such expression is not related to one's particular academic expertise. It is referred to as intramural expression. It is not entirely clear whether an academic is granted freedom of intramural expression when such is undertaken in his/her institution, or whether it is also protected outside the institution, for example when speaking publicly.

The last criterion (e) is not related to one's expertise or academic matters in general. The lack of clarity can be seen when considering what issues can be discussed in the classroom, for example whether the lecturer has a right to discuss matters of public concern, or any other matters that are educationally irrelevant. The last criterion is also related to freedom of extramural expression. Therefore, it is not obvious whether an academic, when speaking as

⁸ *Sapan v. Turkey*, ECtHR (2nd section) (2011, Application no. 17252/09). See Chapter 2.

citizen, deserves the protection of academic freedom.

This research will contribute to bringing more conceptual clarity and precision which is necessary for safeguarding academic freedom through legislation and judicial proceedings. Understanding under what circumstances academic freedom can be claimed and protected would allow to ensure its protection as an independent human right and also to identify whether academic context should be applied when a claim is brought under the violation of other human rights.

The subject of the research. The concept of academic freedom, features and issues of its legal regulation and application.

In the context of this research, the legal regulation academic freedom includes international, European and national legislation, soft-law and case-law which explicitly refers to academic freedom and such instruments that do not address academic freedom directly, however are related to the subject matter, either by contributing to its protection or by creating certain threats, i.e. undue limitation of academic freedom or its separate elements.

Academic freedom is discussed in this research from the perspective of the individual academic. For this reason, freedom of studying which is sometimes perceived as an element of academic freedom, although in some cases it is mentioned in this research, does not form the subject of more detailed discussion.

As this research is limited to academic freedom from an individual academic's perspective, it is also important to stress that the research does not extend to institutional autonomy, which is also referred to as institutional academic freedom. The latter is a separate fundamental principle of higher education, which, although intertwined with academic freedom, covers different aspects of higher education. For this reason, institutional autonomy is discussed in the research as far as it is necessary to show the main differences from academic freedom and where they both are inseparably related or where it helps to underline certain facets of academic freedom.

It should be noted that the concepts of “higher education institution” and “university” are used in this research as synonyms and they describe public institutions which carry out university studies, conduct scientific research, experimental (social, cultural) development, and/or develop high-level professional art; also college studies, develop applied research and/or professional art; conduct long-term research.

The aim of the research. The aim of this research is to offer a comprehensive analysis of the conception of academic freedom and of its legal protection as a human right.

The objectives. The main objectives in order to achieve the aim of the research are the following:

1) To present, by way of an analysis of legal and scientific literature, the prevailing conceptions of academic freedom, and to briefly discuss those dimensions of academic freedom commonly recognized and underline their main characteristics; to underline the fundamentality and grounds for justification of the protection of academic freedom from an historical perspective.

2) To provide, within the framework of human rights, a comprehensive analysis of academic freedom as a fundamental right, and to identify complex aspects of its protection and application.

3) To identify, by way of an analysis of the international and European higher education legal framework issues of the conception of academic freedom, and attempt to highlight the prevailing perception of academic freedom, and to underline its balance with the responsibilities and commitments it brings.

4) To identify issues of the conception, protection and application of academic freedom through an analysis of Lithuanian legislation and jurisprudence in the field.

Originality of the research. There is a large amount of international scientific literature discussing different aspects of academic freedom. Different scholarly contributions quite often cover only one of the elements of academic freedom, some treat academic freedom in general without specifying its different dimensions, and others discuss the constitutional protection of academic freedom, address certain particular national issues, or relevant legislation and case-law in respect of individual national jurisdictions. Academic freedom is also frequently addressed outside a legal context. There has been a substantial discussion, debate, and research about the role of academic freedom within the HEIs, for the academic community and society at large. Academic freedom has often been addressed within the historical context in order to trace and highlight its development and transformations, and to justify the need for its protection.

The subject has been especially popular among US scholars as for the past century academic freedom has been systematically elaborated and applied in the judicial and legislative work of the Committee on Academic Freedom and Tenure of the American Association of University Professors (hereinafter AAUP). The reason for this is that academic freedom in the United States of America (hereinafter US/USA) is not directly protected in the constitution or in specific legislation (contrary to the situation in many European countries), but it is protected through the First Amendment of the US Constitution. The protection of academic freedom has depended on the varying interpretations of the First Amendment by the US Supreme Court.

Accordingly, scholarly literature on academic freedom in the USA concentrates on a legal and moral evaluation of those interpretations.⁹ The number of publications has notably increased after the September 11th 2001 terrorist attacks on the World Trade Center with the adoption of the USA Patriot Act of 2001.¹⁰ The Act initiated a number of limitations and violations of academic freedom which were highly criticized and discussed by scholars.¹¹

Significant research in the field of academic freedom in Europe was conducted by different scholars, however these studies mainly relate to issues of academic freedom in general or to more specific national issues of the respective countries. T. Karran performed highly important and relevant work on the subject. In his research he examined a variety of issues of academic freedom: he provided a working definition of academic freedom for the higher-educational institutions of the EU;¹² by using comparative data from 23 states within the EU he examined the protection of academic freedom in the universities of the Member States of the EU;¹³ he examined the compliance of universities in the EU with the UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel, which deals primarily with protection for academic freedom.¹⁴ Most recently, T. Karran and K. D. Beiter presented the results of their research project SAFE (Safeguarding Academic Freedom in

⁹ For a comprehensive overview of this issue see Robert M. O'Neil, "Bias, "Balance", and Beyond: New Threats to Academic Freedom," *University of Colorado Law Review* Vol. 77 (2006). Lawrence Rosenthal, "The Emerging First Amendment Law of Managerial Prerogative," *Fordham Law Review* Vol. 77 (2008). Richard H. Hiers, "Institutional Academic Freedom or Autonomy Grounded Upon the First Amendment: a Jurisprudential Mirage," *Hamline Law Review* Vol. 30 (2007). Neal H. Hutchens, "A Confused Concern of the First Amendment: the Uncertain Status of Constitutional Protection for Individual Academic Freedom," *Journal of College and University Law* Vol. 36, No. 1 (2009). Lawrence White, "Fifty Years of Academic Freedom Jurisprudence," *Journal of College and University Law* Vol. 36, No. 3 (2010). Paul Horwitz, "Fisher, Academic Freedom, and Distrust," *Loyola Law Review* Vol. 59 (2013). Walter P. Metzger, "Profession and Constitution: Two Definitions of Academic Freedom in America," *Texas Law Review* Vol. 66 (1988). J. Peter Byrne, "Constitutional Academic Freedom After *Grutter*: Getting Real About the "Four Freedoms" of a University," *University of Colorado Law Review* Vol. 77 (2006).

¹⁰ *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001* (2001, No. 107-56).

¹¹ For a comprehensive overview of this issue see Elizabeth Barker Brandt, "The Crumbling Academic Freedom Consensus and the Threat of U.S. Antiterrorism Policy," *Forum on Public Policy* Vol. 1, No. 4 (2006). Kenton R. Bird and Elizabeth Barker, "Academic Freedom and 9/11: How the War on Terrorism Threatens Free Speech on Campus," *Communication Law and Policy* Vol. 7 (2002). Robert M. O'Neil, "Academic Freedom and National Security in Times of Crisis," *Academe* Vol. 89 (2003). Julie H. Margetta, "Taking Academic Freedom Back to the Future: Refining the "Special Concern of the First Amendment," *Loyola Journal of Public Interest Law* Vol. 7 (2005). Elvia R. Arriola, "Democracy and Dissent: Challenging the Solomon Amendment as a Cultural Threat to Academic Freedom and Civil Rights," *Saint Louis University Public Law Review* Vol. 24 (2005). Doug Rendleman, "Academic Freedom in *Urofsky's* Wake: Post September 11 Remarks on "Who Owns Academic Freedom?,"" *Washington and Lee Law Review* Vol. 59 (2002). Michelle Asha Cooper, "Academic Freedom in the 21st Century," *Thought and Action* Vol. 20, No. 1 (2003). Brooks A. Keel, "Protecting America's Secrets While Maintaining Academic Freedom," *Academic Medicine* Vol. 79, No. 4 (2004).

¹² Terence Karran, "Academic Freedom in Europe: Time for a Magna Charta?," *Higher Education Policy* 22, No. 2 (2009) // DOI: 10.1057/hep.2009.2.

¹³ Terence Karran, "Academic Freedom in Europe: A Preliminary Comparative Analysis," *Higher Education Policy* 20, No. 3 (2007).

¹⁴ Terence Karran, "Academic Freedom in Europe: Reviewing UNESCO's Recommendation," *British Journal of Educational Studies* Vol. 57, No. 2 (2009) // DOI: 10.1111/j.1467-8527.2009.00430.x.

Europe) which addressed academic freedom as a fundamental human right and as a key element in creating a knowledge economy in Europe.¹⁵ Reports and comments on the research results of an assessment of the legal protection of the right to academic freedom in EU member states were also presented in the article.¹⁶ All this significantly valuable research mainly concentrates on the overall assessment of EU countries' constitutions, laws on higher education, and other relevant legislation through quantified results. The comparative research relies on different indicators of protection of academic freedom in the EU countries, however it does not cover in detail international and European legislation and soft-law related to academic freedom and it does not provide a full and systematic overview of case law of the ECtHR.

A significant contribution in elaborating the concept of academic freedom and of the fundamental principles of higher education has been made brought by J. De Groof. In his research, De Groof addressed different aspects of academic freedom, including its characteristics and definitions, its relation with freedom of expression, the limitations on academic freedom¹⁷, freedom, autonomy and accountability in education.¹⁸

It should not be omitted that major contributions to the research on the concept of academic freedom and its development have also been made by such scholars as Post, Byrne, Barendt, and Altbach. Post offered various accounts of constitutional doctrines of academic freedom by analyzing the relation between commitment to a marketplace of ideas and the need to recognize and protect the values of expertise.¹⁹ Despite the constitutional law of academic freedom, he, together with Finkin, also elaborated on the concept of academic freedom, its separate dimensions and internal connections to emerging needs for knowledge and intellectual mastery, addressing professional understandings of academic freedom.²⁰ Byrne discussed the interpretation of academic freedom as a constitutional right in judicial opinions, highlighting the issues of a vague and confusing doctrinal framework which imperils the vitality of constitutional

¹⁵ Terence Karran, Klaus D. Beiter, "Final Report Summary - SAFE (Safeguarding Academic Freedom in Europe)," (2016) // http://cordis.europa.eu/result/rcn/177335_en.html (accessed November 19, 2016).

¹⁶ Klaus D. Beiter, Terence Karran, Kwadwo Appiagyei-Atua, "Measuring" the Erosion of Academic Freedom as an International Human Right: A Report on the Legal Protection of Academic Freedom in Europe," *Vanderbilt Journal of Transnational Law* Vol. 49 (2016).

¹⁷ Jan De Groof, "In Bluebeard's Castle? Some Musings on Academic Freedom and Academic Integrity"; in: André Alen, Veronique Joosten, Riet Leysen and Willem Verrijdt, eds., *Liberæ Cogitationes. Liber amicorum Marc Bossuyt* (Cambridge – Antwerp – Portland: Intersentia, 2013).

¹⁸ Jan De Groof, "Legal Framework for Freedom of Education"; in: Charles L. Glenn, Jan De Groof, eds., *Balancing Freedom, Autonomy and Accountability in Education* Vol. 1 (The Netherlands: Wolf Legal Publishers, 2012).

¹⁹ Robert C. Post, *Democracy, Expertise, Academic Freedom. The First Amendment Jurisprudence for the Modern State* (New Haven and London: Yale University Press, 2012). Robert C. Post, "Academic Freedom and Legal Scholarship," *Journal of Legal Education* Vol. 64, No. 4 (May 2015). Robert C. Post, "Academic Freedom and the Constitution"; in: Akeel Bilgrami and Jonathan R. Cole, eds., *Who's Afraid of Academic Freedom* (New York, Chichester, West Sussex: Columbia University Press, 2015).

²⁰ Matthew W. Finkin and Robert C. Post, *supra* note 4.

academic freedom and also providing a clearer scope of the right to academic freedom.²¹ Barendt conducted research on legal issues of academic freedom from a comparative perspective of three jurisdictions – the United Kingdom, Germany and the US – discussing real threats concerning scholars and scientists.²² Altbach contributed to an elaboration on the issues of academic freedom from a more practical perspective of the academic profession and the academic workplace.²³ He also performed a number of significant studies on various issues in higher education addressing today's challenges faced in the generation of knowledge and by modern universities.²⁴

Lithuanian scholars, of course within the limited scope of their national jurisdiction, have addressed the matter of academic freedom occasionally by discussing various issues of higher education in general,²⁵ however there is no comprehensive research which covers all aspects of academic freedom, its constitutional protection and relevant legislation on higher education. Academic freedom in Lithuania was analyzed in more detail in a doctoral dissertation on state regulation on higher university education, where it was addressed in the context of institutional autonomy.²⁶

²¹ J. Peter Byrne, "The Threat to Constitutional Academic Freedom," *Journal of College and University Law* Vol. 31, No. 1, (2004). J. Peter Byrne, "Academic Freedom: A "Special Concern of the First Amendment"," *Yale Law Journal* Vol. 99, No. 2 (November 1989). J. Peter Byrne, "Constitutional Academic Freedom After *Grutter*: Getting Real About the "Four Freedoms" of a University," *University of Colorado Law Review* Vol. 77 (2006).

²² Eric Barendt, *Academic Freedom and the Law: A Comparative Study* (Oxford and Portland, Oregon: Hart Publishing, 2010).

²³ Philip G. Altbach, "Academic Freedom and the Academic Profession"; in: Philip G. Altbach, ed., *The Changing Academic Workplace: Comparative Perspectives* (Boston, Massachusetts: Center for International Higher Education Lynch School of Education, 2000). Philip G. Altbach, "An International Academic Crisis? The American Professoriate in Comparative Perspective," *Daedalus* Vol. 126, No. 4 (1997). Philip G. Altbach, "Academic Freedom: International Realities and Challenges," *Higher Education* Vol. 41, No. 1/2 (2001). Philip G. Altbach, "Academic Freedom in a Global Context: 21st Century Challenges," *NEA 2007 Almanac of Higher Education* (2007).

²⁴ Philip G. Altbach, "The Past, Present, and Future of the Research University"; in: Philip G. Altbach and Jamil Salmi, eds., *The Road to Academic Excellence. The Making of World-Class Research Universities* (Washington D.C.: The World Bank, 2011). Philip G. Altbach, "The Giants Awake: The Present and Future of Higher Education Systems in China and India"; in: *Higher Education to 2030. Globalisation* (OECD, 2009). Philip G. Altbach and Patti McGill Peterson, "America in the World: Higher Education and the Global Marketplace," *International Perspectives on Education and Society* Vol. 9 (2008). Philip G. Altbach, Liz Reisberg, and Laura E. Rumbley, "Trends in Global Higher Education: Tracking an Academic Revolution. A Report Prepared for the UNESCO 2009 World Conference on Higher Education," (2009) // http://www.unesco.org/fileadmin/MULTIMEDIA/HQ/ED/ED/pdf/WCHE_2009/1745_trend_final-rep_ES_FP_090617a.pdf (accessed June 10, 2016).

²⁵ Agnė Juškevičienė and Rasa Nedzinskaitė, "Akademinės laisvės raiška visuomenėje ir akademinėje bendruomenėje," *Pedagogika* 107 (2012). Vitalija Kečiorytė, "Aukštojo mokslo principai," *Santalka. Filologija. Edukologija* Vol. 4, No. 16 (2008). Linutė Kraujutaitytė, *Aukštojo mokslo demokratiškumo pagrindai: monografija* (Vilnius: Lietuvos teisės universitetas, 2002). Almantas Samalavičius, *Universiteto idėja ir akademinė industrija*, (Vilnius: VPU, 2010). Ingrida Tinfavičienė, "Istorinė universitetinio aukštojo mokslo sampratos raida," *Acta Pedagogica Vilnensia* 12 (2004). Rimantas Želvys and Rima Žilinskaitė, "Lietuvos aukštojo mokslo reforma: laimėjimai ir problemos," *Acta Pedagogica Vilnensia* 19 (2007). Rimantas Želvys, "Internacionalizacijos iššūkiai Lietuvos aukštajam mokslui," *Acta Pedagogica Vilnensia* 17 (2006).

²⁶ Aurelija Pūraitė, *Aukštojo universitetinio mokslo valstybinis reguliavimas*, PhD dissertation (Vilnius: Mykolas Romeris university, 2011).

Despite the above mentioned research on the subject, the originality of this research is justified by a lack of a comprehensive research, both at the international and Lithuanian level, which would combine an overall view on academic freedom, including the analysis of its varying conceptions, the analysis of the international, European and national higher education frameworks which address the matter of academic freedom explicitly or indirectly and an analysis of the human rights framework on the subject.

Hypotheses of the research:

1) As academic freedom covers different elements of academic utterances, there is no consistency in defining what academic freedom actually means and what dimensions it entails. One of the main reasons for this is that the higher education environment is constantly changing and must continuously confront new challenges. Therefore, it might be difficult, if it is possible at all, to establish a precise definition of academic freedom. However, setting an instrument which would cover the core dimensions of academic freedom and which would specify their content would be highly desirable and could be used as an applicable test to decide whether certain speech or utterance has an academic context and falls under the scope of academic freedom.

2) Although today academic freedom is granted the status of an autonomous human right, it is not clear whether under the existing legal regulation academic freedom could be adequately protected as a human right or merely derivatively under the claim of other fundamental rights. That certainly results in insufficient protection of academic freedom.

3) Diverse interpretations of academic freedom leads to a burdensome application of the concept. Inconsistency at higher international and transnational levels results in various interpretations at lower levels, and incoherent application and protection of academic freedom at national levels.

4) Academic freedom must be recognized both as *a right* of individual academic and as *a responsibility* of the state, HEIs and individual academics. Recognition of academic freedom as *a right* and as *a responsibility* is necessary in order to ensure its adequate protection.

5) Legislation in higher education field should include not only declarative provisions highlighting the significance of academic freedom but should also establish more concrete limitations of the rights, as well as obligations, of all actors in higher education systems which can have impact on academic freedom of individual members of the academic community.

The structure of the research. The research consists of an introduction, four chapters and conclusions.

The introductory part of the research outlines the focus of the research, the object, the aim, the objectives and its hypotheses. It serves to demonstrate the relevance and originality of the research. Further, it introduces the research methodology, and provides a review of the sources; these cover different aspects of higher education, academic freedom and, in particular, the issues analyzed in this research.

The first chapter begins by presenting prevailing conceptions of academic freedom and briefly discussing its historical roots, while underlining the fundamental essence of academic freedom which serves as the main ground for justification of its protection. This is followed by a short introduction of the legal justification of academic freedom, which relies on the international and regional normative context, and on the protection of academic freedom at constitutional, national and institutional levels. The first chapter also elaborates on the relationship between academic freedom and institutional autonomy and highlights their inseparability. It should be noted that although these two fundamental higher education principles are intertwined and often are discussed together, this research concentrates mainly on academic freedom and mentions institutional autonomy only where it is necessary to underline certain aspects of academic freedom. The first chapter finally provides general characteristics of commonly found distinct dimensions of academic freedom. As the research concentrates on academic freedom from an individual academic perspective, although reference is occasionally made, it does not elaborate on the freedom of studying in more detail, which in some cases is, however, also perceived as the element of academic freedom.

In the second chapter special attention is dedicated to the recognition of academic freedom as a human right under the normative framework of the United Nations, the EU Charter, the ECHR and in the case-law of Human Rights Committee (hereinafter HRC), the European Court of Justice (hereinafter ECJ), and the ECtHR. This analysis is a significant and important part of this research as it contributes to a higher degree of clarity of the relationship between academic freedom and the other human rights, compared to earlier studies, and also helps to identify the issues of the conception of academic freedom and its protection. This part reveals the relationship of academic freedom with other human rights, and in particular with the right to education and the right to freedom of expression. The importance of academic context in human rights case-law is extensively elaborated and an applicable test to decide whether the speech has an “academic element” is suggested here.

The third chapter is dedicated to elaboration on the perception of the concept of academic freedom in international documents and normative instruments and European higher education context. It provides an analysis of a number of documents drafted by UNESCO. The UNESCO instruments demonstrate a great amount of attention towards the issues of higher education and

in particular academic freedom and institutional autonomy. Although not legally binding they are regarded by states as political or moral commitments and are essential for the elaboration of the concept of academic freedom. It is then followed by an in-depth analysis of the Bologna Process, the EU and the CoE documents relevant to academic freedom. The third chapter also proceeds with an examination of various declarations relating to academic freedom which were adopted by non-governmental international organizations. It is aimed at showing the standards and principles governing the status of members of the academic community and also the multifaceted character of academic freedom established in international documents.

The fourth chapter is fully devoted to the analysis of Lithuanian legal framework of higher education. The full overview of the jurisprudence of the Lithuanian Constitutional Court in the field of higher education helps to identify its perception of academic freedom. Further analysis of national legislation helps to identify the main issues of interpretation, application and protection of academic freedom in Lithuania. This analysis includes national strategies and policies in the state's higher education system, and also the main institutional documents of HEIs, which express the main goals of the European higher education area (hereinafter EHEA).

SOURCES OF THE RESEARCH

There exists extensive research on various issues of academic freedom by foreign authors. Lithuanian authors addressed the issue of academic freedom only occasionally when analyzing different aspects of the higher education system. The volume of international scholarly literature proves that philosophical ideas and developments of the right to academic freedom, its role in higher education system, its doctrinal basis in terms of human rights law, and changes and arising challenges that are faced by HEIs and academics are especially important issues in regard to the comprehensive protection of academic freedom.

The research on the theoretical context of academic freedom, the attempts to define the concept, different opinions and arguments whether there should be a definition of academic freedom at all is based on foreign authors such as J. De Groof,²⁷ T. Karran,²⁸ M.W. Finkin,²⁹ R.C. Post,³⁰ P. Altbach,³¹ D. Palfreyman,³² J.P. Byrne,³³ E. Barendt,³⁴ J.C. Areen,³⁵ R. Barrow,³⁶

²⁷ Jan De Groof, *supra* note 17.

²⁸ Terence Karran, *supra* note 12. Terence Karran, *supra* note 14. Terence Karran, "Academic Freedom: In Justification of a Universal Idea," *Studies in Higher Education* Vol. 34, No. 3 (May 2009) // DOI: 10.1080/03075070802597036.

²⁹ Matthew W. Finkin and Robert C. Post, *supra* note 4.

³⁰ Robert C. Post, *Democracy, Expertise, Academic Freedom. The First Amendment Jurisprudence for the Modern State* (New Haven and London: Yale University Press, 2012).

³¹ Philip G. Altbach, *supra* note 5.

J. Macfarlane,³⁷ R.B. Standler,³⁸ G. Orwell,³⁹ B. Miller,⁴⁰ and on Lithuanian authors such as A. Pūraitė,⁴¹ and A. Juškevičienė and R. Nedzinskaitė.⁴²

In order to justify and to stress the need for academic freedom protection, the historical context of and the values tied to academic freedom are discussed in this research. The research on the origin and historical development of the concept of academic freedom and its transformations draws on the works of W. Ruegg,⁴³ B.R. Clark and G.R. Neave,⁴⁴ Ph.G. Altbach,⁴⁵ B. Miller,⁴⁶ K. Garcia,⁴⁷ G. Graham,⁴⁸ B.E. Hogan and L.D. Trotter,⁴⁹ G. Badley,⁵⁰ R. Dworkin,⁵¹ R. Veld, H.P. Füssel, and G. Neave,⁵² C. Shore and M. Taitz.⁵³ To provide an overview of the role of academic freedom in a modern university which is often perceived as a

³² David Palfreyman, "Is academic freedom under threat in UK and US higher education?," *Education and the Law* Vol.19, No.1 (March 2007) // DOI: 10.1080/09539960701231207.

³³ J. Peter Byrne, "Academic Freedom: A "Special Concern of the First Amendment"," *Yale Law Journal* Vol. 99, No. 2 (November 1989). J. Peter Byrne, "The Threat to Constitutional Academic Freedom," *Journal of College and University Law* Vol. 31, No. 1, (2004).

³⁴ Eric Barendt, *supra* note 22.

³⁵ Judith Areen, "Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance," *The Georgetown Law Journal* Vol. 97 (2009).

³⁶ Robin Barrow, "Academic Freedom: Its nature, Extent and value," *British Journal of Educational Studies* Vol. 57, No. 2 (June 2009) // DOI: 10.1111/j.1467-8527.2009.00433.x.

³⁷ Judith Macfarlane, "Beyond the Right to Offend: Academic Freedom, Rights and Responsibilities in the Canadian University Classroom," *Dalhousie Law Journal* Vol. 20, No.1 (1997).

³⁸ Ronald B. Standler, "Academic Freedom in the USA," (2000) // <http://www.rbs2.com/afree.htm> (accessed June 10, 2016).

³⁹ George Orwell, "The freedom of the press. Orwell's Proposed Preface to 'Animal Farm'," (1972) // http://orwell.ru/library/novels/Animal_Farm/english/efp_go (accessed June 10, 2016).

⁴⁰ Brian Miller, "Free to manage? A neo - liberal defence of academic freedom in British higher education," *Journal of Higher Education Policy and Management* Vol. 36, No. 2 (2014) // DOI: 10.1080/1360080X.2013.861055.

⁴¹ Aurelija Pūraitė, *supra* note 26.

⁴² Agnė Juškevičienė and Rasa Nedzinskaitė, "Akademinių laisvės raiška visuomenėje ir akademinėje bendruomenėje," *Pedagogika* 107 (2012).

⁴³ Walter Rüegg, "Themes"; in: Walter Rüegg, ed., *A history of the University in Europe. Volume III. Universities in the Nineteenth and Early Twentieth Centuries (1800-1945)* (UK: Cambridge University Press, 2004).

⁴⁴ Burton R. Clark, and Guy R. Neave, *The Encyclopaedia of Higher Education. Volume 3, Analytical Perspectives* (Oxford, New York, Seoul, Tokyo: Pergamon Press, 1992). Guy Neave, "On the Cultivation of Quality, Efficiency and Enterprise: An Overview of Recent Trends in Higher Education in Western Europe 1986–1988," *European Journal of Education* Vol. 23, Nos. 1/2 (1988).

⁴⁵ Philip G. Altbach, "Academic Freedom in a Global Context: 21st Century Challenges," *NEA 2007 Almanac of Higher Education* (2007).

⁴⁶ Brian Miller, *supra* note 40.

⁴⁷ Kenneth Garcia, "Religion, Sectarianism, and the Pursuit of Truth: Reexamining Academic Freedom in the Twenty-First Century," *AAUP Journal of Academic Freedom* Vol. 5 (2014).

⁴⁸ Gordon Graham, *The Institution of Intellectual Values* (Exeter: Imprint Academic, 2005).

⁴⁹ Barry E. Hogan and Lane D. Trotter, "Academic freedom in Canadian higher education: Universities, colleges, and institutes were not created equal," *Canadian Journal of Higher Education* Vol. 43, No. 2 (2013).

⁵⁰ Graham Badley, "A Place From Where to Speak: the University and Academic Freedom," *British Journal of Educational Studies* Vol. 57, No. 2 (2009) // DOI number: 10.1111/j.1467-8527.2009.00429.x.

⁵¹ Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge: Oxford University Press, 1996).

⁵² Roel in 't Veld, Hans Peter Füssel, and Guy Neave, *Relations between state and higher education* (The Netherlands: Kluwer Law International, 1996).

⁵³ Cris Shore and Mira Taitz, "Who 'owns' the university? Institutional autonomy and academic freedom in an age of knowledge capitalism," *Globalisation, Societies and Education* Vol. 10, No. 2 (2012) // DOI: 10.1080/14767724.2012.677707.

transnational business corporation the works of J.L. Buller,⁵⁴ J.G. Wissema,⁵⁵ P.G. Altbach, L. Reisberg, and L.E. Rumbley,⁵⁶ Jan De Groof,⁵⁷ E. Barendt,⁵⁸ J. Knight,⁵⁹ J.G. Gaff,⁶⁰ C. Russel,⁶¹ J. Walton,⁶² S. Marginson,⁶³ and M. Henkel⁶⁴ are analyzed.

Academic freedom in this research is discussed as a constitutional right, as a human right and as a fundamental principle of higher education. Accordingly, the research includes the analysis of international, European and national legislation on the subject. When elaborating on the constitutional issues of academic freedom careful attention was paid to works of Post⁶⁵ where he discusses the purpose of constitutional protection for academic freedom and argues that constitutional protection of academic freedom is best justified in terms of the value of democratic competence; Karran⁶⁶ who examined constitutional and legislative protection for academic freedom using comparative data from 23 states within the EU; J. De Groof and Ch. Glenn⁶⁷ who provided various issues of the protection of academic freedom under the Belgian Constitution; Klaus D. Beiter, T. Karran and K. Appiagyei-Atua,⁶⁸ who assessed the legal protection of the right to academic freedom in EU member states, having examined these countries' constitutions, laws on higher education, and other relevant legislation; J.P. Byrne,⁶⁹ who analyzed the interpretation of academic freedom as a constitutional right in judicial opinions and argued that such frustratingly uncertain and paradoxical interpretations must be

⁵⁴ Jeffrey L. Buller, "The Two Cultures of Higher Education in the Twenty-First Century and Their Impact on Academic Freedom," *AAUP Journal of Academic Freedom* Vol. 5 (2014).

⁵⁵ J.G. Wissema, *Towards the Third Generation University. Managing the University in Transition* (UK: Edward Elgar Publishing Limited, 2009).

⁵⁶ Philip G. Altbach, Liz Reisberg, and Laura E. Rumbley, "Trends in Global Higher Education: Tracking an Academic Revolution. A Report Prepared for the UNESCO 2009 World Conference on Higher Education," (2009) // http://www.unesco.org/fileadmin/MULTIMEDIA/HQ/ED/ED/pdf/WCHE_2009/1745_trend_final-rep_ES_FP_090617_a.pdf (accessed June 10, 2016).

⁵⁷ Jan De Groof, "European Higher Education in Search of a New Legal Order"; in: Barbara M. Kehm, Jeroen Huisman, and Bjørn Stensaker, eds., *The European Higher Education Area: Perspectives on a Moving Target* (The Netherlands: Sense Publishers, 2009).

⁵⁸ Eric Barendt, *supra* note 22.

⁵⁹ Jane Knight, *Higher Education in Turmoil. The Changing World of Internationalization. Global perspectives on higher education* (The Netherlands: Sense publishers, 2008).

⁶⁰ Jerry G. Gaff, "Academic Freedom and Accreditation," (2010) // http://www.chae.org/pdf/2010_AC_Academic_Freedom_and_Accreditation_Gaff.pdf (accessed June 10, 2016).

⁶¹ Conrad Russell, *Academic Freedom* (London: Routledge, 1993).

⁶² John K. Walton, "The idea of the university"; in: Michael Bailey and Des Freedman, eds., *The assault on universities: A manifesto for resistance* (London: Pluto Press, 2011).

⁶³ Simon Marginson, "Hayekian neo-liberalism and academic freedom," (2006) // <https://pdfs.semanticscholar.org/89af/42f25eac214a7bd4b9e925f3f81c0022f300.pdf> (accessed June 10, 2016).

⁶⁴ Mary Henkel, "Academic identity and autonomy in a changing policy environment," *Higher Education* Vol. 49 (2005) // DOI: 10.1007/s10734-004-2919-1.

⁶⁵ Robert C. Post, *supra* note 30.

⁶⁶ Terence Karran, *supra* note 13.

⁶⁷ Charles Glenn and Jan De Groof, *Finding the Right Balance. Freedom, Autonomy and Accountability in Education* (Utrecht: Lemma, 2002).

⁶⁸ Klaus D. Beiter, Terence Karran, Kwadwo Appiagyei-Atua, *supra* note 16.

⁶⁹ J. Peter Byrne, "The Threat to Constitutional Academic Freedom," *Journal of College and University Law* Vol. 31, No. 1, (2004).

perceived as confusion of and threat to academic freedom; E. Barendt and D. Bentley,⁷⁰ who discussed the puzzling notion of academic freedom and the law from comparative and international law perspective; D.R. Euben,⁷¹ who analyzed the principles and law shaping individual and institutional claims to academic freedom in the light of current and future challenges.

When analyzing academic freedom as a fundamental right, the research is based on works of J. De Groof,⁷² I. Richter,⁷³ who referred to academic freedom as an individual fundamental right and also in relation with the human rights, in particular with the right to education; K. D. Beiter,⁷⁴ who referred to academic freedom under the framework of the Universal Declaration of Human Rights (hereinafter UDHR) and its Covenants; Ph.G. Altbach,⁷⁵ who provided a comprehensive research on global trends and challenges affecting higher education; R. Quinn and J. Levine,⁷⁶ who argued that existing human rights law would sustain claims for violations of academic freedom as independently and interdependently derived from the other fundamental rights; A. De Baets,⁷⁷ who analyzed the UDHR as a direct source of five important rights for historians: the rights to free expression and information, to meet and found associations, to intellectual property, to academic freedom, and to silence.

Although, as it was already mentioned before, institutional autonomy is not a subject of this research, the main aspects of this fundamental principle of higher education and its main similarities and differences from academic freedom are briefly covered in the dissertation. The assertions of institutional autonomy are based on the discussions and ideas explored in the works of J.P. Thorens,⁷⁸ T. Nokkala and A. Bladh,⁷⁹ A. Cavalli and U. Teichler,⁸⁰ J. De Groof,⁸¹

⁷⁰ Eric Barendt and David Bentley, "Meeting Summary Academic Freedom and the Law," (December 2010) // https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/il081210summary.pdf (accessed June 10, 2016).

⁷¹ Donna R. Euben, "Academic Freedom of Individual Professors and Higher Education Institutions: The Current Legal Landscape," (May 2002) // <https://www.aup.org/issues/academic-freedom/professors-and-institutions> (accessed June 10, 2016).

⁷² Jan De Groof, *supra* note 17. Jan De Groof, *supra* note 18.

⁷³ Ingo Richter, "The Right to Education – The European Model"; in: Charles L. Glenn, Jan De Groof, eds., *Balancing Freedom, Autonomy and Accountability in Education* Vol. 1 (The Netherlands: Wolf Legal Publishers, 2012).

⁷⁴ Klaus Deiter Beiter, *The Protection of the Right to Education by International Law: including a systematic 13 of the International Covenant on Economic, Social, and Cultural Rights* (Leiden/Boston: Martinus Nijhoff Publishers, 2006).

Klaus Deiter Beiter, "The protection of the right to academic mobility under international human rights law," *International Perspectives on Higher Education Research* Vol. 11 (2014) // DOI: 10.1108/S1479-362820140000011019.

⁷⁵ Philip G. Altbach, Liz Reisberg, and Laura E. Rumbley, *supra* note 56.

⁷⁶ Robert Quinn and Jesse Levine, "Intellectual-HRDs and claims for academic freedom under human rights law," *The International Journal of Human Rights* Vol. 18, Nos. 7-8 (2014) // DOI: 10.1080/13642987.2014.976203.

⁷⁷ Antoon De Baets, "The Impact of the Universal Declaration of Human Rights on the Study of History," *History and Theory* Vol. 48 (February 2009).

⁷⁸ Justin P. Thorens, "Academic Freedom and University Autonomy," *Prospects: Quarterly Review of Comparative Education* Vol. 28, No. 3 (September 1998).

J.E. Elliott,⁸² T. Karran,⁸³ R.B. Standler,⁸⁴ D. Palfreyman,⁸⁵ Ph. G. Altbach,⁸⁶ U.Felt and M. Glanz,⁸⁷ A. Habib, S. Morrow, and K. Bentley,⁸⁸ P. Gerbod,⁸⁹ S. Garben,⁹⁰ and H. Ginkel.⁹¹

This research provides a brief overview of each element of academic freedom: freedom of research and publication, freedom of teaching, freedom of intramural expression and freedom of extramural expression. The research elaborated on distinct dimensions, their content, limitations and also existing controversies analyzing works of scholars who in their research either discussed all elements of academic freedom or in particular one of them, namely the works of M.W. Finkin and R.C. Post,⁹² T. Karran,⁹³ J.Vrielink, P. Lemmens, S. Parmentier,⁹⁴ C. Kayrooz, Gerlese S. Åkerlind and Malcolm Tight,⁹⁵ D.R. Euben,⁹⁶ D. Horowitz,⁹⁷ J.C. Areen,⁹⁸ L.R. Lieberwitz,⁹⁹ D.M. Rabban,¹⁰⁰ S.R. Bauries,¹⁰¹ R.R. Kuehn,¹⁰² W.V. Alstynne,¹⁰³ J.P. Byrne.¹⁰⁴

⁷⁹ Terhi Nokkala and Agneta Bladh, "Institutional Autonomy and Academic Freedom in the Nordic Context - Similarities and Differences," *Higher Education Policy* Vol. 27 (2014).

⁸⁰ Alessandro Cavalli and Ulrich Teichler, "The Academic Profession: A Common Core, a Diversified Group or an Outdated Idea?," *European Review* Vol. 18 (2010) // DOI:10.1017/ S1062798709990287.

⁸¹ Jan De Groof, *supra* note 17.

⁸² J.E. Elliott, "Managing Academic Freedom: Recent Cross-Atlantic Developments," *Prometheus* Vol. 29, No. 2 (June 2011) // DOI: 10.1080/08109028.2011.615653.

⁸³ Terence Karran, *supra* note 12. Terence Karran, *supra* note 13. Terence Karran, *supra* note 14.

⁸⁴ Ronald B. Standler, *supra* note 38.

⁸⁵ David Palfreyman, *supra* note 32.

⁸⁶ Philip G. Altbach, *supra* note 45. Philip G. Altbach, "The Past, Present, and Future of the Research University"; in: Philip G. Altbach and Jamil Salmi, eds., *The Road to Academic Excellence. The Making of World-Class Research Universities* (Washington D.C.: The World Bank, 2011).

⁸⁷ Ulrike Felt and Michaela Glanz, "University Autonomy in Europe: Changing Paradigms in Higher Educational Policy," (2002) // http://sts.univie.ac.at/fileadmin/user_upload/dep_sciencestudies/pdf_files/pdfs_abgeschlossene_projekte/University_Autonomy_I.pdf (accessed June 10, 2016).

⁸⁸ Adam Habib, Sean Morrow, Kristina Bentley, "Academic Freedom, Institutional Autonomy and the Corporatised University in Contemporary South Africa," *Social Dynamics: A Journal of African Studies* Vol. 34, No. 2 (2008) // DOI:10.1080/02533950802280022.

⁸⁹ Paul Gerbod, "Relations with authority"; in: Walter Rüegg, ed., *A history of the University in Europe. Volume III. Universities in the Nineteenth and Early Twentieth Centuries (1800-1945)* (Cambridge University Press, 2004).

⁹⁰ Sacha Garben, "The Future of Higher Education in Europe: The Case for a Stronger Base in EU Law," *LSE 'Europe in Question' Discussion Paper Series* No. 50 (2012).

⁹¹ Hans van Ginkel, "Keynote Address of the Conference"; in: *Contemporary Threats and Opportunities. Academic Freedom and Institutional Autonomy within the Context of Accreditation, Quality Assurance and Rankings. Proceeding of the Conference of the Magna Charta Observatory* (Rastignano, Bologna: Bononia University Press, 2001).

⁹² Matthew W. Finkin and Robert C. Post, *supra* note 4.

⁹³ Terence Karran, *supra* note 12. Terence Karran, *supra* note 14.

⁹⁴ Jogchum Vrielink, Paul Lemmens, Stephen Parmentier and the League of European Research Universities (LERU) Working Group on Human Rights, *supra* note 3.

⁹⁵ Carole Kayrooz, Gerlese S. Åkerlind and Malcolm Tight, "Autonomy in Social Science Research: The View from United Kingdom and Australian Universities," *International Perspectives on Higher Education Research* Vol. 4 (2007) // DOI: 10.1016/S1479-3628(06)04001-9.

⁹⁶ Donna R. Euben, *supra* note 71.

⁹⁷ David Horowitz, *The Professors: The 101 Most Dangerous Academics in America* (Washington, DC; Lanham, MD: Regnery Publishing, 2007).

⁹⁸ Judith Areen, *supra* note 35.

⁹⁹ Risa L. Lieberwitz, "The Corporatization of the University: Distance Learning at the Cost of Academic Freedom?," *Public Interest Law Journal* Vol. 12 (2002).

¹⁰⁰ David M. Rabban, "A Functional Analysis of 'Individual' and 'Institutional' Academic Freedom Under the First Amendment," *Law and Contemporary Problems* Vol. 53, No. 3 (1990).

The research is also based on a number of reports issued by different international and regional organizations and networks on various matters of academic freedom or higher education in general, which cover current trends and challenges that may have impact to the right of academic freedom. The analysis draws on reports of Scholars at Risk, as one of the most active international networks whose mission is to protect scholars and promote academic freedom,¹⁰⁵ reports, statements and publications of the AAUP,¹⁰⁶ reports by the Organization for Economic Co-operation and Development (hereinafter OECD)¹⁰⁷ and others.¹⁰⁸

To grasp an overall view of how academic freedom is perceived by international and regional higher education community and various organizations working in the field of higher education a number of documents issued by UNESCO,¹⁰⁹ and declarations, communiqués and other documents of the Bologna Process¹¹⁰ were analyzed.

¹⁰¹ Scott R. Bauries, "Individual Academic Freedom: an Ordinary Concern of the First Amendment," *Mississippi Law Journal* Vol. 83, No. 4 (2014).

¹⁰² Robert R. Kuehn, "A Normative Analysis of the Rights and Duties of Law Professors to Speak Out," *South Carolina Law Review* Vol. 55 (2003).

¹⁰³ William Van Alstyne, "The Specific Theory of Academic Freedom and the General Issue of Civil Liberty," *Faculty Publications* Paper 792 (1975).

¹⁰⁴ J. Peter Byrne, "Academic Freedom and Political Neutrality in Law Schools: An Essay on Structure and Ideology in Professional Education," *Journal of Legal Education* Vol. 43 (1993).

¹⁰⁵ Scholars at Risk, "Free to Think. Report of the Scholars at Risk Academic Freedom Monitoring Project," (June 2015) // <https://www.scholarsatrisk.org/wp-content/uploads/2016/04/SAR-Free-to-Think.pdf> (accessed June 10, 2016).

¹⁰⁶ American Association of University Professors, "Report of Committee A on Academic Freedom and Academic Tenure," (1918) // <https://www.jstor.org/stable/pdf/40216870.pdf> (accessed June 10, 2016).

American Association of University Professors, "Statement of Principles on Academic Freedom and Tenure," (1940) // <https://www.aaup.org/file/1940%20Statement.pdf> (accessed June 10, 2016).

American Association of University Professors, "Committee A on Academic Freedom and Tenure Statement on Extramural Utterances," (1964) // <https://portfolio.du.edu/downloadItem/153180> (accessed June 10, 2016).

American Association of University Professors, "Academic Freedom and Electronic Communications," (2013) // <https://www.aaup.org/file/Academic%20Freedom%20%26%20Electronic%20Communications.pdf> (accessed June 10, 2016).

American Association of University Professors report, "Protecting an Independent Faculty Voice: Academic Freedom After Garcetti v. Ceballos," (2009) // <https://www.aaup.org/file/Protecting-Independent-Voice.pdf> (accessed June 10, 2016).

¹⁰⁷ OECD, "Assessment of Higher Education Learning Outcomes Feasibility Study Report. Volume 1 – Design and implementation," (2013) // <http://www.oecd.org/edu/skills-beyond-school/AHELO%20FS%20Report%20Volume%201%20Executive%20Summary.pdf> (accessed June 10, 2016).

OECD, "Higher Education to 2030. Volume 2: Globalisation," (2009) // <https://www.oecd.org/edu/eri/highereducationto2030volume2globalisation.htm> (accessed June 10, 2016).

¹⁰⁸ The EFA Global Monitoring Report, "Education for All. The Quality Imperative," (2004) //

<http://unesdoc.unesco.org/images/0013/001373/137334e.pdf> (accessed June 10, 2016).

Human Rights Watch, "World Report 1999," (1999) // <https://www.hrw.org/legacy/worldreport99/special/index.html> (accessed June 10, 2016).

The International Bank for Reconstruction and Development/The World Bank, "Constructing Knowledge Societies: New Challenges for Tertiary Education," (2002) //

http://siteresources.worldbank.org/INTAFRREGTOPTEIA/Resources/Constructing_Knowledge_Societies.pdf (accessed June 10, 2016).

¹⁰⁹ The Sinaia Statement on Academic Freedom and University Autonomy (1992) //

http://www.unesco.org/webworld/peace_library/UNESCO/HRIGHTS/332-334.HTM (accessed June 10, 2016).

¹¹⁰ Ministerial declarations and communiqués // <http://www.ehea.info/pid34363/ministerial-declarations-and-communicues.html> (accessed June 10, 2016).

RESEARCH METHODOLOGY

Methodological statements of the research. The research was conducted in accordance with the provisions that the law is both, a body of rules of conduct of binding legal force and effect, as well as the ideas of natural law. On the one hand, positive law is derived from natural, on the other hand, positive law transforms the ideas of natural law into legal imperatives which are safeguarded by the State.¹¹¹ Therefore, the research covers both, the analysis of legal doctrine of academic freedom, as well as the assessment of its significant character and its basic idea, that academic freedom establishes the liberty necessary to advance, produce and disseminate knowledge. This point is fundamental. Academic freedom is a prerequisite to the proper fulfillment of higher education's mission and in the creation of knowledge in the service of the public good. Accordingly, the sociological approach is emphasized, which is intended to ensure the relation between the public, social groups and individuals with law.¹¹²

The analysis of the legal doctrine of academic freedom was based on the following methods: *historic analysis* which was used to provide the historical origins of academic freedom and the historical context of HEIs in general as this is where the traditional justification for the protection of academic freedom is found. It also allowed a comparison of the current perception of academic freedom with traditional perceptions; *data analysis*, which helped to perform the analysis of Lithuanian and international scholarly literature addressing various aspects of academic freedom, as well as issues of and trends in higher education in general which relate to the protection of academic freedom, the analysis of Lithuanian, international and European legal regulation, jurisprudence and soft-law on the matter; *systematic analysis*, which was used to analyze distinct dimensions of academic freedom, trying to underline their correlation and define the criteria for their application; *synthesis*, which helped to integrate all separate elements of academic freedom into more obvious and precise conception of academic freedom; *analytical*, which allowed an evaluation of overall existing legal regulation of academic freedom at the international, European and Lithuanian (constitutional, national and institutional) levels, as well as its conceptual difficulties arising from its inconsistent perception in different international and European soft-law documents and the case-law, it also helped to identify main issues of its protection and application and suggest certain measures to ensure a more comprehensive protection of academic freedom.

¹¹¹ Darius Beinoravičius, "Prigimtinių teisės socialiniai dėsningumai," *Socialinių mokslų studijos* Vol. 1, No. 1 (2009): 64.

¹¹² Vytautas Šlapkauskas, "Sociologinio požiūrio į teisę reikšmė jurisprudencijos raidai," *Socialinių mokslų studijos*, Vol. 4, No. 8 (2010): 168.

CHAPTER 1. THE CONCEPT OF ACADEMIC FREEDOM

1.1. INTRODUCTION

Today, the term “academic freedom” is used quite frequently and the multitude of circumstances in which the term is invoked is so broad as to make it seem that the concept behind the term has become generic. Academic freedom seems more as a hortatory ideal and it is absolutely unclear what is the actual content under this label. It can be assumed that anyone who has a mere connection with academia can claim academic freedom when undesired limitations of rights and freedoms are imposed. By now there is a large literature on academic freedom, or as some authors notice “a small library of scholarly commentary on the subject”¹¹³, mainly written by professors, and a substantial part of it consists of “self-serving praise and unsupported assertions.”¹¹⁴ Although, academic freedom is often exploited without awareness of the meaning or content of this principle, however widespread recognition of the concept itself and of the necessity to elaborate its content, application and limits is established in plenty of significant scholarly works. One could raise the question why then is there a need to suggest another research on the subject? The primary argument would be that academic freedom presupposes an apparent and straightforward idea of what a university is for, by now it is recognized as a fundamental right, however from the legal point of view the content of this right, its limits and application are still very vague and need more clarity and precision. History has proved the cost of violations of academic freedom and institutional autonomy for intellectual regression, social division and economical stagnation, thus “a reaffirmation and revitalization of the principle of academic freedom ... [is] imperative.”¹¹⁵ Another argument is that the global economic and social tendencies are shaping the practices of daily life of HEIs and highly influence their chosen strategies, policies and accordingly, legal regulation, which eventually impact academic freedom and invoke a question of whether these changes are compatible, or whether they infringe academic freedom. The intent for questioning the nature of the concept of academic freedom and revealing its subsequent fulfillment when “science and innovation are considered to be a cornerstone for the future of any society”¹¹⁶ is both timely and relevant.

The current existing climate in different universities around the world is exemplified by the outrages of academic freedom when scholars are being threatened, arrested or deprived of

¹¹³ Matthew W. Finkin and Robert C. Post, *supra* note 4, 1.

¹¹⁴ Ronald B. Standler, *supra* note 38.

¹¹⁵ The Sinaia Statement on Academic Freedom and University Autonomy (UNESCO, 1992) // http://www.unesco.org/webworld/peace_library/UNESCO/HRIGHTS/332-334.HTM (accessed June 10, 2016).

¹¹⁶ Jan De Groof, *supra* note 17, 156-157.

the freedom of thinking, questioning and sharing their ideas, or on the contrary they are involved in indoctrinating rather than educating. As Finkin and Post point out “[e]very generation must earn its own commitments, and the ideals of academic freedom are no exception.”¹¹⁷ This idea supports the need to elaborate on the interrelation between emerging needs for knowledge and the concept of academic freedom. The purpose of this dissertation is not to offer another research entirely on the concept of academic freedom in the sense of its significant value to the higher education system or its historical intellectual roots. However, in order to evaluate existing legal higher education regulation and its compatibility with the foundational principle of academic freedom, it is essential to provide a brief analysis of prevailing perceptions of academic freedom. A thorough analysis of legal regulation and case law on academic freedom first requires a brief survey demonstrating the theoretical concept, unveiling the content and clarifying the essential ideas of academic freedom. The findings should allow a determination to be made on what academic freedom means today and should provide guidance in exposing its essential different dimensions and their limits which will allow a thorough analysis of legal regulation on higher education.

The first chapter will briefly present prevailing conceptions of academic freedom, demonstrating its roots, the main grounds for justification of its protection and will provide possible distinct dimensions. Numerous scholarly publications on the subject present different perceptions and interpretations of the concept, its limits and the level of legal protection. More detailed analysis of the different aspects of academic freedom will be given in further chapters when analyzing judicial recognition of academic freedom and its protection under the international, European and national regulation. The first chapter also includes a short historical development of academic freedom to point out the main values that academic freedom reflects and to argue why it is so important to safeguard this right. The first chapter also introduces the current changes in the external and internal landscapes of higher education and analyses the field of developments impacted by the processes of globalization and their role for academic freedom. An important observation in this chapter is made on the relationship between academic freedom and institutional autonomy, as generally one is analyzed in the context of another, sometimes misconceiving the differences between the two.

¹¹⁷ Matthew W. Finkin and Robert C. Post, *supra* note 4, 2.

1.2. DEFINITIONAL COMPLEXITY OF ACADEMIC FREEDOM

1.2.1. *Is there a need for a definition of academic freedom?*

Despite a large number of scholarly publications on academic freedom and undeniable universal agreement on the significance and necessary protection of academic freedom, there is no overall recognized definition of academic freedom. The scientific literature reflects many attempts to define the concept, however there is no unchallenged consensus on whether there should even be a definition of academic freedom at all. The Rector of the University of Leuven, Piet De Sommer, in his opening speech for the academic year 1970-1971 stated “I would not even dare to define what academic freedom actually means, understanding that in academic circles it is fenced so much ...”.¹¹⁸ Some academics argue that a precise definition of academic freedom would lead to its excessive limitation. And on the contrary, the absence of a definition may be equal to the immunity which can be claimed under any circumstances, as “a warm and vaguely fuzzy privilege”¹¹⁹. Karran argues that academics are in favor of resisting definitional clarity, as when the limits of academic freedom are indefinite it is more complicated for those accused of violating academic freedom to prove their innocence.¹²⁰ Such argument demands not only for setting a definition of academic freedom but also for ascribing its limitations to provide a practical character.

It should be noticed that the prevailing opinion is in favor of defining the concept of academic freedom, however it is also obvious that it is not so simple. Palfreyman holds academic freedom as a concept which is difficult to define in theory and which when inappropriately invoked by academics can be abused in practice.¹²¹ Byrne stresses that there was no adequate analysis of what academic freedom is protected and why it is protected and because of “lacking definition or guiding principle, the doctrine floats in the law, picking up decisions as a hull does barnacles”.¹²² De Groof suggests that the notion of academic freedom should be offered only with caution, but also notes that the term academic freedom needs “a demystification” and defines it “as a basic human right called directly linked to Human Dignity”.¹²³ Barendt advocates for setting different types of claims that may be made to academic freedom as it is too complex to attempt a single definition of academic freedom in one

¹¹⁸ Jan De Groof, *supra* note 17, 156.

¹¹⁹ Matthew W. Finkin and Robert C. Post, *supra* note 4, 6.

¹²⁰ Terence Karran, *supra* note 12, 165.

¹²¹ David Palfreyman, *supra* note 32, 19.

¹²² J. Peter Byrne, “Academic Freedom: A “Special Concern of the First Amendment”,” *Yale Law Journal* Vol. 99, No. 2 (November 1989): 253.

¹²³ Jan De Groof, *supra* note 17, 156.

or two sentences.¹²⁴ These arguments express the perception of a difficult task to define the concept, however they also indicate the importance of clarification of a vague concept of academic freedom which would contribute to elimination of difficulties in its application.

To make things even more complicated some authors argue that academic freedom, if properly understood, has a “governance dimension”¹²⁵ and includes not only research and teaching, but also the freedom to govern HEIs in conformity with academic values whether in approving the curriculum, hiring faculty members, or establishing graduation requirements for students.¹²⁶ However, it can be argued that the governance dimension is more related to institutional autonomy which is interrelated with academic freedom, however is considered as a different and separate principle of higher education regulation.

One of the main obstacles of setting a definition of academic freedom is so called “borderline cases”¹²⁷ in which factual constellations make it extremely difficult to draw a line between certain activities. However, according to Barrow, the existence of such cases does not invalidate the distinction itself or its importance. He further argues that sometimes it may be hard to distinguish whether certain actions should be classified as abuse, incitement or exposition, although most of the time it is not. The fact that certain views or utterances may sometimes incite or be offensive to somebody does not validate the view that one should not be free to act or to attempt to justify that claim.¹²⁸ Another opinion regarding setting up the line between teaching and indoctrination as a clear-cut choice is that it is not just misleading but potentially dangerous.¹²⁹ Macfarlane suggests a test to evaluate the language of the faculty in such cases. She addresses the question of whether “the impugned speech is core or peripheral to the academic concept or goal being addressed” and “why the expression or conduct was required in order to fulfill the search for truth, or a pressing academic objective.”¹³⁰ However, it is apparent that to give a clear and non-misleading answers and reasoning for these questions is not much easier than to draw the line in “borderline cases”.

Those who encourage finding a precise definition of academic freedom either suggest that it is necessary to define academic freedom in order to defend it, because one cannot ensure the proper protection of a right that is not clear; or that they suggest the relevance of defining the concept serves to the common complaint that academic freedom is a license to insult, defame and threaten. Others argue that the definition would help to eliminate unsupported assertions of

¹²⁴ Eric Barendt, *supra* note 22, 17.

¹²⁵ Judith Areen, *supra* note 35, 947.

¹²⁶ *Ibid.*

¹²⁷ Robin Barrow, *supra* note 36, 182.

¹²⁸ *Ibid.*, 183.

¹²⁹ Pamela L. Caughie, “Impassioned Teaching,” (2007) // <http://www.aaup.org/aaup/pubsres/academe/2007/ja/feat/caug.htm> (accessed June 10, 2016).

¹³⁰ Judith Macfarlane, *supra* note 37, 120.

academic freedom as reference to academic freedom is quite generously used as “the argument of status quo, as an alibi or an excuse for not implementing necessary reforms”.¹³¹ However, it is necessary to acknowledge that the precise definition of academic freedom will not eliminate the possibility of offence as in certain cases the truth itself or the process of searching for truth and bringing diverse views may be offensive and such offence can and must be justified. As Orwell puts it: “if liberty means anything at all it means the right to tell people what they don’t want to hear”.¹³² That places academics in a position of “intellectual risk-takers”¹³³, which should be ahead of their time, loyal to the truth no matter where it may lead and whoever it may offend, and academic freedom must be preserved as a tool invoked by academics to justify their offending statements.¹³⁴ However, not all offending statements can be justified. It is necessary to make a distinction between those that actually serve for the dissemination of the truth and those that do not, and which consequently do not fall under the scope of academic freedom. As some scholars argue, it is legitimate for an academic to articulate and defend the extreme and insulting thesis that all “Scots are penny-pinching and selfish”, however it is not to be rude to a Scottish colleague calling him “a Scotch skinflint”.¹³⁵ It is quite commonly agreed that introducing into the teaching a controversial matter which has a relation to the subject falls under the scope of academic freedom, and controversial matter which has no relation to the subject matter of a course should be prohibited. Although an applied physics professor should be careful not to introduce his debatable and extreme political views in the classroom, however, some scholars argue, that academic freedom entitles him to express his strange and extreme political views. There is no overall consensus on whether academic freedom entitles him to voice his individual political opinion which is not related to his academic expertise outside the institution. The common understanding is that in such cases he should not invoke the name of the institution.

When discussing the division between those who are in favor of defining the concept of academic freedom and those who are not, it is worth mentioning that scientific literature offers another interesting approach which is not very widely accepted, however worth a discussion - the statement that academic freedom should be absolute. It could be argued that none of the fundamental rights is absolute and academic freedom is not exceptional. The only possible justification for a claim of an absolute academic freedom would be providing a very precise and accurate definition, which would allow to eliminate any sight of being incompetent, of violating professional norms, of not implementing discipline of accepted intellectual standards. Some

¹³¹ Jan De Groof, *supra* note 17, 156.

¹³² George Orwell, *supra* note 39.

¹³³ Ronald B. Standler, *supra* note 38.

¹³⁴ *Ibid.*

¹³⁵ Robin Barrow, *supra* note 36, 181.

scholars suggest that the freedom to have any belief, theoretical position, the right to say things others may not want to hear, can be referred to as academic freedom and be respected only if expressed in “an appropriately academic manner”¹³⁶ or “has an academic foundation and is expressed in an appropriately academic manner”.¹³⁷ But the vagueness of the standard of “an appropriately academic manner” itself makes it excessively complicated to argue effectively for a justification of the claim for absolute academic freedom. That also proves that any association of academic freedom with academic misconduct is essentially incorrect as the former ends when the latter begins. For this reason it is significant for each academic to acknowledge both. As Barendt notes, one invoking academic freedom must be eager to admit not only duties imposed on academics, but also a duty to respect corresponding rights of others, including students and the Government.¹³⁸

Summarizing the discussion on the necessity of adopting an overall recognized definition of academic freedom, it can be emphasized that definitional clarity is essential and needed. It is necessary to have a basic understanding of the main elements of academic freedom and their conceptual boundaries and the grounds for this assertion will be demonstrated in further chapters. It is important to stress that academic freedom needs clarification not only in regard to the aspects it covers but also in regard to responsibilities and duties it is accompanied by. Such considerations may serve as a starting point for further discussion on the special character of academic freedom which requires balancing between rights and obligations.

1.2.2. Balancing between the right to academic freedom and responsibilities

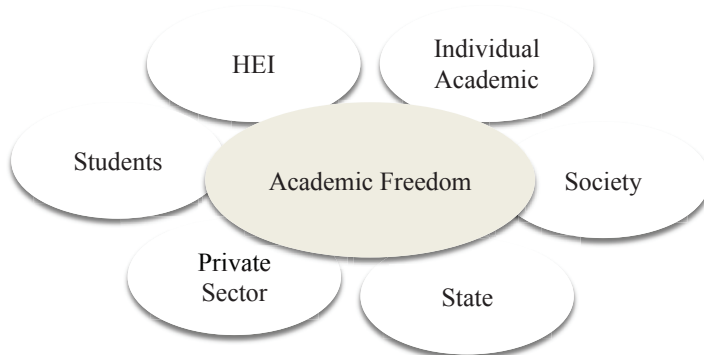
The lack of conceptual clarity or precision of academic freedom also arises from the lack of overall prevailing consensus on what elements academic freedom covers. The most commonly recognized are freedom to teach, freedom of research, freedom of publication, freedom of expression and speech within the HEI or academic context (also called freedom of intramural speech or pure academic speech), freedom of expression and speech outside the HEI on matters not related to one’s academic expertise (also called freedom of extramural speech) and freedom to study. Every separate component has its own conceptual difficulties and different arguments and controversial opinions arise when it comes to the need to set the limits of academic freedom.

¹³⁶ *Ibid.*

¹³⁷ Brian Miller, *supra* note 40, 148.

¹³⁸ Eric Barendt, *supra* note 22, 2.

In essence, academic freedom stands for the freedom to exercise an academic profession according to the standards of that profession. However, academic freedom is not limited only to the interests of an individual academic and should not be perceived only as “a goal in itself”¹³⁹. Since it helps to fulfill one of the main functions or even a commitment of the university to serve the common good for the society through searching for and questioning the truth, disseminating knowledge and fostering free and critical thinking in each member of the academic community, the larger number of interested parties can have an impact on or can be influenced by academic freedom. It is quite often argued that academic freedom must be balanced with academic responsibilities, however it must also be recognized as a responsibility not only of academics but also of the state and HEIs. The freedom of an individual academic does not exist isolated from the rights, freedoms and interests which belong to the other members of academic community and other parties as shown in the following scheme



When discussing academic freedom, rights and freedoms of an individual academic constitute only one of its aspects. Another one would be the professional standards, obligations and responsibilities of an individual academic. Additionally, rights, interests, alongside with obligations and responsibilities in preserving academic freedom and ensuring its protection by the state, HEIs, society, private sector and students constitute one more aspect of academic freedom. These different, although interacting spheres require careful mutual balancing, and accordingly special consideration must be given when trying to draw the line and settle the limits of academic freedom.

Academic freedom covers a number of different issues today. One of them is the need to protect the freedom of the individual academic: freedom to choose what and how to teach,

¹³⁹ Jogchum Vrielink, Paul Lemmens, Stephen Parmentier and the League of European Research Universities (LERU) Working Group on Human Rights, *supra* note 3, 3.

freedom to choose the topic for the research, freedom to publish, the right to access information, freedom to express ideas inside and outside the HEI related to one's expertise and professional activities. It seems that being too careful of what can be said on campus, in public, in the classroom or in the scholarly work is a necessity today in order to keep a position at university, not to be prosecuted, imprisoned or restricted of certain activities. For example, Scholars at Risk Academic Freedom Monitoring Project identified 333 reported attacks on higher education during the period from January 2011 to May 2015 which arose from 247 verified incidents in 65 countries.¹⁴⁰ The report presents threats or intentional use of violent or force, acts of coercion against HEIs and their members that hinder institutional autonomy, academic freedom and educational functions. Accordingly, that allows the identification of another issue which is related to the states' role. They are encouraged to recognize the problems, to review national laws and policies, with particular regard for institutional autonomy and academic freedom, to ensure adequate protection to the members of academic community and elaborate policies and practices which strengthen the culture of respect for academic freedom and institutional autonomy.¹⁴¹ Although the report deals mainly with more severe violations in higher education, there are plenty of examples of academics having their position at university in jeopardy because of their academic speech or conduct. When a lecturer at Yale university responded to a mass email advising everyone not to wear racially insensitive Halloween costumes, saying that students should have a right to wear any costume they want, she came under attack by the students themselves.¹⁴² The lecturer subsequently decided to stop teaching at the university.¹⁴³ This case shows how unfavorable the climate at the university is for an open inquiry and that freedom of speech and intellectual expression may not be supported. Another example is that of a French researcher at the Institute for the Study of the Arab and Muslim World (IREMAM), who was the subject of a disciplinary hearing and faced the charges against him in connection with his work on Islamophobia, for opinions expressed in private correspondences.¹⁴⁴ A Palestinian-American professor at the University of Illinois after his Twitter comments on the bombardment of Gaza was accused of hate speech and lost his position at the university.¹⁴⁵

¹⁴⁰ Scholars at Risk, *supra* note 105.

¹⁴¹ *Ibid.*

¹⁴² Ashley Thorne, "Roses and Thorns: NAS's Top 10 List for 2015," (2015) // https://www.nas.org/articles/roses_and_thorns_nass_top_10_list_for_2015 (accessed June 10, 2016).

¹⁴³ Isaac Stanley-Becker, "Yale instructor at the center of racial protest to leave teaching role," (2015) // <https://www.washingtonpost.com/news/grade-point/wp/2015/12/04/with-her-words-this-instructor-helped-set-off-protests-over-race-and-a-debate-over-free-speech-now-shes-leaving-yale/> (accessed June 10, 2016).

¹⁴⁴ Frances Webber, "Academic Freedom Under Threat," (June 2009) // <http://www.irr.org.uk/news/france-academic-freedom-under-threat/> (accessed June 10, 2016).

¹⁴⁵ Robert Mackey, "Professor's Angry Tweets on Gaza Cost Him a Job," (September 2014) // http://www.nytimes.com/2014/09/13/world/middleeast/professors-angry-tweets-on-gaza-cost-him-a-job.html?_r=1 (accessed June 10, 2016).

Although the latter can be examples of a violation of an individual professor's academic freedom, at the same time they could also serve as examples of another sphere behind the line. Professors more often are accused of introducing tendentious political or ideological matters into their teaching. Academics cannot act in favor of silencing alternative views or teach without due regard for the equal consideration of conflicting opinions and with failing to maintain balance and neutrality. Certain utterances, inactivity, and behavior of academics do fall outside the scope of academic freedom and rather are considered as a violation of professional duties or abuse of their academic freedom. Under such circumstance the rights and interests of all the other related parties need to be protected. It should be mentioned that quite often these outrages involve not only individual academics but HEIs as well acting in ways that are more loyal to political power and corporate money than the higher education system or society. It is quite common to argue now that higher education is more frequently recognized by governments and corporations as too important to be left to academics.¹⁴⁶ For example, the Deutsche Bank, Humboldt University and the Technical University of Berlin entered into a contract by which the bank agreed to finance the Quantitative Products Laboratory and, in return, the bank got a say in the hiring of the two professors, the right to have bank employees as adjunct professors, the right to review the produced research and the right to withhold permission for publication.¹⁴⁷ It is argued that this "toxic mix of science and profit"¹⁴⁸ in very different areas imperils the well-being of millions relying on the historic impartiality of academic research, undermines academic freedom and diminish the university's capacity to perform advanced research and innovation.¹⁴⁹ Thus, the major controversy is the line in between separating the end of academic freedom and the beginning of misuse of professional rights and responsibilities. Taken together, because of a variety of interested parties, the complexity of matters that academic freedom covers, and its multifaceted character, it can be argued that in order to lay strong conceptual foundations and to ensure adequate protection of academic freedom, it is necessary to recognize the importance of the interaction between different spheres and to maintain the balance between them.

Despite the assertions on the difficulty and complexity of the definition of academic freedom, there are plenty of initiatives and examples of such attempts. For example, in its 1918 Report the Committee A on Academic Freedom and Tenure of the AAUP explained, that it is complicated to draw a clear and unmistakable line between the field of utterance which

¹⁴⁶ Graham Badley, *supra* note 50, 153.

¹⁴⁷ D.D. Guttenplan, "Cash Tempts the Ivory Tower's Guardians," (July 2011) // http://www.nytimes.com/2011/07/18/education/18iht-educLede.html?_r=0 (accessed June 10, 2016).

¹⁴⁸ Tim Birtwistle, "Are we collectively guilty of complacency? An update on the continued confusion over what is academic freedom and what may become a battle for academic freedom," *Education and the Law* Vol. 18, Nos. 2-3 (2006): 6.

¹⁴⁹ *Ibid.*

academic freedom protects and the field which is not defended and that “there is a narrow and uncertainly mapped area where judgment must hinge upon a knowledge of the background and all the attending conditions of the individual case.”¹⁵⁰ However, in subsequent years through developing standards for sound academic practices, through producing basic statements and conclusions governing academic freedom, the 1940 Statement of the Principles on Academic Freedom and Tenure was completed and has become the standard of academic freedom in the United States which has been endorsed by more than 240 national scholarly and educational associations.¹⁵¹ The Statement entitled teachers with the full freedom in research and in the publication of the results, freedom in the classroom and set general guidelines for their behavior while being “members of a learned profession, and officers of an educational institution.”¹⁵² This is an example how the advantages of a common statement of governing principles of academic freedom are recognized. Although the statement by the AAUP has no legal effect, HEIs which violate academic freedom are publicly censured by AAUP. The Statement became a standard for the relations between HEIs and faculty. Through investigations of complaints by mistreated faculty, the AAUP has been particularizing and applying the Statement by publishing reports on violations and keeping a list of offending institutions on which no recognized HEI wanted to appear.¹⁵³ The Statement or a variation of it was adopted in most of the HEIs and is incorporated in the faculty policy manual and the employment contract between the university and each faculty member.¹⁵⁴

There is also a number of international documents elaborating the principles of academic freedom and encouraging countries to take necessary measures to ensure its protection. Various studies were undertaken in order to examine recent and long-term developments and to evaluate the feasibility and desirability of an international instrument in the domain of academic freedom and institutional autonomy. A thorough analysis of the international framework of higher education, including academic freedom will be presented in Chapter 3 in order to disclose the perception of academic freedom by the international higher education community. A significant step towards more convincing legal recognition of academic freedom was its explicit incorporation into the EU Charter (more detailed analysis is provided in Chapter 2). Furthermore, it is more frequently referred to as a fundamental principle of universities.

¹⁵⁰ American Association of University Professors, “Report of Committee A on Academic Freedom and Academic Tenure,” (1918) // <https://www.jstor.org/stable/pdf/40216870.pdf> (accessed June 10, 2016).

¹⁵¹ American Association of University Professors, “Protecting Academic Freedom,” // <https://www.aaup.org/our-work/protecting-academic-freedom> (accessed June 10, 2016).

¹⁵² American Association of University Professors, “Statement of Principles on Academic Freedom and Tenure,” (1940) // <https://www.aaup.org/file/1940%20Statement.pdf> (accessed June 10, 2016).

¹⁵³ J. Peter Byrne, “The Threat to Constitutional Academic Freedom,” *Journal of College and University Law* Vol. 31, No. 1, (2004): 85.

¹⁵⁴ Ronald B. Standler, *supra* note 38.

Recognition of academic freedom by the organs of the CoE is also beneficial for its development. The significant value of academic freedom was underlined by the ECtHR noting that “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”.¹⁵⁵ Although the jurisprudence of the ECtHR does not bring much clarity of exactly how important academic freedom is, however it shows the Court’s view on some basic elements that constitute the content of academic freedom.

1.3. WHY PROTECT ACADEMIC FREEDOM?

1.3.1. *Historical roots of academic freedom*

Traditionally, the justification for the protection of academic freedom is found in its historical origins. The notion of the modern academic profession is considered to follow from the different approaches within it, the historical context which shaped it, the forces which continue to influence it, and the values which tied it together. Throughout history the main and most persistent characteristics of academia are considered to be “variety and flux”¹⁵⁶, which until today maintain universities and their members as developing entities. The University is a European institution *par excellence*. It is the only institution which has preserved its fundamental model and its essential social role and performed exceptional functions for all European societies and has expanded over the entire world through the course of history. Academic freedom has a lengthy and controversial history. The early medieval universities of Europe were established by the Church or by local government. Universities were expected to provide political and ideological support, research, teaching and public expression by academics was restricted. The Catholic Church prohibited teaching theological and scientific doctrines which were in conflict with accepted canon.¹⁵⁷

At the beginning of the nineteenth century the fundamental reform of the traditional university was inspired by the appearance of two new university models. The first was the French model of special colleges with severe, often military, discipline, strict control over the curriculum, the awarding of degrees, the compliance of possessed views regarding official

¹⁵⁵ *Sorguç v. Turkey*, ECtHR (2nd section) (2009, Application no. 17089/03).

¹⁵⁶ Burton R. Clark, and Guy R. Neave, *supra* note 44, 1515.

¹⁵⁷ Martin Luther, a professor of theology, because of contradicting theological views and the battle over them with church officials, lost his professorship. He could return to his academic duties only when some German universities turned Protestant and became sympathetic. Philip G. Altbach, *supra* note 45, 51.

doctrines and even personal habits such as the prohibition on the wearing of beards in 1852.¹⁵⁸ This model was determined by the French Revolution and completed by Napoleon. The Napoleonic approach to education in French universities resulted from a belief that central control would ensure that students shared values of the prevailing orthodoxy.¹⁵⁹ The French model lasted until the last third of nineteenth century when its dominance was overcome by the German model.

The German model holds the name of the Humboldtian University. The first Prussian Minister of Education, Wilhelm von Humboldt, expressed the notion of the university that represented a community of scholars and which promoted a way of thinking rather than merely and primarily valuing the acquisition of knowledge.¹⁶⁰ In 1810, he founded a university in Berlin based on liberal ideas of the theologian and philosopher Friedrich Schleiermacher. Schleiermacher perceived the function of a university not as conveying established and directly usable knowledge but rather as introducing the way of discovering knowledge and stimulating the idea of science.¹⁶¹ It is the Humboldtian concept of higher education which introduced an idea of institutional autonomy free from the control of the state. This understanding of the university included an academic community which is committed to intellectual inquiry as an end in itself, without any demand that studies “be practical or profitable.”¹⁶² According to Humboldt, the state’s role towards the university could be fulfilled only in two aspects: protecting their freedom and appointing professors. However, Humboldt’s idealistic model was abandoned by his successor and freedom of opinion in Germany was restricted in 1819 and was not restored until after 1848.¹⁶³

The legal concept of academic freedom originated in Germany around 1850. Humboldt’s and Schleiermacher’s rejection of the French model is considered to be the greatest accomplishment which led to the modernization of the medieval system of the university and in the long term enabled the elimination of the obstacles of academic freedom. The Prussian Constitution of 1850 declared that “science and its teaching shall be free”.¹⁶⁴ Professors were entitled to teach without external control in the area of their expertise.

After establishing the University of Berlin, Wilhelm von Humboldt distinguished two principles of academic scholarship: “solitude and freedom”.¹⁶⁵ Solitude was necessary for

¹⁵⁸ Walter Rüegg, *supra* note 43, 4-5.

¹⁵⁹ Brian Miller, *supra* note 40, 146.

¹⁶⁰ *Ibid*, 146.

¹⁶¹ Walter Rüegg, *supra* note 43, 5.

¹⁶² Gordon Graham, *supra* note 48, 12.

¹⁶³ Walter Rüegg, *supra* note 43, 5.

¹⁶⁴ Friedrich Wilhelm and James Harvey Robinson, “Supplement: Constitution of the Kingdom of Prussia,” *The Annals of the American Academy of Political and Social Science* Vol. 5, Supplement 8 (1894): 29.

¹⁶⁵ Graham Badley, *supra* note 50, 151.

academics to devote themselves to scholarly inquiry and freedom was essential in order to teach what they wanted. Alongside, students were granted the freedom of learning which allowed them to attend lectures they were interested in. The Humboldtian theory of academic freedom was freedom of teaching (*Lehrfreiheit*) and freedom of learning (*Lernfreiheit*).¹⁶⁶ Academic freedom simply meant “having the autonomy to pursue the truth regardless of where it led.”¹⁶⁷ Academic freedom was claimed by German professors as a right. Additionally, they demanded the right to inquire into spheres beyond their specialization. Almost for the entire nineteenth century, scholars enjoyed the freedom to explore different fields of knowledge, to adopt scholarly methods from them, and conduct research throughout the disciplines as they wanted.¹⁶⁸ Academics claimed special rights in order to ensure the pursuit of truth and also expected university autonomy to be granted from secular and ecclesiastic authorities.¹⁶⁹ The Humboldtian model also shifted the focus from being only devoted to teaching and preparing professionals in certain fields more towards research that is instrumental in advancing the intellectual and industrial development of a nation. From the end of the nineteenth century the German model of a modern university has spread widely not only in Europe but was also introduced in the United States and Japan. Although the striving for freedom varied in different countries, the fundamental idea of freedom was everywhere.

The modern concept of academic freedom owes a debt not only to Humboldt but also to John Stewart Mill. He argued that “truth emerges best from a marketplace of ideas from which no opinion is excluded.”¹⁷⁰ Mill’s principle allows both teachers and students to follow their own good in teaching and learning in their own ways as long as they do not cause harm to others or hinder them from their own endeavors for what they regard to be good.¹⁷¹ Mill’s arguments are even considered as providing a stronger protection for academic freedom than to free speech in general, as he argued that “those whom academic freedom insulates are less likely to act from nakedly political or ideological motives than are those whose power it insulates them from.”¹⁷²

The historical emergence of academic freedom emphasized the essentiality of guaranteeing the right to pursue the whole knowledge and its conventional justification became instrumental in the discovery of truth. The Humboldtian university model was given support from the Prussian government because of its focus on both basic research and research for national development and applied work, and because it committed to the country’s development

¹⁶⁶ *Ibid.*

¹⁶⁷ Barry E. Hogan and Lane D. Trotter, *supra* note 49, 70.

¹⁶⁸ Kenneth Garcia, *supra* note 47, 6.

¹⁶⁹ Philip G. Altbach, *supra* note 45, 50.

¹⁷⁰ Ronald Dworkin, *supra* note 51, 248.

¹⁷¹ Graham Badley, *supra* note 50, 151.

¹⁷² Ronald Dworkin, *supra* note 51, 248.

in achieving international power and influence. It was for this reason that Japan and the United States adopted this model, as both nations were aiming at national development and considered higher education as a key instrument for that. However, the concept of academic freedom based on the German ideal of the unity of knowledge and the purpose to include specialized studies into a wider philosophical (or theological) context, as it was adopted in the US, did not last for long as it subsequently developed a number of uniquely American characteristics.¹⁷³ Later in the 19th century, the US universities focused on research with a scientific focus on development for agriculture and its expanding industry. Differently from the German model, the US considered service to society as a key value, the organization of the academic profession in the US was more democratic and its governance and administrative system was more participative and managerial.¹⁷⁴ It is considered that the US research university became the predominant global model, the international “gold standard” through the significant expenditure on research, effective governance and differentiated academic system.¹⁷⁵ The American idea that the university should be oriented towards society at large and its existence is based on providing services to society has, in return, influenced many European policy makers and universities.

The fourth tradition of higher education policy which is still visible is the Newmanian, named after Cardinal John Henry Newman, which concerns aspects of the traditional British university.¹⁷⁶ Currently in many European countries educational systems still use a mixture of the Napoleonic, the Humboldtian, the American and the Newmanian models.

It is important to mention that some nations experienced severe restrictions of academic freedom, which, however, often resulted in a rebuilding and even strengthening of the concept. In Central and Eastern Europe and the countries of the former Soviet Union, despite some of them having had strong traditions of academic freedom, Nazi occupation and long-lasting Communist rule had virtually unlimited power to enforce their political agendas, which undermined and effectively abolished academic freedom in its modern understanding completely. Universities served as a tool for the state to disseminate its ideological orthodoxy. After the collapse of the Iron Curtain, countries reorganized their higher education systems in order to adjust to the international standards of teaching and research and also strove for the restoration of academic freedom and institutional autonomy. After decades-long infringements these rights were being rediscovered with the intention to reintroduce them permanently. However, in some countries academic freedom is still highly restricted or recovered in a much

¹⁷³ Kenneth Garcia, *supra* note 47, 6.

¹⁷⁴ More see Philip G. Altbach, “The Past, Present, and Future of the Research University”: 15; in: Philip G. Altbach and Jamil Salmi, eds., *The Road to Academic Excellence. The Making of World-Class Research Universities* (Washington D.C.: The World Bank, 2011).

¹⁷⁵ *Ibid.*

¹⁷⁶ Roel in ‘t Veld, Hans Peter Füssel, and Guy Neave, *supra* note 52, 48.

slower way. Prior to World War II, academic freedom was also revoked in Japan and Germany, though it was reestablished following the war.¹⁷⁷ Strong and long academic traditions that had existed prior to the war, and the pre-existing culture of academic freedom contributed to a much more quicker transformation as these countries valued academic freedom in teaching and research and respected freedom of expression for scholars not only within the university but also in society.

The traditional Humboldtian concept of academic freedom from its emergence in the medieval times until recent is vital for a fulfillment of the mission of HEIs, for an ability of academics and students to participate in unrestricted and free teaching, research, publication, expression and to foster an open inquiry as a core value of higher education. It also communicated the idea that the pursuit of knowledge for its own sake could appear to be more applicable and innovative than instrumental education or research. However, the concern is that the traditional Enlightenment and Newmanian concept of the university “dedicated to the disinterested pursuit of ‘higher learning’ as an end in itself”¹⁷⁸ is being supplemented by the perception of a university as a transnational business corporation with the primary goals to generate revenue, promote research that is considered relevant to the economic and political objectives of the country and train students to become suitable workers with the necessary skills to meet the needs of global labor market.¹⁷⁹ Within the climate influenced by the idea of higher education being a key element for the country’s development, fostering economic and social well-being, it is necessary to carefully evaluate the regulations and policies HEIs are implementing to adhere to the goals set by governments and international players.

1.3.2. Challenges shaping today’s framework of higher education

It is agreed that a previous key function of the medieval university – to pursue divine truth – has found a place in the modern university, and in particular in research.¹⁸⁰ Today there is universal consent that it is extremely important to safeguard academic freedom as it protects the creation of knowledge within universities, ensures educating students to think for themselves and develops “the whole person.”¹⁸¹ As universities play a key social role and are considered as important contributors to economic development, they are involved in complex globalized

¹⁷⁷ Philip G. Altbach, *supra* note 45, 54.

¹⁷⁸ Cris Shore and Mira Taitz, *supra* note 53, 205.

¹⁷⁹ *Ibid.*

¹⁸⁰ Barry E. Hogan and Lane D. Trotter, *supra* note 49, 70.

¹⁸¹ Jeffrey L. Buller, *supra* note 54, 2.

economies and competitive environment in unison with policy makers, the public and private sector by developing skilled labor force and by generating, applying and communicating new ideas and innovations. For this reason, academic freedom must be construed in the context of social responsibility. Academics need to perform their teaching and research responsibilities maintaining the highest standards of the academic profession and committing to the culture of research. Additionally, the role of the state and HEIs fulfilling their responsibilities in preserving and protecting academic freedom is crucial. It can be argued that it is the only effective way to safeguard academic freedom as a fundamental right.

Many different forces now impact and shape the environment of higher education, which is obliged to adjust in order to meet arising challenges. For quite a long time, the so called “third generation university”¹⁸² has been confronted with seeking for alternative funding, globalization, the expanding trend of commercial activities, interdisciplinary research and a significant increase in student numbers. All of these factors are widely considered to influence, in one way or another, by themselves or in combination, the academic freedom of individual scholars. However, the list of arising challenges can be expanded with a large variety of issues, such as extremist views and controversial topics in academia, terrorist attacks and terror propaganda. Additionally issues relating to the ownership of intellectual property (especially copyright and patents) created by university employees and students, and in the commercialization of research, bring into focus the potential conflicts between those who produce knowledge and research and those who provide funding and may want to retain the control over the results and their economic exploitation. One more issue is the internet which has revolutionized the way the knowledge is communicated, the use of online social networking for academic collaboration and joint research, and using the internet for distributing publications, open educational resources, blogs and other opinion announcements. Accordingly, the legal challenge for HEIs today is to balance the traditional tasks of teaching and learning with the modern realities in higher education.

Higher education is one of the spheres highly affected by presumably the most powerful and multifaceted process of globalization that is shaped by an increasingly integrated world economy. It extends the movement of people, stimulates the spread of ideas, culture, values, knowledge, information and communications technology and economy outside national borders and makes the world more interrelated. Globalization assimilates the effects of political, social and economic dimensions and provokes strong reactions, both supportive and critical. An unprecedented outcome of globalization is the widespread use of English as the dominant

¹⁸² J.G. Wissema, *supra* note 55, 13.

language of scientific communication.¹⁸³ The current environment with the various features influenced by the globalization shapes the role of the HEIs in a different manner. The world of education has changed significantly during the past few decades. Previously considered as a predominantly local factor, higher education today is conceived as an internationally expanding activity. According to the OECD, today, higher education can be characterized by such facets as massive growth and expanding participation; the emergence of new types of institutions (vocationally oriented and private institutions); more diverse types of institutions, study programmes and their students; wider application of communications and educational technologies; increasing internationalization and competition; greater pressure on expenses and search for new forms of financing; the quest for new ways and roles of governance, including expanding emphasis on performance, quality and accountability.¹⁸⁴ To master all these challenges HEIs are required to demonstrate particular competence and efforts and the key role here is played by academics as the success cannot be achieved without highly qualified and committed academic staff. However, it is argued that the expanding tension between enrolment demand, constrained budgets and increasing accountability has resulted in a “discouraging environment for the academic profession worldwide”.¹⁸⁵ In terms of accountability and assessment, much criticism has been aimed at growing requirements on academic productivity, which quite often overemphasize certain factors.

Governments expect the universities to contribute to the economic and social well-being of their respective countries. Employers expect cooperation with the HEIs to hire graduates which are equipped with certain knowledge to meet their requirements and are fully skilled for the labor market, “employability” has become one of the buzzwords of recent higher education policies. Private enterprises finance researches and expect the results matching their objectives, require prior submission of the research findings and make decisions about their publication. HEIs are highly dependent on external financial sources, which lead to at least partial control by providers of research funding over the research topics, speech in the classroom and outside the institution. Barendt argues that when universities and academic staff cannot freely choose to teach or research what they consider worthy of study, but instead have to respond to the needs of business, industry and the wider society, this makes academic freedom clearly vulnerable.¹⁸⁶ The existing climate is sometimes identified as a new bimodal view of higher education with two increasingly important goals: to develop “the whole person” and to be largely or exclusively

¹⁸³ Philip G. Altbach, Liz Reisberg, and Laura E. Rumbley, *supra* note 56.

¹⁸⁴ OECD, “Assessment of Higher Education Learning Outcomes Feasibility Study Report. Volume 1 – Design and implementation,” (2013) // <http://www.oecd.org/edu/skills-beyond-school/AHELO%20FS%20Report%20Volume%201%20Executive%20Summary.pdf> (accessed June 10, 2016).

¹⁸⁵ Philip G. Altbach, Liz Reisberg, and Laura E. Rumbley, *supra* note 56.

¹⁸⁶ Eric Barendt, *supra* note 22, 7.

involved in job training, which makes it to a certain degree uncertain what higher education is and what purpose it serves.¹⁸⁷

An exceptionally important result of globalization is internationalization, which has led to the process of introducing an international and intercultural dimension into higher education through a variety of policies and programs. It is believed that internationalization does and will contribute to the quality of higher education. As De Groof notes, “[t]he internationalization accelerated the decomposition of academic traditions, and legislation could hardly control the continuous changes.”¹⁸⁸ The demand for higher education has been increasing, which eventually results in promoting mobility and cross border education, fostering the growth of different types of higher education providers and expanding engagement in various partnerships. The key drivers that work alongside the challenges to further the transformation of higher education include the development of advanced communication, information and technology services, the emergence of the knowledge society, expanding international labor markets, a political focus on the market economy, predominance of private investment and reduced public support for education, alternate funding sources, lifelong learning, an increase in quantity and diversity involved actors.¹⁸⁹

One of the most prominent examples of regional and international cooperation in higher education is the collaboration among European countries that has culminated in one of the most ambitious projects: the Bologna Process. The Bologna Process was fueled by the political and economical aspirations to make European higher education more attractive and competitive and to ensure that the European higher education system “acquires a world-wide degree of attraction equal to our extraordinary cultural and scientific traditions.”¹⁹⁰ Although the control of national higher education systems is still deeply rooted in every European country, certain regulations, policies, guidelines and models of higher education established by various transnational organizations such as OECD, UNESCO and the EU are being introduced more frequently. UNESCO highlights “higher lifetime earnings and economic growth”¹⁹¹ as the benefits of better education. Governments also have identified a direct link between higher education and the quality of life.

It is important to acknowledge that these significant trends in higher education will continue. The OECD has identified a number of potential key developments for the period until

¹⁸⁷ Jeffrey L. Buller, *supra* note 54, 1.

¹⁸⁸ Jan De Groof, *supra* note 17, 155.

¹⁸⁹ Jane Knight, *supra* note 59, 1.

¹⁹⁰ *Joint declaration of the European Ministers of Education - The Bologna Declaration of 19 June 1999* (1999) // http://www.ehea.info/Uploads/Declarations/BOLOGNA_DECLARATION1.pdf (accessed June 10, 2016).

¹⁹¹ EFA Global Monitoring Report 2005, “Education for All. The Quality Imperative,” (2004) // <http://unesdoc.unesco.org/images/0013/001373/137334e.pdf> (accessed June 10, 2016).

2030: cross-border higher education, including mobility of students, faculty and institutions will increase; academic research will become extensively international and will continue to be influenced by collaborative and competitive forces; higher education systems in Asia and Europe will gradually expand their global influence; private higher education supply and financing will grow; market-like mechanisms will be more substantial in higher education governance applying performance-based and competitive allocation of funds; focus on quality assurance will strengthen institutional rankings and the need for accountability.¹⁹² Although the importance of internationalization is growing, the activities of HEIs, including their internationalization strategies, are mainly settled by national regulatory and funding frameworks, as education is still one of the most sensitive sectors. For example, negotiations which were aimed at integrating the higher education sector into the existing international framework for services industries, the General Agreement on Trade in Services (hereinafter GATS), administered by the World Trade Organization, which recognized the importance of an international education marketplace, provoked a substantial reluctance, as countries prefer to retain control over these services. It is argued that the failure to sign a treaty which would liberalize the trade of higher education services is possibly only temporary.

Almost fifteen years ago, the World Bank stressed that higher education is “a critical pillar of human development worldwide”¹⁹³ and identified four dimensions, each representing both opportunities and threats for higher education: 1) the increasing importance of knowledge as a driver of growth in the context of the global economy, 2) the information and communication revolution, 3) the emergence of a worldwide labor market, and 4) global socio-political transformations.¹⁹⁴ It was noted that possible opportunities and threats will likely affect the very mission and purpose of higher education systems.¹⁹⁵ It is apparent that HEIs worldwide have faced those challenges and today are still trying to adapt to them while confronting the burden of a competitive market. HEIs are trying to meet the requirements of a global knowledge society and include many changes, as diverse as adjusting curricula to new education and training needs, employing international teachers and researchers, performing international researches and joint projects, developing marketing strategies and attractive profiles to increase the number of students, especially foreign ones, and altogether confront the challenges arising from competition and lack of financial sources in the national higher education systems.

¹⁹² OECD, “Higher Education to 2030. Volume 2: Globalisation,” (2009) // <https://www.oecd.org/edu/eri/highereducationto2030volume2globalisation.htm> (accessed June 10, 2016).

¹⁹³ The International Bank for Reconstruction and Development/The World Bank, “Constructing Knowledge Societies: New Challenges for Tertiary Education,” (2002) // http://siteresources.worldbank.org/INTAFRREGTOPTEIA/Resources/Constructing_Knowledge_Societies.pdf (accessed June 10, 2016).

¹⁹⁴ *Ibid.*

¹⁹⁵ *Ibid.*

All these trends and challenges which are shaping the higher education setting accordingly influence the working environment of academics and their academic freedom. HEIs in order to adhere and fulfill the arising European and national demands and maintain or enhance competitiveness now focus on measuring and comparing academic performance and productivity. HEIs governance now is highly influenced by the quest for a “world-class” universities and a high global university ranking. The appearance of the university rankings is considered as “a game-changer for higher education and research”.¹⁹⁶ It is argued that they have become an implicit, and even explicit, reference point for policy-making and decision-making and have determined an evaluative state’s over-reliance on quantitative indicators to measure quality.¹⁹⁷

Universities seek higher rankings and academics, and as a consequence, encounter additional requirements which raise many concerns. Often only those who fulfill determined requirements for publishing a certain number of articles in reputed academic journals or other established criteria can be awarded with the employment contract, promotion or higher salary at the university. Though it’s essential for the creation and dissemination of knowledge, publishing in highly rated journals is considered more valuable than other academic activities, such as teaching, publication of textbooks or publication in non-refereed journals. The burden to comply with the criteria and achieve academic excellence may also lead to the decrease in quality or even academic misconduct which could have a negative impact on the transmission of knowledge from university to society. Researchers often feel pressure to focus on subjects supported by grants from government, industry or foundations. As a consequence, sometimes it leads to violation on academic ethics by plagiarism, falsification of scientific data or its biased interpretation, unjustified intrusion of co-authorship to younger colleagues or subordinates, denial or reticence about the impact of people or organizations who assisted in performing scientific research, manipulation of impact factors and self-citation.

Accordingly, it should be noted that academic freedom should be given much more attention than only as to a declarative provision in higher education legislation which highlights its significance and encourages its respect (more arguments to support the claim of the significant role of academic freedom in a modern higher education environment are provided below). Academic freedom must be constantly evaluated together with responsibilities. First, the responsibility of the state must be considered. The state has a prerogative in introducing ambitious national higher education strategies and policies and set overemphasized requirements

¹⁹⁶ Ellen Hazelkorn, “Reflections on a Decade of Global Rankings: what we’ve learned and outstanding issues,” *European Journal of Education* Vol. 49, No. 1 (2014): 12 // DOI: 10.1111/ejed.12059.

¹⁹⁷ *Ibid.*

and expectations to HEIs. The state must be responsible for establishing the rules of the game in a way which ensures the protection of academic freedom. Second, the responsibility of HEIs in establishing their own policies and requirements to academics. Third, the responsibility of academics, as a given right to academic freedom does not include dishonesty and poor quality. For this reason, the next chapters will be dedicated to analyzing different international, regional and national documents and legislation explicitly discussing the subject of academic freedom and also the documents and legislation on higher education in general which can be linked to academic freedom implicitly. That will help to evaluate whether academic freedom in this legal higher education framework is understood as a declarative aspirational principle or as a human right with its adequate protection.

1.3.3. The role of academic freedom in a modern higher education environment

Although participation in a global higher education market may lead to greater progress, innovation and excellence, it creates uncertainty on whether the HEIs are actually capable of sustaining excellence in higher education systems and to adequately respond to these challenges while preserving academic freedom and institutional autonomy. That also requires governments to develop appropriate means of guaranteeing and regulating these freedoms. It is very important to acknowledge academic freedom as a fundamental prerequisite for the fulfillment of university's mission in serving the common good by producing knowledge which requires freedom of inquiry. And this must be accomplished not only from the perspective of the government and HEIs, but also from the perspective of those fostering the academic profession and contributing to the implementation of the mission of HEIs. This is one of the strongest arguments in favor of our hypothesis suggesting the necessity to recognize academic freedom as a right and as a responsibility. The protection of academic freedom is crucial in order for the state and HEIs to ensure a fundamental right to education. For this reason the state and HEIs must feel responsible and be active in safeguarding academic freedom. In that case, the HEIs would be able to implement all three missions of universities: the mission of teaching, the mission of research and a complementing the so-called "third mission" – services to society.¹⁹⁸

Academics are the holders and producers of the world's knowledge and are committed to an interest in ideas and their expression and by shared and powerful ideologies concerning the

¹⁹⁸ Patricio Montesinos, Jose Miguel Carlot, "Juan-Miguel Martinez and Francisco Mora, Third Mission Ranking for World Class Universities: Beyond Teaching and Research," *Higher Education in Europe* Vol. 33 (2008): 259 // DOI: 10.1080/03797720802254072.

community of scholars and academic freedom.¹⁹⁹ From one point of view, it is a privilege which is not given to the members of any other profession. From the other, alongside it brings duties and responsibilities. Academics, together with the HEIs are considered to be the key builders of the successful economic and social growth in the country, accordingly they bear serious commitments before the students, the university, the state and the society and have to adhere the rising requirements and expectations. While implementing their extremely important role they have to retain the fundamental mission of the HEIs, academic competence and responsibility. The mission is fulfilled when academics are not obliged to support “an official line, an economic agenda, or a political ideology”,²⁰⁰ but rather are not bound by constraints using their talents to advance human knowledge and understanding. Accordingly, only in this way, the coherence of the idea that the key role of universities is to contribute to national and international “economic prosperity and social welfare”²⁰¹ is ensured.

There are a number of publications praising academic freedom as the highest value in the academy, naming it as “a sacred cow of the profession”,²⁰² as a prerequisite for advancement of knowledge and creation of knowledge society. Academic freedom is now nearly commonly acknowledged to be “a principal foundation of modern university life and is the sine qua non of a mature university”²⁰³ and is most directly linked with the foundational purpose of the university. Among many other purposes the university serves, the fundamental one is to pursue knowledge, truthfulness and understanding.²⁰⁴ It is common practice to put trust in academic publications and to take for granted that the facts are accurately reported.²⁰⁵ Accordingly, it’s apparent that academic freedom must be upheld and protected not because it is “an inalienable, God-given right of all scientists”²⁰⁶ but because it has an exceptional character - it is the best way to attain the truth. Everyone teaching and performing research must dissociate themselves from “partisan politics”²⁰⁷ and commit to truth and objectivity. That emphasizes the importance of granting full independence to determine academic questions. The significance of academic freedom is even compared to judicial independence, as both communicate “the widespread

¹⁹⁹ Burton R. Clark, and Guy R. Neave, *supra* note 44, 1515.

²⁰⁰ Human Rights Watch, “World Report 1999,” (1999) // <https://www.hrw.org/legacy/worldreport99/special/index.html> (accessed June 10, 2016).

²⁰¹ Eric Barendt, *supra* note 22, 16.

²⁰² Jerry G. Gaff, *supra* note 60.

²⁰³ Kenneth Garcia, *supra* note 47, 2.

²⁰⁴ For example, Barrow argues that he uses the term “understanding” as the questions whether there is such a thing as universal truth or whether scientific knowledge is objective are debatable. However, as it is not a subject of this research to analyze the different concepts, they will be used in the research as synonyms. Robin Barrow, *supra* note 36, 179-180.

²⁰⁵ Conrad Russell, *supra* note 61, 120.

²⁰⁶ Satoshi Kanazawa, “If the truth offends, it’s our job to offend,” *Times Higher Education Supplement* (December, 2006) // <https://www.timeshighereducation.com/news/if-the-truth-offends-its-our-job-to-offend/207191.article> (accessed June 10, 2016).

²⁰⁷ Philip G. Altbach, *supra* note 45, 50.

acknowledgement of their continuing value”.²⁰⁸ The international higher education community refers to a university as “the repository of truth”,²⁰⁹ as a place where the critical intellectual mind of a society, engaging in the quest for truth, meet and argue chasing for this ideal, where the scholarly elite comes together, abandons obsolete findings, and then reconsiders and defends other interpretations of truth.²¹⁰ And this key task of the universities of discovering and disseminating the truth can be entirely accomplished only if universities will respect and benefit from academic freedom.

It is not an easy task to give a straightforward well-argued answer on how all the changes are shaping the culture and practices of the HEIs and influence academic freedom. There is no unanimous agreement that academic freedom is or is not limited by them. Daxner raises the question whether the state which represents the public good is actually barred from imposing its core values and purposes to the public higher education public system.²¹¹ Miller argues that managerialism in higher education restricts academic freedom through control, instrumentalism and ideology.²¹² And Walton sees managerialism as the unjustified and distorting interference of market-dominated resolutions into the area of higher education where their consequences are destructive.²¹³ However those in favor of managerialism argue that the absence of such intervention and control would “render higher education impotent because teaching and research would lack focus and society would be unwilling to provide the resources needed to support these endeavours.”²¹⁴ Such an idea can be equaled to the neo-liberalism theory explored by Hayek. According to him, the thinker is free as long as she/he is not explicitly directed what to think as a coercion eliminates an individual as a thinking and valuing person and in the context of neo-liberalism possible choices and the means of choice-making are given in such a way as to keep the population on predictable tracks.²¹⁵ When transformed into the sphere of higher education the theory of neo-liberalism aims towards the main purpose “to install commercial capital in place of public services and turn knowledge into commodities.”²¹⁶ For this reason, economically profitable fields in HEIs, such as study programs which attract foreign students

²⁰⁸ Peter MacKinnon, “Administering and Protecting Academic Freedom”: 37; in: Paul M. Bidwell and Len M. Findlay, eds., *Pursuing Academic Freedom: “Free and Fearless”?* (Saskatoon: Purich Publishing Ltd., 2001).

²⁰⁹ During the International Conference on Academic Freedom and University Autonomy nearly 180 distinguished scholars and representatives of international organizations, from about 30 countries gathered for debate focusing on the analysis of academic freedom and university autonomy. CEPES Papers on Higher Education, “Academic Freedom and University Autonomy. Proceedings of the International Conference,” (May 1992) // <http://unesdoc.unesco.org/images/0009/000927/092770eo.pdf> (accessed June 10, 2016).

²¹⁰ *Ibid.*

²¹¹ Michael Daxner, *Academic Freedom and University Institutional Responsibilities in South East Europe (1989-2003)* (Bologna: Bononia University Press, 2004), 59-60.

²¹² Brian Miller, *supra* note 40, 143.

²¹³ John K. Walton, *supra* note 62, 18.

²¹⁴ Brian Miller, *supra* note 40, 149.

²¹⁵ Simon Marginson, *supra* note 63.

²¹⁶ *Ibid.*

and commercial research are promoted. Current trends in higher education are even described as the true restoration of an old academic feudalism when universities are aimed towards effective absorption of the EU structural funds and project funds rather than towards development of science and arts.²¹⁷

As a benchmark for limiting academic freedom Henkel suggests the Brooks Report for the OECD (1971) which established the principles conveying the idea that “governments rather than scientists must set over-riding research priorities and that the key driver of science policies must be the achievement of social and economic goals.”²¹⁸ She also argues that as higher education and science became an important instrument of national economic policy, HEIs and their members were subject to government scrutiny, faced the growth of their activities, the need to compete in various forms of market, the limits set by the state on public funding which meant that income generation was an increasingly powerful imperative.²¹⁹

Still, a very strong support in the scientific literature can be detected for the concept of academic freedom which is coherent with the Humboldtian idealization of freedom to teach and freedom to learn which should be preserved as the essential prerequisites for intellectual development. The belief in the necessity to safeguard this principle and to ensure the notion of the university promoting a way of thinking is very vibrant among many scholars and academics. The trend of the HEIs adhering to the variety of challenges imposed by the processes of globalization and internationalization and consequently introducing into their systems different requirements, methods, policies and regulations reforming conventional working environment for academics provoked evident disfavor in regard to the whole higher education system and claiming improper limitation of their right to academic freedom. In many cases the expressed frustration is just and very constructive. However quite often the criticism is based on the unwillingness to implement unhandy changes into the comfortably settled routine of academic life. It would be extremely difficult to advocate against all these “shaking and shaping higher education system” processes and there is really no need to ignore the positive consequences of globalization and internationalization higher education is exposed to. However, it is very important to acknowledge that within that context academic freedom and institutional autonomy cannot be disregarded either.

When one talks about the academic values cherished under the Humboldtian ideals, without having a slight intention to diminish that, it should be considered that a university then was not perceived as an enterprise and as the major tool for national and international economic

²¹⁷ Leonidas Donskis, “Istorijos klastojimas ir kuklus biurokratijos žavesys,” (March, 2016) // <http://www.vdu.lt/lt/istorijos-klastojimas-ir-kuklus-biurokratijos-zavesys/> (accessed June 10, 2016).

²¹⁸ Mary Henkel, *supra* note 64, 160.

²¹⁹ *Ibid*, 159.

prosperity. Those signs of political, economic and territorial mutation and eternal transformation which once became visible more than 20 years ago, built a tremendously different and burdensome environment for the nations and the HEIs to evolve in. Europe's attention was called on and focused on the assumption that universities are seen as the key entities for creating and maintaining a stable and peaceful environment for the dissemination of knowledge and performing research and, in parallel, fulfilling the increasing national demand for economic, cultural, and technological development. Universities were concerned how to find the right balance in demonstrating the prominence of their role to social needs and the effectiveness of accomplishing that role. It is argued that their function cannot be recognized as something determined once and for all, as it has "a heredity, rooted in freedom of enquiry, but this heredity must be expressed in interaction with an ever-changing social environment".²²⁰

Accordingly, even if it can be perceived as a highly unsupported approach, it might be timely to proclaim that academic freedom is not the same as it was and that it can be valuable to reconsider its essence, applied limitations and possibly its adaptability to the needs of the HEIs, the state and society. Being now, allegedly, a recognized human right, and not merely a principle of higher education, academic freedom needs conceptual clarification and deserves adequate protection. In the context of the continuously changing environment the most effective protection of academic freedom can be achieved only if responsibilities of the state, private sector, HEIs and academics will be recognized and adequately balanced.

1.4. LEGAL JUSTIFICATION OF ACADEMIC FREEDOM

1.4.1. *International normative context for academic freedom*

The most essential legal justification for academic freedom could very well – however arguably – be “the right to education”, which has been established as a fundamental human right by the UDHR.²²¹ The relationship between academic freedom and the right to education has been demonstrated in the preceding subchapters on the historical and theoretical background of academic freedom which is destined towards the protection of “disciplinary knowledge within universities”.²²² This, as one example from the national level, as it has been suggested by the US Supreme Court is a special concern of the First Amendment to the US Constitution “which does

²²⁰ CEPES Papers on Higher Education, *supra* note 209.

²²¹ UN General Assembly, *The Universal Declaration of Human Rights* (10 December, 1948), art. 26. // <http://www.un.org/en/documents/udhr/> (accessed June 10, 2016).

²²² Robert C. Post, *supra* note 30, 61.

not tolerate laws that cast a pall of orthodoxy over the classroom”.²²³ The relevance between academic freedom and Article 26 of the UDHR emerges not particularly from its wording, but from a more detailed following principles of educational policy: free access to the secondary and tertiary level of the educational systems, as well as to vocational training; the purpose of education should be the all-encompassing development of the human personality and the respect of the human rights and liberties; education shall encourage understanding, tolerance and friendship between all nations, all racial and religious groups, and it shall favor the activities of the United Nations for peace.²²⁴ In this perspective, academic freedom is understood not as an individual right but rather as an obligation, the importance of which must be acknowledged by individual academics, HEIs and governments in order to ensure an adequate and comprehensive implementation of the right to education. The right must also be understood and ensured in its negative dimension to the effect that the right to educate implies that the governments, HEIs (in exercising their institutional autonomy) and individual academics do not recognize or establish any “philosophical, ideological or religious theories <...> as <...> the sole basis for an educational system.”²²⁵

Aside from seeking to derive the justification of academic freedom from the right to education, academic freedom is also recognized in a number of international documents. The UDHR, which was the first to expressly mention the right in its Article 26, was followed by numerous other conventions and declarations that included among their substantive provisions the right to education, and more particular on academic freedom. The International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR), for example, requires states to “respect the freedom indispensable for scientific research”²²⁶, which later was elaborated by the United Nations Committee on Economic, Social and Cultural Rights in its commentary noting that staff and students in HEIs are especially vulnerable to political and other pressures and suggesting that “<...> the right to education can only be enjoyed if accompanied by academic freedom of staff and students”.²²⁷

Numerous international declarations have been made on academic freedom during the past decades which recognized its value and encouraged academic communities and governments to implement the necessary measures to ensure its protection. However, these documents often

²²³ *Keyishian v. Board of Regents*, *supra* note 1.

²²⁴ Ingo Richter, *supra* note 73, 105-106.

²²⁵ Jan De Groof, *supra* note 18, p. 30.

²²⁶ This is within the context of a broader recognition of cultural rights and the right to benefit of the results and application of scientific research. UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, (16 December, 1966), art. 15(3) // <http://www.refworld.org/docid/3ae6b36c0.html> (accessed June 10, 2016).

²²⁷ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, (8 December, 1999) // <http://www.refworld.org/docid/4538838c22.html> (accessed June 10, 2016).

lack consistency in their conceptual understanding of academic freedom, as some of them combine and mix the concepts of academic freedom and university autonomy with each other, and also with other not directly related rights and concepts. Leaving this aside, the forgoing clearly underlines a commitment of the international community towards academic freedom, its significance, and its place within the higher education system. Influential work in the field of academic freedom has been done by UNESCO which has not only been taking part in focusing on various issues of and relating to academic freedom and which has drafted a number of international documents on different aspects of higher education and institutional autonomy, but also actively assisted the international academic community in conveying the idea of academic freedom. In its publications, UNESCO advocates for academic freedom in the scientific process, for the autonomy appropriate for the tasks of researchers and to the advancement of science and technology and for the autonomy and freedom of research necessary to scientific progress,²²⁸ for the freedom of teaching and discussion, for the freedom in carrying out research and disseminating and publishing the results, for the freedom to express opinions about the institution or higher education system.²²⁹ Furthermore, UNESCO requested the International Association of Universities (hereinafter IAU) to examine the feasibility, desirability and possible content of an International Charter on Academic Freedom and University Autonomy. Although they reached the conclusion that such an international instrument was both feasible and desirable, it was, however, never actually enacted.

A number of declarations relating to academic freedom, demonstrating the concern of the academic community to elaborate the principle was adopted by non-governmental organizations with the assistance of UNESCO. They declare academic freedom as an imperative necessary to perform academic functions without discrimination or fear of reprisal from any authority or interest, external or internal to the university;²³⁰ the freedom in the pursuit, development, and transmission of knowledge, through research, discussion, production, creation, teaching and writing.²³¹ Although the substance of the declarations often overlaps, and although they often lack a more specific and detailed approach towards separate aspects of academic freedom and thereby fail to define the concept adequately and coherently, they certainly merit a more

²²⁸ *Recommendation on the Status of Scientific Researchers*. The General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO), (1974), preamble and art. 8.

²²⁹ *Recommendation concerning the Status of Higher-Education Teaching Personnel*. The General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO), (1997), art. 27 // http://portal.unesco.org/en/ev.php-URL_ID=13144&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed June 10, 2016).

²³⁰ *The Declaration of Rights and Duties inherent in Academic Freedom (The Siena Declaration)*. The International Association of University Professors and Lecturers, (1982), art. 3.

²³¹ *The Declaration on Academic Freedom and Autonomy of Institutions of Higher Education (The Lima Declaration)*, World University Service (1988).

thorough analysis (which will follow in the second and third chapters) to grasp the full scope of academic freedom as it is perceived by the international higher education community.

1.4.2. Regional legal context of academic freedom

Academic freedom is recognized by the Bologna Process as a touchstone and guarantor of other fundamental human rights. For example, the Magna Charta Universitatum, instituted by the European Universities Association (hereinafter EUA), states that: “[f]reedom in research and training is the fundamental principle of university life, and governments and universities, each as far as in them lies, must ensure respect for this fundamental requirement”.²³² As a “successor” of the EUA’s Magna Charta, the Bologna Declaration notes that “[t]his is of the highest importance, given that Universities’ independence and autonomy ensure that higher education and research systems continuously adapt to changing needs, society’s demands and advances in scientific knowledge.”²³³ The Sorbonne Declaration and its follow-up the Bologna Declaration, two important documents initiating the major changes in the higher education systems in Europe, concentrated on the vision of creating the EHEA, however did not elaborate on the principles of institutional autonomy and academic freedom. The Bologna Process only at a later stage was directly linked to academic freedom when at the Budapest-Vienna meeting an official statement declared: “We, the Ministers, recommit to academic freedom as well as autonomy and accountability of HEIs as principles of the EHEA and underline the role the HEIs play in fostering peaceful democratic societies and strengthening social cohesion”.²³⁴ This commitment was also reconfirmed repeatedly at the subsequent Ministerial Conferences which take place every two years. The London Communiqué is the first one to mention that the development of EHEA is based on institutional autonomy and academic freedom.²³⁵ The full overview of the challenges introduced by the Bologna Process will be presented in the third chapter in order to evaluate the potential threats they entail towards academic freedom.

²³² *The Magna Charta Universitatum*, (Bologna, 18 September 1988) // <http://www.magna-charta.org/resources/files/the-magna-charta/english> (accessed June 10, 2016).

²³³ The Bologna Declaration, *supra* note 190.

²³⁴ *Budapest-Vienna Declaration on the European Higher Education Area*. Declaration of the Meeting of the European Ministers in charge of Higher Education in Budapest and Vienna (2010) // http://media.ehea.info/file/2010_Budapest_Vienna/64/0/Budapest-Vienna_Declaration_598640.pdf (accessed June 10, 2016).

²³⁵ *London Communiqué Towards the European Higher Education Area: responding to challenges in a globalised world*. Communiqué of the Meeting of the European Ministers in charge of Higher Education in London (2007) // http://media.ehea.info/file/2007_London/69/7/2007_London_Communique_English_588697.pdf (accessed June 10, 2016).

Notwithstanding that academic freedom is not explicitly incorporated into the ECHR, the ECtHR has developed allusive scope of academic freedom under Article 10 of ECHR. Article 10 guarantees the right to freedom of expression in a variety of contexts, however it took the Court a while to acknowledge academic freedom as being a part of this right. For example, in *Hertel v. Switzerland*, the Court did not address the fundamental question and made no principled statement on the special role of academic freedom, although the case addressed issues of unfair competition and intellectual property rights that implied academic freedom, freedom of speech, and freedom of access in the information society. But in the proceedings that led to the challenge in front of the ECtHR, the Swiss domestic courts had addressed the issue of scientific freedom in stating that it guarantees the freedom to expound knowledge in the academic sphere.²³⁶ The first explicit recognition of the importance of academic freedom by the Court can be noticed in *Sorguç v. Turkey*, where reference to the Parliamentary Assembly of the CoE Recommendation 1762(2006) on Academic Freedom and University Autonomy (hereinafter Recommendation 1762(2006)) in regard to the protection of academic freedom of expression was made. The Parliamentary Assembly of the CoE in its Recommendation 1762(2006) stated 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”.²³⁷ Additionally the Court underlined the importance of academic freedom stating that it 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”.²³⁸ Once again the importance of academic freedom was reaffirmed in the 2010 case *Sapan v. Turkey*. Also in 2010, the ECtHR has delivered a judgment in a case that combined questions related to freedom of expression, freedom of research, medical data, privacy protection and access to official documents.²³⁹ Jurisprudence of ECtHR shows a deliberate and gradual evolution of the recognition of academic freedom. However, first of all the fact itself that the Court recognizes the right, and second the Court’s development of the substance and content of the right to academic freedom as well as its limits add significant value to the doctrine of academic freedom. As the major concern in this research is the protection of academic freedom as a human right, a comprehensive analysis of the jurisprudence of the ECtHR will be provided in Chapter 2.

²³⁶ *Hertel v. Switzerland*, ECtHR (1998, Application no. 59/1997/843/1049).

²³⁷ *Recommendation 1762 (2006) on Academic Freedom and University Autonomy*. The Parliamentary Assembly of the Council of Europe (30 June 2006), art. 4, sec. 1. // <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17469&lang=en> (accessed June 10, 2016).

²³⁸ *Sorguç v. Turkey*, *supra* note 155.

²³⁹ *Gillberg v. Sweden*, ECtHR (3rd section) (2010, Application no. 41723/06).

Another framework which deserves a thorough analysis in regard to the protection of academic freedom is at the level of the EU. Although higher education is still widely within the competence of the Member States, it has become increasingly intertwined with other fields of competence of the EU and is considered to be an important factor in developing and maintaining the EU's competitiveness at a global level. And because the EU, today, plays a very important role in the European higher education there is a need for a more common approach in this area. However, the EU Member States are reluctant about this development and are still trying to safeguard their national autonomy and effective political control over higher education. The EU competence in higher education, although still very limited, was recognized by the Treaty of Maastricht on European Union (as most recently amended by the Treaty of Lisbon, hereinafter TEU) which today states the necessity for the Union to contribute to the development of quality education and encouraging cooperation between Member States, while fully respecting their responsibility for the content of teaching and the organization of education systems and their cultural and linguistic diversity.²⁴⁰ The EU interest in higher education is highly concentrated in research performance as the Union is becoming more competitive in industry at the international level and is moving towards becoming a world-leading knowledge economy. Just as in the Lisbon Strategy, in the Europe 2020 strategy HEIs are viewed as key players for innovation and technology development and the focus is centered on sustainable and inclusive growth that is to be achieved through more effective investment in education, research and innovation.²⁴¹ Notwithstanding the important role of HEIs in the strategic plans of the EU, neither academic freedom in general, nor, for example, freedom of research, received proper attention in any of the strategic documents. However, while the principal focus is on promoting research performance to create and foster a competitive knowledge economy, awareness of and support for academic freedom could contribute to more effective achievement of these goals.

One of the elements of academic freedom, the freedom of research, is recognized in the European Charter for Researchers entitling researchers to freedom of thought and expression and the freedom to identify methods.²⁴² The intended, although unratified and later abandoned, Constitution for the EU also incorporated a norm on the protection for academic freedom, stating that “[t]he arts and scientific research shall be free of constraint. Academic freedom shall

²⁴⁰ Consolidated Version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, Title XIII, art. 165(1) (ex art. 149(1) TEC).

²⁴¹ European Commission, “Europe 2020. A Strategy for Smart, Sustainable and Inclusive Growth,” (2010) // <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF> (accessed June 10, 2016).

²⁴² Commission Recommendation of 11 March 2005 on the European Charter for Researchers and on a Code of Conduct for the Recruitment of Researchers, OJ L 75/67, 22.3.2005, (2005/251/EC).

be respected”.²⁴³ It is apparent that the reference to academic freedom in the EU legislation related to higher education is clearly very fragmental and lacks a more systematic approach.

The Treaty of Lisbon stresses the objective of the Union of strengthening its scientific and technological bases by achieving a European research area, encourages cooperation between undertakings, research centers and universities, and advocates dissemination and optimization of the research results, training and mobility of researchers.²⁴⁴ This fundamentally important role of higher education and in particular of scientific research adds considerable complexity and many new challenges, and for this reason the broader role of higher education as a public good and academic freedom serving as the prerequisite, should not be neglected in this battle for seeking greater prestige and income. It is argued that especially now, when everyone is convinced of “the centrality of the higher education enterprise globally”²⁴⁵ and HEIs are the major tool to vitalize the knowledge economy, to provide the knowledge necessary to the social mobility and economic progress, “a lukewarm or selective application of academic freedom [...] and [...] diversity in the degree of implementation of academic freedom throughout the Common European Higher Education Area”²⁴⁶ can hardly be tolerated.

A more precise recognition of academic freedom can be derived from the EU Charter, which stipulates that “[t]he arts and scientific research shall be free of constraint. Academic freedom shall be respected”.²⁴⁷ The term academic freedom provided in the EU Charter has not been defined and there are no decisions of the ECJ available in this regard. Academic freedom was derived primarily from the right to freedom of thought and expression with a reference to Article 10 of the ECHR (freedom of expression) and to the limits to freedom of expression established in that Article. It is argued that to the extent that Article 13 of the EU Charter is indeed an enforceable “right” and not merely a guiding “principle” it is difficult to evaluate whether it is a new right without further clarification of its content.²⁴⁸ The language of Article 13 is vague and it is thus not clear whether the right is limited to freedom of artistic and scientific expression or it may extend further than the freedom of expression.

²⁴³ Treaty establishing a Constitution for Europe as signed in Rome on 29 October 2004 and published in the Official Journal of the European Union on 16 December 2004 (C series, No 310), art. II-73 // https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_establishing_a_constitution_for_europe_en.pdf (accessed June 10, 2016).

²⁴⁴ Consolidated Version of the Treaty on the Functioning of the European Union, *supra* note 239, art. 179 (ex art. 163 TEC), art. 180 (ex art. 164 TEC).

²⁴⁵ Philip G. Altbach, Liz Reisberg, and Laura E. Rumbley, *supra* note 56.

²⁴⁶ Jan De Groof, *supra* note 17, 160.

²⁴⁷ Charter of Fundamental Rights of the European Union, OJ C 364/5, 18.12.2000, (2000/C 364/01), art. 13 // http://www.europarl.europa.eu/charter/pdf/text_en.pdf (accessed June 10, 2016).

²⁴⁸ House of Lords European Union Committee, “The Treaty of Lisbon: an impact assessment,” (March 2008) // <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcom/62/62.pdf> (accessed June 10, 2016).

Chapter 3 will provide a more detailed analysis of the legal framework of the EU higher education, including the analysis of the EU higher education policies which concern directly academic freedom but also those, that include the discourse on the knowledge-based economy driving higher education into greater competition, which, it can be argued, may contain indirect limitations of academic freedom. And as they are introduced by the Member States in their national higher education systems, it is highly relevant to disclose potential risks to the thorough protection of academic freedom.

1.4.3. Constitutional protection of academic freedom

Traditionally, it is asserted that the highest level of protection for academic freedom is guaranteed in the countries where it is established by the Constitution. However, such an assertion is quite controversial, and others opine that an express and specific constitutional norm is not necessary, as the notion of academic freedom stems directly from the democratic foundation of the state. For example, Post criticizes the US courts' objective to protect academic freedom in order to safeguard the marketplace of ideas and argues that it demonstrates their failure to understand the connection between academic freedom and the value of democratic competence which is the main ground for justifying its constitutional safeguards.²⁴⁹ However, these are only two extremities in between which other forms of legal protection for academic freedom are also possible.

Usually, it is presumed that academic freedom is based in law, however there often exists confusion as to what that law is, as academic freedom is "not defined nearly as much as it is discussed".²⁵⁰ In modern democracies, academic freedom is conventionally recognized by the constitution. In various constitutional contexts, it can be expressed either as an extension of the right to the freedom of expression, or as an individual, more specific right which is centered exceptionally on scholarship, science, research and teaching. Notwithstanding the fact that in some European Constitutions (Greek, Spanish and Swiss), "Academic Freedom" is laid down explicitly, it hardly helps to discover the precise content of it. The Federal Constitution of the Swiss Confederation defines academic freedom as freedom of research and teaching.²⁵¹ The Constitution of Greece safeguards the freedom of science, research and teaching and also

²⁴⁹ Robert C. Post, *supra* note 30, 62.

²⁵⁰ Donald J. Weidner, "Academic Freedom and the Obligation to Earn It," *Journal of Law & Education* Vol. 32, No. 4 (2003): 445.

²⁵¹ *Federal Constitution of the Swiss Confederation of 18 April 1999*, art. 20. // <http://www.refworld.org/docid/3ae6b6040.html> (accessed June 10, 2016).

includes a limitation concerning “academic freedom and freedom of teaching”.²⁵² Such wording distinguishes freedom of teaching as not being an element of academic freedom. The Spanish Constitution of 29 December 1978 recognizes and protects the freedom of expression, the right to scientific production and creation and the right to academic freedom.²⁵³

A second group of constitutions includes those which cover either one or more elements of academic freedom. A comparative analysis allows one to distinguish the following aspects of academic freedom included in different Constitutions: the right to scientific originality²⁵⁴, the freedom to produce and disseminate scientific works²⁵⁵, the freedom of scientific research²⁵⁶, the freedom of scientific endeavor²⁵⁷, the freedom of scientific expression²⁵⁸, the freedom of scientific creativity²⁵⁹; the freedom to teach²⁶⁰, the freedom of science²⁶¹. From this overview, it

²⁵² *The Constitution of Greece as revised by the parliamentary resolution of April 6th 2001 of the VIIth Revisionary Parliament*, art. 16(1). // <http://www.wipo.int/edocs/lexdocs/laws/en/gr/gr220en.pdf> (accessed June 10, 2016).

²⁵³ *The Spanish Constitution of 27 December, 1978*, art. 20(1)(b)(c). // <https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf> (accessed June 10, 2016).

²⁵⁴ *Constitutions of the Portuguese Republic, Seventh Revision [2005]*, art. 42(1). // <http://www.en.parlamento.pt/Legislation/CRP/Constitution7th.pdf> (accessed June 10, 2016).

²⁵⁵ *Constitutions of the Portuguese Republic, Seventh Revision [2005]*, art. 42(2). // <http://www.en.parlamento.pt/Legislation/CRP/Constitution7th.pdf> (accessed June 10, 2016); *The Spanish Constitution of 27 December, 1978*, art. 20(1)(d). // <https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf> (accessed June 10, 2016).

²⁵⁶ *The Austrian Federal Constitution of 1920, Reinstated in 1945, with Amendments through 2009*, art. 81c(1). // https://www.constituteproject.org/constitution/Austria_2009.pdf (accessed June 10, 2016); *Charter of Fundamental Rights and Freedoms of Czech Republic*, amended by constitutional act Nr. 162/1998 Coll. (came into force 1st of January 1999), art. 15(2). // http://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/prilohy/Listina_English_version.pdf (accessed June 10, 2016); *Basic Law for the Federal Republic of Germany, as Amended by the Unification Treaty of 31 August 1990 and Federal Statute of 23 September 1990*, art. 5(3). // <http://www.constitution.org/cons/germany.txt> (accessed June 10, 2016); *The Constitution of the Republic of Latvia, Adopted by the Constitutional Assembly of Latvia on 15 February 1922*, art. 113. // <http://www.saeima.lv/en/legislation/constitution> (accessed June 10, 2016); *The Constitution of the Republic of Lithuania*, Official Gazette, (1992, No. 33-1014), art. 42(1); *The Constitution of the Republic of Poland of 2nd April, 1997, as published in Dziennik Ustaw No. 78, item 483*, art. 73. // <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> (accessed June 10, 2016); *Constitution of the Slovak Republic of 1992*, art. 43(1). // <https://www.prezident.sk/upload-files/46422.pdf> (accessed June 10, 2016); *The Constitution of the Kingdom of Sweden of 1974 with Amendments through 2012*, art. 23. // https://www.constituteproject.org/constitution/Sweden_2012.pdf?lang=en (accessed June 10, 2016).

²⁵⁷ *The Constitution of the Republic of Slovenia, Adopted on 23 December 1991*, art. 59. // <https://www.dz-rs.si/wps/portal/en/Home/PoliticniSistem/UstavaRepublikeSlovenije> (accessed June 10, 2016).

²⁵⁸ *The Constitution of the Republic of Hungary of 1949*, art. 70/G(1). // <http://www.constitution.org/cons/hungary.txt> (accessed June 10, 2016).

²⁵⁹ *The Constitution of the Republic of Bulgaria, Prom., SG. 56/13 Jul 1991, amend., SG. 85/26 Sep 2003, amend., SG. 18/25 Feb 2005*, art. 54(2). // <http://www.government.bg/cgi-bin/e-cms/vis/vis.pl?p=0159&n=000007> (accessed June 10, 2016); *The Constitution of the Republic of Croatia*, The consolidated text published in "Narodne novine" (the Official Gazette), No. 41/01 of May 7, 2001 together with its corrections published in "Narodne novine" No. 55 of June 15, 2001, art. 68(1). // <http://www.wipo.int/edocs/lexdocs/laws/en/hr/hr049en.pdf> (accessed June 10, 2016).

²⁶⁰ *The Austrian Basic Law on the General Rights of Nationals, Adopted on: 21 Dec 1867*, art. 17(1). // http://www.servat.unibe.ch/icl/au03000_.html (accessed June 10, 2016); *Basic Law for the Federal Republic of Germany, as Amended by the Unification Treaty of 31 August 1990 and Federal Statute of 23 September 1990*, art. 5(3). // <http://www.constitution.org/cons/germany.txt> (accessed June 10, 2016); *The Constitution of the Republic of Hungary of 1949*, art. 70/G(1). // <http://www.constitution.org/cons/hungary.txt> (accessed June 10, 2016); *The Constitution of the Italian Republic of 22 December 1947*, art. 33(1). // <http://www.refworld.org/docid/3ae6b59cc.html> (accessed June 10, 2016); *The Constitution of the Republic of*

can be concluded that the main dimensions of academic freedom are the freedom of research and the freedom of teaching. Presumably, the freedom of science is just a broader concept, however some constitutions incorporate it jointly with the freedom of research and teaching, and then the actual contents of ‘science’, ‘research’ and ‘teaching’ remain relatively vague. The least common dimension of academic freedom is the freedom of learning, which is recognized only in the Constitutions of Portugal and Hungary.

Finally, the last group of constitutions consists of those considered having the lowest protection of academic freedom. Under these constitutions academic freedom is granted a quasi-constitutional protection by deriving it from more general provisions on the right to freedom of expression (e.g. the Constitutions of Romania, Malta, Ireland, France and Denmark) or from the right to freedom of speech (e.g. the Constitution of Luxembourg). It is argued that the guarantee of free speech serves as the basis of the concept of academic freedom,²⁶² or that “[i]f academic freedom is not simple freedom of speech, it is an extension of the principle of free speech which is an essential prerequisite for the proper performance of the profession”.²⁶³ Although in the latter countries the level of protection of academic freedom is considered to be lower than in those including separate aspects of academic freedom, it does not necessarily mean that the legal justification for academic freedom is not sufficient, such as in the case of France, where the independence of university professors is a constitutional principle which is derived from both Article 11 of the 1789 Declaration of the Rights of Man and of the Citizen and the fundamental principles recognized by the laws of the Republic.²⁶⁴

Lithuania, Official Gazette, (1992, No. 33-1014), art. 42(1); *The Constitution of the Republic of Poland of 2nd April, 1997, as published in Dziennik Ustaw No. 78, item 483, art. 73.* // <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> (accessed June 10, 2016); *Constitutions of the Portuguese Republic, Seventh Revision [2005]*, art. 43(1). // <http://www.en.parlamento.pt/Legislation/CRP/Constitution7th.pdf> (accessed June 10, 2016).

²⁶¹ *The Constitution of the Republic of Estonia of 3 July 1992*, art. 38. // <https://www.president.ee/en/republic-of-estonia/the-constitution/> (accessed June 10, 2016); *The Constitution of Finland of 11 June 1999*, section 16(3). // <http://www.finlex.fi/en/laki/kaannokset/1999/en19990731.pdf> (accessed June 10, 2016); *Basic Law for the Federal Republic of Germany, as Amended by the Unification Treaty of 31 August 1990 and Federal Statute of 23 September 1990*, art. 5(3). // <http://www.constitution.org/cons/germany.txt> (accessed June 10, 2016); *Constitution of the Italian Republic of 22 December 1947*, art. 33(1). // <http://www.refworld.org/docid/3ae6b59cc.html> (accessed June 10, 2016); *Constitution of Republic of Lithuania*, Official Gazette, (1992, No. 33-1014), art. 42(1).

²⁶² William H. Daughtrey, “The Legal Nature Of Academic Freedom In United States Colleges And Universities,” *University Of Richmond Law Review* 25 (1990): 267.

²⁶³ John Turner, “The Price of Freedom,” 106; in: Malcolm Tigh, ed., *Academic Freedom and Responsibility*, (Buckingham: SRHE/OU Press, 1988).

²⁶⁴ The Constitutional council of the French Republic Decisions no. 83-165 DC of 20 January 1984, Official Journal of 21 January 1984, p. 365; no. 93-322 DC of 28 July 1993, Official Journal of 30 July 1993, p. 10750: “Par leur nature, les fonctions d’enseignement et de recherche exigent, dans l’intérêt même du service, que la libre expression et l’indépendance des enseignants-chercheurs soient garanties. En ce qui concerne les professeurs, la garantie de l’indépendance résulte en outre d’un principe fondamental reconnu par les lois de la République.” (By their very nature, the purpose of university education and of research at university level requires, in the very interest of these services, that the free expression and the independence of the teachers-researchers be guaranteed. As far as professors are concerned, the guarantee of independence also follows from a fundamental principle recognized by

The lowest level of protection can be noticed in the Netherlands, as the Constitution does not explicitly mention freedom of expression, but rather that prior permission to publish thoughts or opinions through the press is not required.²⁶⁵ The Constitution of Belgium has a very general statement that education is free,²⁶⁶ which is basically oriented towards the right to organize education and the right of free choice of education²⁶⁷. Academic freedom generally remained an unwritten principle in Belgium, until a Judgment of the Belgian Constitutional Court which was handed down in 2005.²⁶⁸ The Court has specified that the freedom ‘of teachers’ cannot be limited to pedagogical freedom or to the context of educational activities only.²⁶⁹ Academic freedom was qualified by the Court as an aspect of freedom of expression and freedom of education (as included in Article 24(1) of the Belgian Constitution) and the one containing “the ‘principle’ pursuant to which ‘teachers and researchers’, in the interest ‘of the development of knowledge and the diversity of opinions’, must enjoy a ‘very large freedom’ to carry out research and to express their opinions ‘in the exercise of their functions’.”²⁷⁰

Furthermore, certain constitutions contain limitations to the above-mentioned provisions. For example, the Constitution of Hungary includes the provision limiting those who are entitled to decide in questions of scientific truth and to determine the scientific value of research only to scientists.²⁷¹ The Constitutions of Germany and Greece include certain limits stating that academic freedom and the freedom to teach shall not override the allegiance to the Constitution.

A very well-known example of the indirect protection of academic freedom is the USA, where academic freedom falls under the protection of free speech under by the First Amendment to the Constitution. Before legal recognition, the emergence of academic freedom started as an ethical and organizational principle in the AAUP Statement which declared it as the most essential of its principles for the progress of knowledge. The question of constitutional protection of academic freedom was discussed in a number of cases. For the very first time the

the laws of the Republic) // <http://www.conseil-constitutionnel.fr/conseil-con.decision-n-83-165-dc-du-20-janvier-1984.8111.html> (accessed June 10, 2016).

²⁶⁵ *The Constitution of the Kingdom of the Netherlands of 2008*, art. 7(1). // <https://www.government.nl/documents/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008> (accessed June 10, 2016).

²⁶⁶ *The Belgian Constitution of 17 February 1994*, art. 24(1). // http://www.const-court.be/en/basic_text/belgian_constitution.pdf (accessed June 10, 2016).

²⁶⁷ Charles Glenn and Jan De Groof, *supra* note 67, 51.

²⁶⁸ The Belgian Constitutional Court analyzed that the questioned decree of the French Community regarding the organization of higher education to encourage its integration into the European higher education area and on the refinancing of the universities inappropriately limited academic freedom to ‘pedagogical freedom’. The Constitutional Court of Belgium (23 November 2005, Judgment no. 167/2005) // <http://www.const-court.be/en/common/home.html> (accessed June 10, 2016).

²⁶⁹ Jan De Groof, *supra* note 17, 153.

²⁷⁰ *Ibid*, 154.

²⁷¹ *The Constitution of the Republic of Hungary of 1949*, *supra* note 257, art. 70/G(1).

term “academic freedom” in a reported judicial opinion appeared in 1940.²⁷² The significance of academic freedom was recognized and accepted by the first majority opinion of the US Supreme Court in 1957, in its landmark case of *Sweezy v. New Hampshire*.²⁷³ The Supreme Court held that there had been an “invasion of [Sweezy’s] liberties in the areas of academic freedom and political expression – areas in which government should be extremely reticent to tread.”²⁷⁴ Justice Frankfurter’s influential concurring opinion pointed out the same values, however, he considered academic freedom more as an institutional right than one of an individual nature, stating that universities could determine for themselves what and how they teach, and who may be admitted to study.²⁷⁵ Following this decision, US courts have developed the constitutional protection of institutional claims to academic freedom, within the scope of the First Amendment. However, as a constitutional right, it can be claimed only against a state university, but not against a private university.²⁷⁶ The US constitutional principle of academic freedom has developed in two stages. The earlier cases of the 1950s and 1960s focused on faculty and institutional freedom from external interference and since the early 1970s, the focus has shifted primarily on faculty freedom from institutional interference.²⁷⁷

The analysis of constitutional protection of academic freedom does neither reveal a consistent and unanimous approach different countries have towards academic freedom, nor does it allow one to determine the exact content of it or of its separate aspects. However it can be concluded that constitutional law on academic freedom distinguishes the following principal facets of academic freedom: the freedom of scientific research, the freedom of dissemination of research results, the freedom of teaching and the freedom of studying.

²⁷² J. Peter Byrne, *supra* note 69, 86.

²⁷³ *Sweezy v. New Hampshire*, U.S. Supreme Court (1977, 354 U.S. 234). A university professor was interrogated by the state’s Attorney General about his connections with communism and refused to answer a number of questions before a judge, he was found in disrespect of court and ended in jail.

²⁷⁴ *Ibid.* The Supreme Court continued: “[t]he essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”

²⁷⁵ *Ibid.*

²⁷⁶ Ericarendt and David Bentley, *supra* note 70.

²⁷⁷ Donna R. Euben, *supra* note 71.

1.4.4. Academic freedom in the context of national and institutional legislation

Although constitutional protection for academic freedom is not expressly provided in some countries, or it is considered to be of a lower rank compared to other constitutional rights, it may still be guaranteed by ‘normal’ national legislation. Karran, in his comparative analysis of academic freedom in Europe, summarizing the constitutional protection for freedom of speech and academic freedom and specific legislation on academic freedom, came to the conclusion that with the exception of Greece and Malta, all EU countries, despite significantly different level of coverage, have some academic freedom protection in specific national legislation on higher education.²⁷⁸ That indicates a uniform consensus between the EU countries on the necessity to safeguard academic freedom.

In the United Kingdom, which does not have a written constitution, academic freedom was not incorporated into a legal document until the Education Reform Act of 1988 which incorporates a provision protecting the freedom of academics “to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at their institutions”.²⁷⁹ In practice, provisions of academic freedom are incorporated in academic staff’s employment contracts which, in case of a conflict regarding controversial research or extramural speech, it allows academics to challenge the decisions against them on the grounds of academic freedom before either the internal university tribunal or an employment tribunal.²⁸⁰

In Sweden, the legislation includes the freedom of research which comprises of the following principles: the freedom to select research issues, develop research methodology and publish research results.²⁸¹ In Finland, the Universities Act declares the freedom of teaching and research.²⁸² It should be noted that this provision grants the freedom to universities and not to individual academics which are even obliged by the same provision to comply with the statutes and regulations issued concerning teaching arrangements.²⁸³ In Denmark, the universities are granted freedom of research and also are obliged to defend and uphold both scientific ethics and

²⁷⁸ Terence Karran, *supra* note 13, 295. At the time the research was done, the author used data from 23 EU countries.

²⁷⁹ *The UK Education Reform Act 1988*, section 202. // http://www.legislation.gov.uk/ukpga/1988/40/pdfs/ukpga_19880040_en.pdf (accessed June 10, 2016).

²⁸⁰ Eric Barendt and David Bentley, *supra* note 70.

²⁸¹ *The Swedish Higher Education Act (17 December 1992)*, section 6. // <https://www.uhr.se/en/start/laws-and-regulations/Laws-and-regulations/The-Swedish-Higher-Education-Act/> (accessed June 10, 2016).

²⁸² *The Finnish Universities Act 558/2009*, section 6. // <http://www.finlex.fi/fi/laki/kaannokset/2009/en20090558.pdf> (accessed June 10, 2016).

²⁸³ *Ibid.*

the freedom of research of the individual researcher as well as of the university as a whole.²⁸⁴ In Norway, as another example, the Act on Universities and University Colleges explicitly includes academic freedom stating that universities may not be instructed regarding the academic content of their teaching and the content of research or artistic or scientific development work and they are entitled to design their own academic and value-related bases within the frameworks laid down in or pursuant to their own statutes.²⁸⁵ Academic freedom in Nordic countries is not unlimited and is “bound by employment obligations, quality standards and societal needs, especially teaching”.²⁸⁶ Scholars also notice that concerns regarding academic freedom in the Nordic countries are mainly related to freedom of research, which has been limited in accordance with increased institutional autonomy and new steering mechanisms.²⁸⁷

The Lithuanian Law on Higher Education and Research grants members of the academic community (consisting of students, the teaching staff, the research staff, other researchers, and professors emeritus of higher education and research institutions) academic freedom which encompasses the freedom of thought, the freedom of expression, the freedom to choose methods of and access to research and pedagogical activities, protection against restrictions and sanctions for dissemination of the research results, and for the expression of beliefs.²⁸⁸ The provision also requires members of the academic community to enjoy academic freedom and act in compliance with the Code of Academic Ethics. Different from the Nordic countries, or for example in Poland, where academic freedom is granted to education institutions and requires them to be governed by the principles of academic freedom in teaching and scientific research,²⁸⁹ in Lithuania academic freedom is an individual right. In Latvia, the Law on Institutions of Higher Education includes a provision titled ‘Academic Freedom’, the scope of which is comprised of the freedom of studies and research.²⁹⁰ The provision, however, is conditional, as the freedom granted by this norm is safeguarded only if it does not contradict with the rights of other persons, the constitution of an institution of higher education and regulatory enactments.²⁹¹ According to the Law academics are entitled to choose the topic and direction of scientific

²⁸⁴ *The Danish (Consolidation) Act no. 960 of 14 August 2014 on Universities (the University Act)*, section 2(2). // <http://www.science.ku.dk/english/research/phd/student/filer/regelsaet/UniversityAct.pdf> (accessed June 10, 2016).

²⁸⁵ *The Norwegian Act relating to Universities and University Colleges of 1 April 2005, no. 15*, section 1-5. // <http://app.uio.no/ub/ujur/oversatte-lover/data/lov-20050401-015-eng.pdf> (accessed June 10, 2016).

²⁸⁶ Terhi Nakkala and Agneta Bladh, *supra* note 79, 6.

²⁸⁷ *Ibid*, 1.

²⁸⁸ *Law on Higher Education and Research of the Republic of Lithuania*, *supra* note 6, art. 53.

²⁸⁹ *The Act of 27 July 2005 Law on Higher Education of the Republic of Poland*, (Dziennik Ustaw - Official Journal of Laws of 2005, no.164, item 1365, as amended), art. 4(2). // http://www.nauka.gov.pl/g2/oryginal/2013_12/d687905792f5ff6a3ecf84d7df4f8e57.pdf (accessed June 10, 2016).

²⁹⁰ *The Law On Institutions of Higher Education of the Republic of Latvia (2012)*, section 6 // http://www.vvc.gov.lv/export/sites/default/docs/LRTA/Citi/Law_On_Institutions_of_Higher_Education.doc (accessed June 10, 2016).

²⁹¹ *Ibid*, section 6(1).

activities and study methods. In Austria, not only does the law safeguard academic freedom, it also protects individual academics from the requirement to take part in scientific or artistic work which could conflict with their conscience.²⁹²

Although the Constitution of Romania does not explicitly protect academic freedom, the Law on National Education includes a provision which states that university autonomy is guaranteed by the Constitution and academic freedom is guaranteed by law,²⁹³ which is systematically different from many of the constitutions analyzed above. Members of the university community are guaranteed academic freedom which includes the right to freely express academic opinions in the university, the freedom of teaching, research and creation, according to the criteria of academic freedom. Teaching and research staff are given the right to publish studies, volumes or works of art.²⁹⁴ The freedom of research is ensured in terms of choosing the topics, the methods and procedures of research and capitalizing on its results, as long as this is in compliance with the law.²⁹⁵

In the US, the protection of academic freedom provided for by the American Association of University Professors' Statement of Principles on Academic Freedom and Tenure (hereinafter AAUP Statement), which is accepted by most universities in the US and is incorporated into the contracts of employment of individual professors. The principles cover freedom to teach, to research, and most controversially, the freedom of extramural speech as long as it is exercised responsibly. In legal terms, however, these principles are only considered to be a form of soft law, and are therefore not enforceable in national courts. The AAUP Statement entitles academics to full freedom of research, freedom of publishing research results and freedom in the classroom.²⁹⁶ It also has a provision on limited freedom of speech, on one side it protects academics from institutional censorship or discipline when they speak or write as citizens but on the other side because of their special status it imposes obligations not to act in a way impairing the name of the institution and the whole profession.

In summary, it can be concluded that academic freedom is given different meanings and boundaries in legislation of different countries. Usually the law safeguards the freedom of research, in some cases with certain restrictions, whereas the freedom of teaching is mentioned less frequently. Legislation differs in regard to mentioning to whom it is actually intended, as in some cases neither institutions nor individuals are specifically mentioned in the legislation. Not

²⁹² *Federal Act on the Organisation of Universities and their Studies (Universities Act 2002) of the Republic of Austria*, (9 August 2002, no. 120/2002), art. 105. // https://www.ris.bka.gv.at/Dokumente/Erw/ERV_2002_1_120/ERV_2002_1_120.pdf (accessed June 10, 2016).

²⁹³ Romanian Law on National Education (1/2011), art. 123(1). // http://keszei.chem.elte.hu/bologna/romania_law_of_national_education.pdf (accessed June 10, 2016).

²⁹⁴ *Ibid.*, art. 304(4).

²⁹⁵ *Ibid.*, art. 123(5).

²⁹⁶ American Association of University Professors, *supra* note 152.

in all countries legislation specifies the obligations the universities have towards the academics and their academic freedom. It is difficult to imagine how such an analysis could disclose the precise nature of academic freedom in different countries and allow one to make unambiguous arguments on the level of its protection. It is true that many Constitutions and national laws on higher education acknowledge academic freedom as a prerequisite of the excellent higher education system. However to make a more precise assessment of the protection of academic freedom, it is necessary to evaluate not only national legislation which explicitly includes the provision of academic freedom or its separate aspects but also to analyze different national laws and legislation at institutional level which can have an impact on academic freedom, as for example, the statutes of university, the codes of academic ethics, the law establishing the requirements for employment, the requirements when applying for a certain position, the laws regulating performance, limitations and funding of research, legislation establishing rights and duties of the government and HEIs in ensuring the protection of academic freedom.

As the constitutional doctrine of academic freedom only stresses the significance of the principle and its value for the higher education system, and the reality of its actual implementation is always vague, the evaluation of legislation which, in one way or another, may influence academic freedom, can help to reveal the existing climate of and potential risks for academic freedom. For this reason the second and the third chapters concentrate on an in-depth analysis on theoretical implications on academic freedom and its prevalence in international documents, normative instruments and regional legislation in higher education in order to determine the extensive scope of academic freedom which will help to accomplish a comprehensive analysis of national laws and institutional legislation influencing academic freedom in Lithuania.

1.5. THE RELATIONSHIP BETWEEN ACADEMIC FREEDOM AND INSTITUTIONAL AUTONOMY

Academic freedom and institutional autonomy are two major principles of higher education which are most of the time discussed together as both are interrelated and considered to be crucial for the HEIs and academics as helping to ensure the full enjoyment of the right to education, teaching and research, the open communication of findings, hypotheses and opinions which are essential for higher education.²⁹⁷ Both rights, academic freedom and university autonomy, are considered to express the ideals of freedom and diversity, are vital for the

²⁹⁷ CEPES Papers on Higher Education, *supra* note 209.

advancement of knowledge and of humanity and enable the university to maintain its anticipatory and innovative role in society. The protection of institutional autonomy, although less commonly than the individual academic freedom, however can also be found in the constitutions of many EU Member States. For example, the Constitution of the Republic of Lithuania states that “[s]chools of higher education shall be granted autonomy”.²⁹⁸ Thorens argues that there is no clear answer to the question of institutional autonomy in general, because the concept itself is relative.²⁹⁹ It is mainly because institutional autonomy, just like academic freedom has exclusive goal to promote the role of the HEIs in expanding and disseminating knowledge. Institutional autonomy sometimes is viewed as “a twin principle of academic freedom”³⁰⁰, because scholars with a strong voice within HEIs have made efforts to introduce stability in their own institutions through making compromises with governments, the political positions of which vary from that of “‘guardian angels’ of academic freedom to intrusive forces of knowledge policies”.³⁰¹ However, institutional autonomy is not the same as “an individual faculty member’s right to question orthodoxy.”³⁰²

It is important to note that sometimes both concepts, academic freedom and institutional autonomy, are explored as synonyms without the awareness of their correct meaning and their particular differences. As De Groof notes that despite their interrelationship, academic freedom should purportedly be distinguished from institutional autonomy because of their diverse contents.³⁰³ In certain cases academic freedom is referred to as including two distinct categories: (1) individual academic freedom which is granted to an individual academic and which protects his/her rights and (2) institutional academic freedom (or also called “the institutional form of academic freedom”³⁰⁴) which is granted to the institution and which protects HEIs from the interference by from governments.³⁰⁵ Thus, the concept of “institutional academic freedom” is a synonym for a more widely recognized term “institutional autonomy”, or also called “university autonomy”, while individual academic freedom is usually simply referred to as “academic freedom”. One of the main criteria distinguishing individual academic freedom from institutional autonomy is that the former may be invoked by an academic against his own institution or colleagues, whereas the latter may be invoked by an institution against the state. Another significant difference between two is that academic freedom may be deemed as an

²⁹⁸ *Constitution of Republic of Lithuania*, Official Gazette, (1992, No. 33-1014), art. 40(3).

²⁹⁹ Justin P. Thorens, *supra* note 78, 405.

³⁰⁰ Alessandro Cavalli and Ulrich Teichler, *supra* note 80, S2.

³⁰¹ *Ibid.*, S2.

³⁰² J.E. Elliott, *supra* note 82, 164.

³⁰³ Jan De Groof, *supra* note 17, 157.

³⁰⁴ UN Educational, Scientific and Cultural Organisation (UNESCO), *Recommendation concerning the Status of Higher-Education Teaching Personnel*, (11 November 1997), art.18 // http://portal.unesco.org/en/ev.php-URL_ID=13144&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed June 10, 2016).

³⁰⁵ Ronald B. Standler, *supra* note 38.

independent fundamental right, while institutional autonomy is “an institutional and procedural implementation of the educational freedom”.³⁰⁶ Despite various interpretations of academic freedom and institutional autonomy, these two principles, although having a close interrelation, should be distinguished and identified separately.

In general, institutional autonomy provides a HEI with a right to make its own decisions on selecting faculty members, on setting the students’ admission requirements, on curricula, on determining the size of its student body, and on assessing tuition and fees. In order to clear up the confusion over the terms of academic freedom and institutional autonomy, Palfreyman suggests to consider institutional autonomy as including the HEI’s procedures and processes in relation to the four main freedoms of a university: the freedom to decide (1) what to teach; (2) to whom to teach; (3) who teaches; and (4) how to teach.³⁰⁷ Institutional autonomy is a characteristic of the decision-making process where decisions on matters related to knowledge, teaching and research are made. This principle endorses the freedom to choose staff and students, to establish the conditions under which they are selected, work and study in the university, to determine curriculum and degree standards and to distribute funds throughout different categories of expenditures. In this process the harmonization of university policies and the general policies of the public authorities and the management of limited resources are considered as the main problematic areas.

Essentially, and in a very simple terms, institutional autonomy can be described as the independence which allows HEIs to pursue their functions in ways which are “morally and intellectually independent of all political authority and economic power”³⁰⁸ or simply as “the power of a HEI to govern itself without outside control”.³⁰⁹ However such definition is not very accurate as HEIs hardly can be granted full independence from outside control. Some authors note that “[n]o political system, no matter how democratic, could really accept the total autonomy of the universities”³¹⁰, however the limits of institutional autonomy have varied noticeably in different periods and places. Thorens notes that even the most famous private American universities in order to continue their existence and advanced research performance could not sustain themselves without receiving subsidies and tax exemptions.³¹¹ It can be concluded that the modern university may not enjoy complete independence from the state and the society, at least financially – with all its implications. The state should be obliged to provide

³⁰⁶ Terhi Nokkala and Agneta Bladh, *supra* note 79, 4.

³⁰⁷ David Palfreyman, *supra* note 32, 29-30.

³⁰⁸ *The Magna Charta Universitatum* (18 September 1988) // <http://www.magna-charta.org/resources/files/the-magna-charta/english> (accessed June 10, 2016).

³⁰⁹ CEPES Papers on Higher Education, *supra* note 209.

³¹⁰ Paul Gerbod, *supra* note 89, 100.

³¹¹ Justin P. Thorens, *supra* note 78, 405.

the necessary financial means to HEIs so they are enabled to carry out their public function. It can be justified by the idea of social justice as it highly contributes to the implementation of the policy goal and potential fundamental right of access to higher education. It is suggested that it should rather be perceived as enabling HEIs and the whole higher education system to communicate and to negotiate effectively with society.³¹²

Institutional autonomy also means that the HEI, as an employer, must create such a climate in which faculty members could fully enjoy academic freedom as a specially protected form of freedom of expression linked to the academic profession. Within this employment context faculty members are required to exercise their individual academic freedom responsibly and professionally while simultaneously discharging their duties in teaching and research.³¹³ Institutional autonomy is often perceived as a prerequisite for the protection of academic freedom. There are no doubts that a higher level of academic freedom protection may be achieved if a HEI is shielded from the state's political influence on research, teaching and other academic spheres. In a 1997 meeting in Paris, UNESCO also stressed that the enjoyment of academic freedom requires the autonomy of HEIs, which is vital for effective decision-making in the sphere of academic work, standards, management and related activities.³¹⁴ The ECtHR also noted that institutional autonomy is a crucial guarantee for the protection of academic freedom and it is "simultaneously the best insurance of the freedom to provide for education and the right to education."³¹⁵

It is generally assumed that when HEIs are granted institutional autonomy, academic freedom "will quasi-automatically come along with it".³¹⁶ However, HEIs, although being granted autonomy, are facing a number of requirements and expectations coming from the state and the society at large. While fulfilling their functions, trying to meet the raised expectations and seeking their goals, HEIs have the power to limit academic freedom in the way that is most suitable for them. For this reason it is very important for HEIs to be responsible in regard to preserving and protecting academic freedom.

Some scholars argue that the biggest threats to academic freedom lie not outside, but rather within the academy as the dominant powers try to impose "political correctness" in the social sciences and humanities, force liberal or radical orthodoxy and suppress opposing

³¹² Malcolm Skilbeck and Helen Connell, "The Management and Financing of Higher Education," *Prospects: Quarterly Review of Comparative Education* Vol. 28, No. 3 (September 1998): 423.

³¹³ David Palfreyman, *supra* note 32, 26.

³¹⁴ UN Educational, Scientific and Cultural Organisation (UNESCO), *Recommendation concerning the Status of Higher-Education Teaching Personnel*, *supra* note 304, art.17.

³¹⁵ *Tarantino and other v. Italy*, ECtHR (2nd section) (2013, Applications nos. 25851/09, 29284/09 and 64090/09).

³¹⁶ Ulrike Felt and Michaela Glanz, *supra* note 87.

viewpoints.³¹⁷ It is always a risk that those responsible for leading a university may get too far involved in financial and management issues and less in academic matters. One of the major side effects are concerns regarding “the independence and objectivity of research and education”³¹⁸ when HEIs have to increasingly rely on funding from the other sources, and in particular the private ones. The fear of reduced public funding even made university leaders to waive the full advantage of the newly gained autonomy.³¹⁹ It is argued that incentives of research funding may tempt scientists to consent to the sponsors’ terms and conditions, thereby compromising academic values.³²⁰

Even UNESCO in its recommendation notes that autonomy should not be used as a pretext to limit the rights of academics.³²¹ HEIs are autonomous to the extent that they can determine policies independently from outside influence. The same autonomy can be used in two ways: to safeguard academic freedom from a hostile external environment, but it can also enable an internal violation of academic freedom. It can “so empower institutional bureaucrats”³²² as to endanger academic freedom of individual academics. Such threat to academic freedom is considered as a serious abuse of institutional autonomy.³²³ Accordingly, institutional autonomy is not only a prerequisite for the protection of academic freedom, but it can be also used as a tool to limit it. As a result, it can be concluded that although institutional autonomy protects individual academics from being effectively undermined by the legislator, it does not necessarily protect individual academics with unorthodox views from dismissal by an HEI’s administration.

Institutional autonomy that allows for large areas of discretion is not only an interest of a university, it is also in the public interest.³²⁴ For this reason responsible institutional autonomy is increasingly encouraged. Some scholars argue that universities must learn to behave more autonomously.³²⁵ As HEIs fulfill certain social functions, i.e. “the advancement, conservation, application, and dissemination of knowledge”³²⁶, they must be aware that higher level of institutional autonomy and of autonomous self-governance is directly related to responsibility. Although HEIs deem institutional autonomy as highly attractive and preferable, it is important

³¹⁷ Philip G. Altbach, *supra* note 45, 51.

³¹⁸ Sacha Garben, *supra* note 90, 23.

³¹⁹ The International Bank for Reconstruction and Development/The World Bank, *supra* note 193.

³²⁰ Rebecca S. Eisenberg, “Academic Freedom and Academic Values in Sponsored Research,” *Texas Law Review* Vol. 66 (1988): 1363.

³²¹ UN Educational, Scientific and Cultural Organisation (UNESCO), *Recommendation concerning the Status of Higher-Education Teaching Personnel*, *supra* note 304, art.20.

³²² Adam Habib, Seán Morrow, Kristina Bentley, *supra* note 88, 141.

³²³ Canadian Association of University Teachers, “Policy Statement on Academic Freedom,” (November 2005) // <http://www.caut.ca/en/policies/academicfreedom.asp> (accessed June 10, 2016).

³²⁴ CEPES Papers on Higher Education, *supra* note 209.

³²⁵ Hans van Ginkel, *supra* note 91, 25.

³²⁶ CEPES Papers on Higher Education, *supra* note 209.

not to underestimate the potential consequences it might bring. It does indeed mean that institutional autonomy must not be exercised as to impede academic freedom but rather on the contrary, to encourage respect of academic freedom and ensure its protection. In conclusion, it should be noted that institutional autonomy is a powerful tool for HEIs to implement appropriate application of academic freedom. It is essential not only in protecting academic freedom as a fundamental right of individual members of the academic community but also in fulfilling a fundamental right to education.

1.6. DISTINCT DIMENSIONS OF ACADEMIC FREEDOM

One of the main difficulties in regard to bringing a conceptual clarity to academic freedom is the different elements it covers. Sometimes it is even argued that any definitions, including the attempt to define, are impossible and even irrational. As it will be seen in the next chapters, the lack of an agreement of what facets fall under the concept of academic freedom leads to the complicated application and insufficient protection of academic freedom. Karran, one of the few, who responded to a call to attempt to establish a working definition of academic freedom for the EU argued that there was a need for providing a “practical *modus vivendi* for the concept [of academic freedom] within today’s *studia generalia*”.³²⁷ Following Karran’s path, this subchapter will outline the basic contours of the main components of academic freedom, while trying to distinguish some dominant practical matters of the academic profession where distinct aspects of academic freedom could be applied. Furthermore it will serve as a preface for a more detailed research supplemented with a normative survey of higher education legislation and case law which will be discussed in the following chapters.

Conventionally academic freedom is perceived as having the following dimensions:

- ✓ freedom of research;
- ✓ freedom of publication;
- ✓ freedom of teaching;
- ✓ freedom of expression and speech within the HEI or academic context (also called freedom of intramural speech or pure academic speech);
- ✓ freedom of expression and speech outside the HEI (also called freedom of extramural speech);
- ✓ and freedom to study.

³²⁷ Terence Karran, *supra* note 12, 185.

In addition to these elements, certain other elements are also considered to be aspects of academic freedom, such as freedom to information, intellectual property rights in regard to research, “academic mobility”³²⁸ and even “the right to err”³²⁹. However, some of these aspects imply a much broader applicability which goes beyond the academic sphere, and this eventually raises the question whether the rights and freedoms which (originally) can be claimed by anyone have to be interpreted differently, when they are claimed by academics? Each of these main dimensions of academic freedom has its own inner logic, creates its own substantial complexity and deserves separate consideration. When all are combined together they communicate the consent about the idea of what is the mission of higher education.

1.6.1. Freedom of research and publication

The basic assertion in regard to freedom of research and publication is that researchers cannot create new knowledge and promote it unless they are “free to inquire and to speculate”³³⁰ and “free to share the results of their research with peers and general public”.³³¹ Generally when performing research academics are granted the right to determine the subject area of their research and the methods to pursue their scientific claim. Sometimes it is intentionally stressed that the scope of the freedom of research covers the right to perform controversial research, as it is the case when the researcher is extremely vulnerable and deserves the highest protection of his rights. The League of European Research Universities (hereinafter LERU), along with the choice of topic and methods, distinguishes the mode of analysis and the right to draw (preliminary) conclusions from one’s findings.³³² Another element which can also be added is the freedom of access to research and the right to information. The freedom to publish research results is understood as the right of the researcher to decide whether to publish the results or not, to choose where to publish, and also the freedom not to be forced to publish research results. It also includes no restrictions or sanctions for dissemination of research results and the right to legal protection of intellectual property. Although occasionally, the freedom of research and publication is granted as a “full” freedom, there is not even the slightest doubt that all these

³²⁸ See more on „academic mobility“ Klaus Deiter Beiter, “The protection of the right to academic mobility under international human rights law,” *International Perspectives on Higher Education Research* Vol. 11 (2014): 244 // DOI: 10.1108/S1479-362820140000011019.

³²⁹ Jogchum Vrielink, Paul Lemmens, Stephen Parmentier and the League of European Research Universities (LERU) Working Group on Human Rights, *supra* note 3, 1.

³³⁰ Matthew W. Finkin and Robert C. Post, *supra* note 4, 54.

³³¹ *Ibid.*

³³² Jogchum Vrielink, Paul Lemmens, Stephen Parmentier and the League of European Research Universities (LERU) Working Group on Human Rights, *supra* note 3, 14.

listed rights and freedoms are not absolute. While exercising these rights and freedoms the researcher is at the same time bound by the prerequisites of the complex research system which requires one to maintain the balance between the individual's freedom, accountability, rights and responsibilities.

Despite the fact that the final decision about how to perform research and to communicate its results may rest with the individual researcher, there are personal, professional, political, historical, cultural, legal, financial, social and institutional factors that may impact the choice of research topic and methodology. Accordingly, the crucial question is where is the limit of the freedom of research and publication, and when do the surrounding requirements of an academic environment and other factors of influence cease being appropriately justifiable and begin to constitute a violation of academic freedom?

First of all, there is a set of imperative restrictions on research performance established in international and national laws, as for example in the field of biology and medicine, genetic engineering and nuclear power.³³³ EU legislation supports the prevalence of the rights, safety and well-being of the trial subjects over the interests of science and society.³³⁴ Lithuanian national laws require one to carry out biomedical research in accordance with the principle that human interest outweighs the public and scientific interest.³³⁵ The Constitutional Court of the Republic of Lithuania in one of its rulings noted that the freedom of research and publication may be limited in cases when a state or official secret is involved in order to protect public security and the well-being of the nation.³³⁶

Other groups of limitations may be set by the research institution in regard to employment regulations and settled obligations, and institutional codes of academic ethics. Academics are facing increasing workloads, which is being considered as diminishing their ability to "exercise

³³³ International legislation prohibits: "any intervention seeking to create a human being genetically identical to another human being, whether living or dead." (*Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings*, Council of Europe (ETS no. 168, 12.1.1998), art. 1); "the creation of human embryos for research purposes" (*Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine*, Council of Europe (ETS no. 164, 4.4.1997), art. 18). International law also sets certain limitations, for example in order to ensure protection of persons undergoing research, the law establishes a list of conditions that must be met to undertake a research on a person (*Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine*, Council of Europe (ETS no. 164, 4.4.1997), art. 16).

³³⁴ *Commission Directive 2005/28/EC of 8 April 2005 laying down principles and detailed guidelines for good clinical practice as regards investigational medicinal products for human use, as well as the requirements for authorisation of the manufacturing or importation of such products*, The Commission of European Communities, Official Journal (L 91/13, 09/04/2005), art. 2.

³³⁵ *Republic of Lithuania Law on the biomedical research ethics*, Official Gazette (2000, No. 44-1247), art. 1.

³³⁶ The Constitutional Court of the Republic of Lithuania ruling on the compliance of the provisions of the Republic of Lithuania Law on Science and Studies (wording of 30 April 2009) with the Constitution of the Republic of Lithuania (2011, no. 13/2010 - 140/2010).

their critical capacity”.³³⁷ This has a negative impact for the fulfillment of the mission academic freedom is entrusted with. Growing focus on research excellence which has led to the introduction of requirements to report on research performance and impact and which became a significant factor assessing HEIs, has caused distortion in a research culture inclining more towards quantity rather than quality. Furthermore, governments are implementing research funding policies which navigate research endeavors “explicitly in line with national economic objectives <...> and implicitly away from social critique in the social sciences.”³³⁸ When scientific research is funded by external entities (private or public), requirements and conditions apply which were negotiated and mutually agreed between the parties and established in a contract or other equivalent cooperation agreement. In many cases these conditions favor the interests of the funding party. When performing scientific research and making its results publicly accessible, academics must also act in conformity with professional and quality standards. Consequently these are only few examples of the intertwined scientific research system influencing the free choice of academics and the dilemma remains who actually possesses the right to decide on the appropriateness of a research subject and methodology or until what degree the freedom of research and publication is vital? In this regard it can be argued that in order to ensure the protection of freedom of research and publication, the role of the state and HEIs is extremely important. It is their responsibility to limit others’ intervention with freedom of research and publication.

1.6.2. Freedom of teaching

Insofar as academics are granted the freedom of research and the freedom of making their research results available to their peers and to the general public, they should be also entitled the freedom to disseminate their research results to their students as this is how the idea of the unfettered search for truth and the advancement of knowledge is sustained. In undertaking teaching, academic freedom is granted in determining “the subject curriculum and how it is taught”.³³⁹ The basic idea is that academics are also free to discuss their research subjects in the classroom. As critical thinking can be achieved, and the capability to discover the truth out of a multitude of “messages” can be nurtured, by exercising the intellectual capacities through a wide exposure to and a vigorous exchange of ideas, the scope of freedom of teaching also

³³⁷ Carole Kayrooz, Gerlese S. Åkerlind and Malcolm Tight, *supra* note 95, 19.

³³⁸ *Ibid.*

³³⁹ Terence Karran, *supra* note 12, 170.

extends to bringing controversial matters into the classroom as long as they are pedagogically relevant or insofar as they are “germane to the subject matter”³⁴⁰. However, it is argued that academics do not possess a right to introduce into their teaching “controversial matter which has no relation to their subject”³⁴¹, as it falls out of the scope of freedom of teaching.

While enjoying the freedom of teaching academics are required to avoid creating a confrontational learning environment in the classroom for students with conservative or sensible political views or radical religious beliefs or intruding tendentious political or ideological commentaries and imposing personal opinion. Such an academic practice is called indoctrination, which contradicts the core idea of a democratic education. Horowitz argues that in a democracy, academics are expected to teach students how to think - not what to think and while introducing controversial issues, they are expected to refrain from suggesting which side is right, or simply telling students which side of the controversy is “politically correct”, but rather should they contribute to developing students’ abilities to think for themselves.³⁴²

Finkin and Post suggest the criterion to evaluate whether pedagogical intervention can be regarded as educationally relevant. They argue that the subject under consideration is pedagogically relevant if it helps students “in better understanding a subject under consideration, either in the sense of acquiring greater cognitive mastery of that subject or in the sense of acquiring a more mature apprehension of the import of that subject, which is to say, an improved ability to experience and appreciate the significance of that subject.”³⁴³ Discussing controversial issues in the classroom is very topical these days, as traditional teaching within the boundaries of the classroom has extended to other spheres and is challenged by different facets of modern academic life, such as the internet, blogs, social media and university online platforms which are now used for open educational resources, or posting teaching materials, and also publicly available information on academic staff and students. Accordingly, the concept of “classroom” must be expanded to reflect present realities. The use of digital means can easily magnify a potential risk of creating a hostile environment, as both professors and students may be tempted to post material, make personal opinion or information, which can be insulting or embarrassing, instantly available to a large audience. HEIs should be encouraged to establish policies and regulations in regard to these issues.

The widespread emergence of new technologies in teaching provides a possibility to use new methods of teaching, new ways for communicating the teaching content, new ways for communication with students and, alongside, brings different obstacles that academics are trying

³⁴⁰ Donna R. Euben, *supra* note 71.

³⁴¹ American Association of University Professors, *supra* note 152.

³⁴² David Horowitz, *supra* note 97, 15.

³⁴³ Matthew W. Finkin and Robert C. Post, *supra* note 4, 92.

to confront. The appearance and constant development of new technologies must be addressed by HEIs. This development has created the need to understand the potential and risks of new technologies, and also the need to cooperate in acquiring the necessary skills and qualifications for the academic staff in order to adapt to innovative teaching methods. The focus on qualifications of academic staff is especially relevant in the context of encouraged internationalization, when academics teach more frequently in different countries. This requires corresponding skills not only in the field of new technologies but also respective knowledge of foreign languages. It is also an imperative in order to attract more foreign students. Increasing student mobility is shaping HEIs agenda towards developing and encouraging more attractive study programmes in foreign languages. Rapid development of new technologies also encourages the so called “cross-border e-learning”³⁴⁴ which has not yet displaced traditional institutional education. However, it is expected that it will continue growing and will foster new types of teaching and access to teaching resources. In the context of distance learning, academic freedom, because of the varying level of its legal protection in different countries, is also very vulnerable and it is argued that the assurances that in cross-border distance learning academic freedom will be protected are illusory.³⁴⁵

Another aspect closely related to freedom of teaching is quality assurance in the study process which involves external assessment and accreditation of institutions and study programmes. One of the criteria of study programme evaluation is the descriptions of the course which establish the outcomes, criteria of learning achievement evaluation, their relation and contribution to the study outcomes to the whole study programme, content (topics) of the course, study (teaching and learning) methods, methods of learning achievement assessment, etc. Generally the descriptions of the courses are prepared before approval of the study programme and then each time before the accreditation of the study programme. Different courses are not necessarily being taught by the academic who prepared the description of the course. The question can be raised whether individual academics are really free to choose the content and the methods for their teaching, and whether they can deviate from those established in the course description and adapt them according to the demand and circumstances and the level of the students’ knowledge and academic abilities in order to satisfy their interests. Karran notes that any deviations from the course, in respect to the content and method of instruction is possible, however this must be made clear to the students, including the reasons for the implemented changes.³⁴⁶ However, HEIs are not always in favor of any deviation from or

³⁴⁴ OECD, “Higher Education to 2030. Volume 2: Globalisation,” *supra* note 192.

³⁴⁵ Risa L. Lieberwitz, *supra* note 99, 115.

³⁴⁶ Terence Karran, *supra* note 12, 171.

changes to a particular course. On the other hand, if students are not complaining about the different content of a course the administration of the HEI may never discover that.

As any other freedom, freedom of teaching must be balanced with certain obligations. Although Bok argues that “[n]o one ever raised the level of scholarship by ordering professors to write better books, nor has the quality of teaching ever improved by telling instructors to give more interesting classes <...> good work depends on the talent and enthusiasm of professors”³⁴⁷, academics are required to adhere to certain professional standards and requirements in the classroom. As academics are considered to be experts of both “in their scholarly discipline and in their pedagogical technique”³⁴⁸, they should understand better than anyone else the importance of maintaining the standards of the academic profession. Academics in the classroom are required to teach in a manner that reflects current thinking, recent research and a variety of views and opinions. They are also required not to introduce in their teaching any element of “positive or negative bias, distortion, misrepresentation or deliberate omission within the content and mode of delivery or make derogatory, stigmatising or irrelevant, oral or written statements (or nonverbal symbols) in respect to (inter alia) age, economic status, ethnicity, gender, language, marital status, nationality, personality, political belief, physical appearance, physical or mental disablement, race, religion, sexual orientation, social status, wealth, etc., unless these relate directly to the subject matter”.³⁴⁹ Although it may seem that sound teaching practices can be achieved simply by having in mind the discussed context of the challenges, provisions and requirements that influence the freedom of teaching, it is not that simple to maintain the balance between being critical, deviating from and questioning generally accepted beliefs, introducing experimentation and speculation in the classroom and alongside being in conformity with professional norms. As already mentioned above, such atmosphere carries the potential for “borderline cases”.

1.6.3. Freedom of intramural speech

The term “intramural speech” (also referred as “intramural expression”, “pure academic speech”, “academic governance speech”) creates some confusion due to the inconsistency in the approaches to how it should be defined. LERU explains it as “expert utterances within the university or academic context in pursuit of teaching and research excellence. It can be both the

³⁴⁷ Derek Bok, “2006–2007 Annual Report to the Harvard Corporation,” // <http://harvardmagazine.com/breaking-news/president-boks-annual-report> (accessed March 15, 2016).

³⁴⁸ Matthew W. Finkin and Robert C. Post, *supra* note 4, 80.

³⁴⁹ Terence Karran, *supra* note 12, 171.

context or the individual(s) involved that determine whether someone's utterances or writings enjoy the high level of 'pure academic speech' protection."³⁵⁰ It was also argued that the high level of academic freedom protection should be guaranteed for external speakers, including non-academics, for addressing issues through on-campus utterances as part of the scholarly debate.³⁵¹ It is very uncommon to grant academic freedom to non-academics. It also remains unclear whether any external speaker, being an expert or not on academic and institutional matters, can enjoy academic freedom just for addressing corresponding issues. That also brings confusion in trying to argue why an external speaker would need the protection of academic freedom, as it is intended to safeguard academics from undue restraints and control from the university and protect the free expression of opinions and criticism that might otherwise jeopardize their employment relationships.

Another perception is that intramural speech is the speech of faculty that does not involve disciplinary expertise but rather concerns the action, policy, or staff of a faculty member's home institution.³⁵² It is suggested that intramural speech should encompass both an expressed critique in the local press on a university's decision regarding its new policy on research funding and the same critique addressed in the university's senate or council meeting. Some scholars regard academic governance speech as encompassing not only criticism of the university's administration but also the speech about curriculum and tenure matters, however others, by contrast, argue that only the speech which promotes critical inquiry should be protected.³⁵³ Those in favor of the promotion of critical inquiry explain that, for example, intramural speech about university parking or disagreements over salary or office space have such an indirect relation to research and teaching that it does not deserve protection. And intramural speech on matters of the curriculum, changes in or administrative abuse of the peer review process, the allocation of financial resources to the library and other educational policy issues are sufficiently related to critical inquiry and should therefore be protected as it corresponds to the theory of academic freedom.³⁵⁴ However the standard of critical inquiry promotion is very vague and it would be difficult when applying it to distinguish between the intramural speech which deserves protection and which does not. The key issue should be not how a particular close case should be resolved, but the recognition that some intramural speech on matters beyond an individual's teaching and scholarship should be protected by a first amendment right of academic freedom.

³⁵⁰ Jogchum Vrielink, Paul Lemmens, Stephen Parmentier and the League of European Research Universities (LERU) Working Group on Human Rights, *supra* note 3, 18.

³⁵¹ *Ibid.*

³⁵² Matthew W. Finkin and Robert C. Post, *supra* note 4, 113.

³⁵³ Judith Areen, *supra* note 35, 987.

³⁵⁴ *Ibid.*; David M. Rabban, *supra* note 100, 295.

UNESCO sees intramural speech as freedom to express opinions about the institution or academic system, freedom from institutional censorship and freedom to participate in professional or representative bodies.³⁵⁵ Differently than discussed above, UNESCO advocates for a broader protection of intramural speech, which comprises not only the speech regarding “a faculty member’s home institution” but also the academic system in general. There is no prevailing agreement in regard to the scope of protection of intramural speech, and scholars continue to debate whether it should be broader or narrower.³⁵⁶ Some scholars advocate for a distinction of intramural speech protection in cases when academic work is produced as a normal routine of a professor at a public university and the same academic work done by the same professor but paid for not by the employer university but rather an external entity, which eventually should deserve narrower protection.³⁵⁷ Karran defines the right of self-governance as including the right to express opinions on the educational policies and priorities within their institutions, to take a prominent role in decision-making processes, to appoint representatives of managerial authority, and to determine who shall serve as Rector.³⁵⁸ Such an approach also supports the narrower protection of intramural speech only concerning a particular institution.

In the context of these conceptions of intramural speech, a more detailed analysis of national and institutional legislation is essential to identify whether the role of academics in the decision-making process of an HEI is properly ensured, whether there are no limitations established in regard to expressing criticism on the university’s policies, for example the requirements to address them primarily within the boundaries of the institution and not publicly, and if there are certain limitations, whether they can be justified, as the protection of intramural speech also requires that the utterances of academics adhere to certain professional standards and do not violate principles of academic morality.

The principal justification for the freedom of intramural speech stems from the culture of self-governance and collegiality which exists (or at least so it should) in universities. HEIs are encouraged to guarantee academics the opportunity and right to take part in their governing bodies, to participate in the elections of the representatives of those bodies and in collegial decision making processes in regard to the administration and establishment of higher education policies, curricula, performance and funding of research, allocation of resources and other matters. The institutional mission of assuring high quality teaching, research and the common good for the society can be achieved through reliable governance of HEIs that combines the

³⁵⁵ UN Educational, Scientific and Cultural Organisation (UNESCO), *Recommendation concerning the Status of Higher-Education Teaching Personnel*, *supra* note 304, art.27.

³⁵⁶ Risa L. Lieberwitz, *supra* note 99, 91.

³⁵⁷ Scott R. Bauries, *supra* note 101, 727.

³⁵⁸ Terence Karran, *supra* note 12, 176.

synthesis of social vision, acknowledgement of global tendencies and issues, and efficient managerial expertise. It can be substantially strengthened through “dialogue with all stakeholders, especially teachers and students, in higher education.”³⁵⁹ It demonstrates recognition of the primacy of academics’ role in fundamental educational matters. It is argued that if the interests of business empower it to discipline employee speech condemning its product or competence of others, the universities serve the common good and it cannot be achieved if “resolved by managerial dictate”.³⁶⁰

1.6.4. Freedom of extramural speech

Extramural speech is usually considered as more complex aspect of academic freedom. Extramural speech refers to speech made by academics in their capacity as citizens and not in their capacity as officers or employees of HEIs and on matters of public concern that are not related to their academic expertise or institutional affiliation.³⁶¹ Some scholars note that if a university censors what its professors may say as citizens in public and restrains them from utterances it does not approve, it thereby assumes the power to establish what particular opinions it permits and, accordingly, assumes full responsibility for whatever it permits.³⁶² AAUP advocates for the freedom of extramural speech in a sense that academics, although members of academic community and officers of HEIs, are also citizens and when they speak or write as citizens, they should be free from institutional censorship or discipline.³⁶³ That should leave them in the position of every other citizen who have to take full responsibility for what they speak or write, and who have to answer to public authorities according to the national laws. However, being members of the academic community imposes upon them a burden by the nature of their special position in the society which creates special obligations for them. AAUP argues that “as scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.”³⁶⁴ The controlling principle of such statement is that an expression of opinions as a citizen cannot

³⁵⁹ OECD, “Higher Education to 2030. Volume 2: Globalisation,” *supra* note 192.

³⁶⁰ American Association of University Professors report, “Protecting an Independent Faculty Voice: Academic Freedom After *Garcetti v. Ceballos*,” (2009) // <https://www.aaup.org/file/Protecting-Independent-Voice.pdf> (accessed June 10, 2016).

³⁶¹ Matthew W. Finkin and Robert C. Post, *supra* note 4, 127.

³⁶² Donna R. Euben, *supra* note 71.

³⁶³ American Association of University Professors, *supra* note 152.

³⁶⁴ *Ibid.*

constitute grounds for dismissal unless it evidently indicates the unfitness of the particular academic to serve, and that the lack of any weighty evidence of unfitness should lead to a dismissal of the charges by the HEI.³⁶⁵

Restrictions on the right of university employees to extramural speech may be established at different levels, for example through state statutes, that prohibit certain law school members from handling or assisting in any lawsuit, or as university employment policies, that prohibit faculty members from accepting employment as an expert if it would contradict the University's or State's interests, or even if there are no such laws and policies, HEIs occasionally seek to control extramural utterances of academics, for example by the termination of an employment contract for testifying before the legislature and participating in a newspaper commercial critical towards the institution's board.³⁶⁶

The concern has been raised in regard to applying the freedom of extramural speech for academics' online speech. It is argued that it is impossible to draw a distinction between intramural and extramural speech in cyberspace. Scholarly debate raises questions whether statements posted on a academic's home page constitutes "intramural" or "extramural" speech, and if there is any difference whether the statement was posted from the academic's home or office computer, or partly from each?³⁶⁷ In the light of these uncertainties, it is observed that despite the fact that the principles of responsibility towards colleagues and academic community are no less fully applicable in a digital environment, the reference to extramural speech should not apply to electronic communications. However, it should be noted that neither the particular place where the speech has appeared nor the means through which it appeared matter, but rather its content and how the author of the speech identifies himself in relation to that speech. If an academic posting the speech online associates himself with the academic profession and/or his institution then it should be considered as intramural speech and if it obviously made as a citizen's speech with no affiliation to the academic profession, his expertise or institution then the freedom of extramural speech should apply.

When an academic writes or speaks as a citizen, he enjoys the constitutional freedom of speech as every other citizen and he faces the same limits and the same obligations corresponding to this freedom. The freedom of extramural speech additionally guarantees no restraints from the institution or no threat to his employment relationship. Exceptionally, only members of the academic community are granted with this freedom. However, it sets additional

³⁶⁵ American Association of University Professors, "Committee A on Academic Freedom and Tenure Statement on Extramural Utterances," (1964) // <https://portfolio.du.edu/downloadItem/153180> (accessed June 10, 2016).

³⁶⁶ Robert R. Kuehn, *supra* note 102, 258.

³⁶⁷ American Association of University Professors, "Academic Freedom and Electronic Communications," (2013) // <https://www.aaup.org/file/Academic%20Freedom%20%26%20Electronic%20Communications.pdf> (accessed June 10, 2016).

limits to the freedom of speech that other citizens do not face. That means that academics possess a lesser amount of freedom of speech because they bear a burden of being representatives of the academic profession and they are accordingly bound by obligations which must be regarded in the light of their responsibilities to their subject, to their students, to their profession, and to their institution. Academics have a particular obligation to advance culture of free inquiry and to foster public understanding of academic freedom.

Some scholars support the statement that academic freedom should not protect the extramural speech of the individual academic. Labeling such extramural speech as “aprofessional” they argue that this is in part because they view political activities as unrelated to the professor’s duty or the institution’s mission.³⁶⁸ Others argue that academics engaged in extramural utterances, although they are not protected by academic freedom, they enjoy all other constitutional freedoms as every other citizen. The same standard is also applied to the utterances which are outside their area of expertise or academic matters, although they are made on campus.³⁶⁹ When making a speech as private citizens they even should have a duty to make it explicitly clear that they are not speaking or acting for the institution.³⁷⁰ However, Byrne, taking the particular example of a law professor, observed, that they are often encouraged to be involved in public service work (for example in the case of law clinics), which may involve controversial extramural utterances, and this is the reason why academic freedom should protect the professor from discipline or censorship by the institution.³⁷¹ The importance of protection of extramural utterances was emphasized by Thorens in such a way that although academic freedom is not more noble than freedom of expression, it is necessary to make specific provisions to protect those who were expressly appointed to be responsible for the development and propagation of knowledge.³⁷² The justification for the protection of extramural utterances can be found in the idea that it is often difficult to draw the line between the speech within academic’s expertise from one which fall outside the scope of expertise. Accordingly, in order to maintain a conducive environment to the performance of fundamental professional tasks when academics are able to focus entirely on their professional responsibilities rather than feeling unconfident in regard to public utterances, any attempt of trying to set the limits should be discouraged.

³⁶⁸ William Van Alstyne, *supra* note 103, 141.

³⁶⁹ Terence Karran, *supra* note 12, 173.

³⁷⁰ *Ibid.*

³⁷¹ J. Peter Byrne, *supra* note 104, 331.

³⁷² Justin P. Thorens, *supra* note 78, 404.

Summarizing the first chapter, a few main conclusions can be suggested. *First*, the vast literature on the subject which was analyzed to present the perception of academic freedom shows inconsistency and different interpretations of the concept and its elements. It is indicated not only by the scholarly works but also by analyzed constitutions, and the national and institutional legislation of different EU Member States. The following chapters will demonstrate whether it is also the case within the international, regional and national (Lithuanian) legal higher education framework. *Second*, there is a lack of substantial scientific discussion on academic freedom and its protection as of a fundamental right. It could be due to its relatively recent recognition as a human right. It can be also argued that another reason could be its insufficient conceptual clarity. *Third*, to ensure the adequate protection of academic freedom as a fundamental right, it is not enough to rely on its traditional historical justification. Although it is necessary to keep in mind the historical origins of this legal concept and its vital role for a fulfillment of the mission of HEIs, it is also essential to recognize different forces and challenges impacting and shaping today's environment of higher education. *Fourth*, in order to preserve academic freedom as a prerequisite for knowledge society advancement, it must be recognized both as a right of an individual academic and as a responsibility of the state, HEIs and academics. The fundamental argument is that a human right to education can be enjoyed if accompanied by academic freedom. Accordingly, it must be reflected in higher education legislation, institutional standards and rules which should cover rights and obligations of the parties that are entitled to influence the scope of academic freedom.

CHAPTER 2. ACADEMIC FREEDOM AS A HUMAN RIGHT

2.1. INTRODUCTION

Academic freedom has been the focus of attention of the international academic community for a while now. The sad reality is that higher education communities face restrictions on their activities that are often imposed with malicious intent by the state authorities. The intensity of such violations of the right to academic freedom differs significantly in various countries. The measures aimed at silencing academics vary from dismissal or the denial a promotion to traveling restrictions or even to threats, prosecution and imprisonment. Continuous attacks on members of the higher education community demonstrate the pressing need to increase awareness of these issues and to aim at preventing future violations. Such attacks on members of the academic community simultaneously infringe different human rights, amongst them and central to this study, the right to academic freedom.

Today, its recognition as a human right is undisputed. However, there is not yet a clear understanding of the relationship between academic freedom and other human rights. It is apparent that each separate element of academic freedom is directly and indirectly connected and intertwined with other human rights. The rights to freedom of thought, opinion, expression and movement are essential to every human being and the whole society, including academia. But in comparison to other individuals, academics, due to the different nature, but also the variety of their professional activities (e.g. teaching, research, intramural and extramural expression) should, it is argued, have both *the right* and *the duty* to exploit these fundamental human rights. This duality of academic freedom as an “obliging right” is most convincingly and persistently justified by the idea that academic freedom fosters a “marketplace of ideas”. Justice Oliver Wendell Holmes, elaborating on this fundamental right, reasoned that “the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market”.³⁷³ Enjoyment of fundamental human rights highly contributes to the main purpose of the university - the preservation, advancement and dissemination of knowledge. In this lies the link and close relation between academic freedom and other human rights. However, academic freedom protects only such thought and utterances which complies with professional norms and standards. It is only in this way that academics can fulfill the mission of the university and contribute to the implementation/realization of another fundamental human right - the right to education. Subsequently, academic freedom must be perceived as freedom to pursue a scholar’s profession

³⁷³ *Abrams v. United States*, U.S. Supreme Court (1919, 250 U.S. 616).

according to the standards of that profession by which conclusions are “gained by a scholar’s method and held in a scholar’s spirit”³⁷⁴ and must be “the fruits of competent and patient and sincere inquiry”.³⁷⁵ The implementation of these duties indicates another relation in this context, namely that between academic freedom and the fundamental right to education.

It should be stressed that the claims arising out of different infringements or limitations of academics’ rights and freedoms are more likely to be brought as human rights claims (e.g. freedom of expression)³⁷⁶ which do not directly include a context of academic freedom. That makes the standards and the scope of the claims for violations of academic freedom very indefinite and vague. This is due to the overlap in scope of such human rights which can form the basis for a claim that would also constitute a hindrance of the exercise of academic freedom. Scholarly debate also exposes a significant inconsistency in approaching this balancing exercise, as there is no overall agreement on the relation between academic freedom and other human rights. Subsequently, the main question raised in this chapter is *whether the existing international and European human rights laws sustain claims for violations of academic freedom*.

2.2. ACADEMIC FREEDOM UNDER THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK

2.2.1. *Independent and interdependent inference of academic freedom from other human rights*

The Universal Declaration of Human Rights, a document that marks a milestone in the history of human rights, states that “everyone has the right to education”.³⁷⁷ From this proclamation is derived the obligation to respect, implement and safeguard the right to education, as a universally recognized human right. Having a universal application, it is a source of rights for everyone, including academics. It is argued that in relation to education, research and science the UDHR is a direct source of the rights to freedom of expression and information, freedom of association, intellectual property, academic freedom, and silence;³⁷⁸ and also an indirect source of the duty to produce, disseminate and teach expert knowledge.³⁷⁹ The UDHR assigns to “every individual and every organ of society” an obligation to “strive by teaching and

³⁷⁴ Robert C. Post, *supra* note 30, 66.

³⁷⁵ *Ibid.*

³⁷⁶ It will be demonstrated and discussed in more detail within the analysis of the case-law of the ECtHR.

³⁷⁷ UN General Assembly, *The Universal Declaration of Human Rights*, *supra* note 221, art.26.

³⁷⁸ See more on “the right to silence” Antoon De Baets, *supra* note 77, 24.

³⁷⁹ *Ibid.*, 20.

education to promote and respect”³⁸⁰ human rights. In this context it is asserted that HEIs play a central role in preserving national and international civil society and ensuring its progress. Without such a role of institutions, governments, which tend to be the primary violators of human rights, “feel little or no moral and political pressure to promote and protect academic freedom and human rights”.³⁸¹ Accordingly, it can be argued that such violations as mistreatment and imprisonment of members of the academic community, suppression of the freedom of expression, inquiry and research must be identified as fundamental human rights violations. And governments must encounter full accountability for the protection and promotion of human rights. From a historical perspective, the predominant guarantee for the protection of academic freedom (as well as for other human rights for that purpose) is the elimination of state interference. After the Second World War, the academic community urged for the safeguards at a human rights level “to protect science against censorship and application for harmful and wrongful purposes”.³⁸² Although the legal status of the UDHR is formally non-binding, the provisions of the document are considered as human rights standards and by many legal experts are perceived as international customary law.

To grant the provisions of the UDHR more substance at the national level, the successive instruments, two United Nations human rights covenants, reestablished the fundamental rights contained in the UDHR. Both, the ICESCR and the International Covenant on Civil and Political Rights (hereinafter ICCPR) are of high importance for the concept of academic freedom. Neither of these documents, which are commonly referred to as the “International Bill of Human Rights” directly mentions the term “academic freedom”. However these documents indicate that academic freedom was recognized by international human rights law as “independently and interdependently”³⁸³ inferred from the right to freedom of thought, expression, opinion, the right to education, as well as other human rights. Table 1 demonstrates those provisions recognized by all three documents which are of particular relevance with respect to the protection of academic freedom.

³⁸⁰ UN General Assembly, *The Universal Declaration of Human Rights*, *supra* note 221, Preamble.

³⁸¹ Winston E. Langley, *Encyclopedia of Human Rights Issues Since 1945*, (The United States of America: Greenwood Press, 1999), 2.

³⁸² Corrette Ploem, “Freedom of research and its Relation to the Right to Privacy”: 162; in: Sjeff Gevers, Ewoud Hondius and Joep Hubben, eds., *Health Law, Human Rights and the Biomedicine Convention – Essays in Honour of Henriette Roscam Abbing* (Leiden/Boston: Martinus Nijhoff Publishers, 2005).

³⁸³ Robert Quinn and Jesse Levine, *supra* note 76, 900.

Document	Human rights relevant to academic freedom
UDHR	<ul style="list-style-type: none"> • the right to liberty and security of person (Article 3); • the right to freedom of movement (Article 13.1); the right to leave any country, including one's own, and to return to his country (Article 13.2); • the right to freedom of thought, conscience and religion (Article 18); • the right to freedom of opinion and expression, including freedom to seek, receive, and impart information and ideas (Article 19); • the right to freedom of peaceful assembly and association (Article 20.1); • the right to education (Article 26.1); education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace (Article 26.2); • the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits (Article 27.1); the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (Article 27.2).
ICCPR	<ul style="list-style-type: none"> • the right to liberty and security of person (Article 9.1); • the right to liberty of movement (Article 12.1); the freedom to leave any country, including his own (Article 12.2); the right to enter his own country (Article 12.4); • the right to freedom of thought, conscience and religion (Article 18.1); • the right to hold opinions (Article 19.1); the right to freedom of expression (Article 19.2); • the right of peaceful assembly (Article 21); • the right to freedom of association with others (Article 22.1).
ICESCR	<ul style="list-style-type: none"> • the right of everyone to education (Article 13.1); • the right to enjoy the benefits of scientific progress and its applications (Article 15.1 (b)); the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (Article 15.1 (c)).

Table 1. The list of human rights in relation to academic freedom recognized by the UDHR³⁸⁴, ICESCR³⁸⁵ and ICCPR³⁸⁶.

Neither of the rights in Table 1 provides a visible and clear basis for the protection of academic freedom. However it is apparent that the provisions listed above are closely related to academic freedom. For example, the rights to freedom of thought, expression and information are necessary to perform research, for the publication and dissemination of research results, and for teaching. They can be relied upon to protect freedom of intramural and extramural expression. The rights to freedom of movement, association, peaceful assembly presuppose opportunities to organize meetings, conferences, in which scientific views and critical opinions are exchanged, and to form professional associations. Probably the only element of academic freedom most directly incorporated in the International Bill of Human Rights is the right to the protection of the moral and material interests of authors of scientific production, which provides the basis for the protection of intellectual property, in particular the protection of copyright. This

³⁸⁴ UN General Assembly, *The Universal Declaration of Human Rights*, *supra* note 221.

³⁸⁵ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, *supra* note 226.

³⁸⁶ *International Covenant on Civil and Political Rights*, UN General Assembly (16 December, 1966) // <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> (accessed June 10, 2016).

right is also protected under the Berne Convention for the Protection of Literary and Artistic Works which under Article 2 covers every production in scientific domain as “literary and artistic works”.³⁸⁷

However, despite the direct links between academic freedom with a variety of human rights, academic freedom still lacks a firm basis for its protection among these rights. Furthermore, doubts may be raised in regard to whether these rights cover the full scope of academic freedom or they guarantee the protection only of certain facets of academic freedom. De Baets argues that academic freedom can be “safely derived from a combination of articles”³⁸⁸, however endeavoring to find justification for academic freedom out of the variety of human rights brings much vagueness in its application. This difficulty to give the concept a clearly distinguishable shape and scope results in general declarative statements that academic freedom is of high importance and is recognized as a human right; however, it does not contribute to clarifying its content and to distinguishing it from the other human rights.

Similar problems arise in regard to the right to education. As previously discussed, the perception of academic freedom highlights the relevance of this principle for the implementation of the right to education. It is a significant element in the process of scientific inquiry, the dissemination of knowledge, pursuit of truth, and development of the human personality. In this context, academic freedom should not be perceived only as an individual right but also as a collective right for the realization of key social goals. The right of everyone to education, the right to enjoy the benefits of scientific progress and its application also creates certain obligations in order to achieve the complete implementation of these rights. Accordingly, when members of the academic community face the duty to ensure the proper fulfillment of these rights they must combine both, adherence to professional standards and requirements and enjoyment of academic freedom. The interest of the society in a thorough realization of the right to education and the benefits from the scientific progress can be defined as a collective interest of academic freedom and makes it an essential part of a right to education. Important notes on elaboration on the relationship between academic freedom and the right to education were presented in the commentary drafted by the United Nations Committee on Economic, Social and Cultural Rights on the Article 13 of the ICESCR, which will be further discussed in more detail.

³⁸⁷ Berne Convention for the Protection of Literary and Artistic Works (9 September, 1886; as amended on 28 September, 1979), art. 2.

³⁸⁸ Antoon De Baets, *supra* note 77, 24.

2.2.2. Derivation of academic freedom from the right to education

Before discussing the explicit recognition of academic freedom in the context of the International Bill of Human Rights, it should be also noted that possibly the most directly relevant provision to academic freedom in the document is the one imposing a duty on the States, requiring that “[t]he States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity”.³⁸⁹ It is the only clear recognition of one of the elements of academic freedom – the freedom of research. Later the recognition of academic freedom was also stressed in the commentary made by the United Nations Committee on Economic, Social and Cultural Rights (hereinafter CESCR), which suggests that “<...> the right to education can only be enjoyed if accompanied by academic freedom of staff and students”.³⁹⁰ Noting that staff and students in HEIs are especially vulnerable to political and other pressures, the commentary emphasizes the necessity of academic freedom and an entitlement and provides observations regarding its content, which are demonstrated in Table 2.

Academic freedom	<ul style="list-style-type: none">• freedom of research;• freedom of teaching;• freedom of publication;• freedom of intramural speech;• freedom of studying;• the right to enjoy human rights.
Obligations of academics	<p>The enjoyment of academic freedom carries with it obligations:</p> <ul style="list-style-type: none">• the duty to respect the academic freedom of others;• the duty to ensure the fair discussion of contrary views;• the duty to treat all without discrimination.

Table 2. Academic freedom in relation to Article 13 ICESCR.

First of all, it should be mentioned that the observations about academic freedom by the CESCR are made particularly in regard to Article 13 of the ICESCR and not to any other article. The rationale for that is quite simple, as this provision is distinct from the other human rights discussed because of its germane character with its particular focus on education. Other related human rights lack such facet.

³⁸⁹ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, *supra* note 226, art. 15(3).

³⁹⁰ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, *supra* note 227, paragraph 38.

It is accepted that the first sentence of Article 13.1 should be perceived as “an open-ended fundamental norm in the sphere of education”.³⁹¹ Article 13 is the longest provision in the Covenant and is also the most wide-ranging and comprehensive article on the right to education in international human rights law.³⁹² Some scholars argue that this provision “constitutes a complete locus for the right to academic freedom”³⁹³. Others, however, dispute the claim which states that academic freedom is an absolute requirement for the enjoyment of the right to education because it fails to provide “the strong justification to conclude that the freedom is derived from the right to education”.³⁹⁴ Yet, another opinion posits that “academic freedom is traceable to freedom of expression through the right to education”.³⁹⁵ Thus it would be quite inaccurate to accept the claim that academic freedom can be fully derived from the right to education. And it is so because of at least four reasons.

First, it has already been observed, and it is not disputable that academic freedom is interrelated with the right to education. For this reason the commentary explicitly states that “the right to education can only be enjoyed if accompanied by the academic freedom of staff and students”.³⁹⁶ That demonstrates the unquestionable significance of academic freedom for the thorough implementation of the right to education. And that also highlights our hypothesis that academic freedom must be recognized as a right and as a responsibility. However, it is highly doubtful whether in practice the claim for academic freedom violation could be brought solely under the scope of Article 13 ICESCR. It can be argued that the latter must be accepted as a basis to underline the importance of the protection of academic freedom. It could be also accepted as an indirect source indicating the collective interest of academic freedom and derivatively, the obligations of respective parties, i.e. players of higher education system who can directly or indirectly affect academic freedom. Nevertheless, the reference to Article 13 in case of individual academic freedom infringements seems oversimplified and insubstantial.

Second, when observing the structure of the commentary, it should be mentioned that it comprises of a part specifying the normative content of Article 13 that does not include academic freedom. However, it is discussed in the part on “Special topics of broad application”

³⁹¹ Klaus Deiter Beiter, *The Protection of the Right to Education by International Law* (Leiden/Boston: Martinus Nijhoff Publishers, 2006), 461.

³⁹² UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, *supra* note 227, paragraph 2.

³⁹³ Klaus Deiter Beiter, *supra* note 328, 244.

³⁹⁴ Antoon De Baets, “The Doctrinal Place of the Right to Academic Freedom under the UN Covenants on Human Rights: A Rejoinder,” *University Values* (May 2012) // http://scholarsatrisk.nyu.edu/documents/UV_MAY_2012.pdf (accessed June 10, 2016).

³⁹⁵ Kwadwo Appiagyei-Atua, “A Theoretical Review of the Origins of Academic Freedom,” *University Values* (July 2014) // <https://www.scholarsatrisk.org/resources/a-theoretical-review-of-the-origins-of-academic-freedom/> (accessed June 10, 2016).

³⁹⁶ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, *supra* note 227, paragraph 38.

of Article 13. The Committee has stressed that even though the matter of academic freedom is not explicitly mentioned in Article 13, it considers it appropriate and necessary to make some observations about academic freedom. It clearly demonstrates the intention to elaborate on the significance of academic freedom for the fulfillment of the right to education but not on the identification of the right as an element of the normative scope of Article 13.

Third, another observation in this regard could be made in relation to formulation of Article 13. If leaving aside the commentary, the wording of Article 13 ICESCR does not reveal anything about research, publication, intramural and extramural activities, and only moderately mentions teaching. Accordingly, even if accepting the opinion that Article 13 is essential for academic freedom protection, it can scarcely be accepted that it covers the complete scope of academic freedom. Subsequently, it would require observing the other human rights.

Fourth, and finally, another reason stipulating insufficient level of academic freedom protection when referring to Article 13 is its dominant application from the students' and pupils' perspective rather than individual academics' perspective safeguarding their rights and freedoms. It demonstrates the need for additional means of protection or a closer attention to clarifying the content of academic freedom.

Although the commentary does not explicitly recognize academic freedom as part of the normative content of Article 13 ICESCR, it shows the general perception of the dimensions constituting academic freedom. Without more detailed content of each given element of academic freedom, the CESCR recognizes it as "a freedom to pursue, develop and transmit knowledge and ideas through research, teaching, studying, discussion, documentation, production, creation and writing".³⁹⁷ It suggests the following elements of academic freedom: freedom of research, teaching, publication and studying. The recognition of intramural speech is also apparent as the commentary includes the liberty to freely express opinions about institutions or education systems, and to participate in professional or representative academic bodies. However, it lacks reflection on the freedom of extramural activities. The commentary also underlines the necessity to respect academic freedom including different opinions and views of other individuals and to treat all without discrimination while enjoying academic freedom. The CESCR considers the autonomy of HEIs as a necessary precondition in order to achieve full implementation of academic freedom. This autonomy is essential for effective decision-making in regard to academic work, standards, management and related activities.

Attention must also be brought to the interrelation between academic freedom and other internationally recognized human rights. The commentary states that among other freedoms,

³⁹⁷ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, *supra* note 227, paragraph 39.

academic freedom also includes the liberty “to enjoy all the internationally recognized human rights applicable to other individuals in the same jurisdiction”.³⁹⁸ It remains uncertain whether the members of the academic community have a right to exercise human rights, i.e. freedom of thought, opinion, expression and others, to the same extent as every other individual, be it inside or outside the university, on academic matters or public matters which are outside the scope of one’s expertise. It is apparent that each member of the academic community has a right to enjoy human rights. However, it is not clear whether any differences exist when these rights are performed by the academic in the classroom and the one outside the university speaking on public issues and not on behalf of HEIs?

2.2.3. *The case law of Human Rights Committee: does academic context matter?*

Above expressed doubts in regard to the differences when the rights are exercised by academics or by the other individuals, can be illustrated by referring to the case law of HRC. In *Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*, which was decided in 1996, two teachers at the University of Benin were charged with the offence of *lèse-majesté* (outrage au Chef de l’Etat dans l’exercice de sa fonction) because of possession of pamphlets criticizing the living conditions of foreign students in Togo.³⁹⁹ Although charges were dropped, they unsuccessfully sought reinstatement to their former positions at the university. The HRC concluded that there had been a violation of Article 19 ICCPR on the freedom of information and expression. The HRC observed the teachers as citizens who “must be allowed to inform themselves about alternatives to the political system/parties in power, and <...> may criticize or openly and publicly evaluate their Governments without fear of interference or punishment, within the limits set by article 19, paragraph 3”.⁴⁰⁰ The HRC also concluded that the authors of the pamphlets who were holding positions in the public service (as they were employees of a public university) had the freedom to engage in political activity, to debate public affairs and to criticize the government, as enshrined in Article 25 ICCPR. Although some scholars claim that in this decision the HRC protected teachers’ academic freedom, the Committee in this case did not give any special attention to the status of academics. If considered within the scope of academic freedom, the actions of the Togolese government could qualify as a violation of the freedom of extramural expression. However, as previously discussed, the CESCR commentary

³⁹⁸ *Ibid.*

³⁹⁹ *Adimayo M. Aduayom, Sofianou T. Diasso and Yawo S. Dobou v. Togo*, the Human Rights Committee (1996, U.N. Doc. CCPR/C/51/D/422/1990, 423/1990 and 424/1990).

⁴⁰⁰ *Ibid.*

on Article 13 ICESCR did not recognize it as one of the elements of academic freedom. The issue was also not brought under the normative content of the right to education. It remains unclear whether the outcome would have been different if the commentary was issued earlier than the decision in the case. The concluding argument would be that although the right of the teachers, as citizens, to freedom to engage in political activity and to criticize the government was upheld, however, the decision lacked the context of the special academic status which grants academic freedom and imposes special academic obligations. For this reason, it would be inaccurate to assert that the HRC protected teachers' academic freedom, but merely examines whether violation of the right to freedom of information and expression had occurred.

In *Robert Faurisson v. France*, a university professor was convicted for the offence of holocaust denial as he had sought proof for the methods of killings by gas asphyxiation, thereby raising doubts regarding the existence of gas chambers for extermination purposes at Auschwitz and in other Nazi concentration camps.⁴⁰¹ He claimed that his opinions were rejected by academic journals, he has become the target of death threats, suffered physical assault and serious injuries. The Committee stated that there was no violation of Article 19 ICCPR. It argued that the restriction was provided by law and the "conviction was fully justified, not only by the necessity of securing respect for the judgment of the International Military Tribunal at Nuremberg, and through it the memory of the survivors and the descendants of the victims of Nazism, but also by the necessity of maintaining social cohesion and public order".⁴⁰² It should be stressed that in this case the author claimed that his freedom to doubt and freedom of research were infringed and argued that "the desire to fight anti-semitism cannot justify any limitations on the freedom of research"⁴⁰³ and "no law should be allowed to prohibit the publication of studies on any subject, under the pretext that there is nothing to research on it".⁴⁰⁴ Without questioning the reasoning of the outcome of this case, it is important to notice that the Committee when fulfilling its task to ascertain whether the conditions of the restrictions imposed on the rights to freedom of expression were met, did not observe the fact that the author was an academic and that the case concerned the individual's freedom of research. However certain observations in this area were made in one of the concurring opinions. Here, Elizabeth Evatt and David Kretzmer expressed doubts whether the State party sufficiently demonstrated that the restriction was necessary in order to guarantee respect for the rights or reputations of others, according to Article 19(30)(a) ICCPR. As the requirement of necessity implies an element of proportionality, the opinion reasoned "[w]hile there is every reason to maintain

⁴⁰¹ *Robert Faurisson v. France*, the Human Rights Committee (1996, U.N. Doc. CCPR/C/58/D/550/1993).

⁴⁰² *Ibid.*

⁴⁰³ *Ibid.*

⁴⁰⁴ *Ibid.*

protection of *bona fide* historical research against restriction, even when it challenges accepted historical truths and by so doing offends people, anti-semitic allegations <...> which violate the rights of others <...> do not have the same claim to protection against restriction. The restrictions placed on the author did not <...> in any way affect his freedom of research.”⁴⁰⁵ Although more detailed argumentation and explanations in this regard were not provided, the express recognition of the freedom of research itself, and in particular including the right to challenge accepted truths and thereby potentially offend others, is not only noteworthy but of high significance. It should be also mentioned that the restrictions on the freedom of research were discussed in terms of the freedom of expression and not in terms of the right to education. It should also be acknowledged that in this case, as opposed to the case previously discussed, the academic freedom was raised as a concept.

One could then argue, why there is a need to grant members of the academic community special academic freedoms (in form of a *lex specialis* human rights) if they can, even in the absence of an express right to academic freedom, fully exercise their profession within the scope of protection of other fundamental human rights. However, the need to provide special protection, it is argued here, is inevitable. And not only because academic freedom grants some privileges but also because it upholds certain obligations. Academic freedom preserves “not the absolute freedom of utterance of the individual scholar, but the absolute freedom of thought, of inquiry, of discussion and of teaching, of the academic profession”.⁴⁰⁶ Haskell argues that in a historical context “the heart and soul of academic freedom lie not in free speech but in professional autonomy <...> Academic freedom came into being as a defence of disciplinary community”.⁴⁰⁷ For this reason, it may be necessary to offer a stronger conceptual basis for the human rights of academics granting them with more specific rights to freedom of academic thought, academic opinion, academic expression or “academic mobility”.⁴⁰⁸ It would contribute to making it evident what the entitlements of the right to freedom of thought, opinion, expression, as recognized in the context of international human rights law, imply for the members of the academic community. It is also argued that because of the special role of academics who fulfill their duties to place existing knowledge under scrutiny, to contribute to the protection of the interests of society and to advance the welfare of their respective countries,

⁴⁰⁵ *Ibid.*

⁴⁰⁶ American Association of University Professors, “1915 Declaration of Principles on Academic Freedom and Academic Tenure,” (1915) // <https://www.aaup.org/NR/rdonlyres/A6520A9D-0A9A-47B3-B550-C006B5B224E7/0/1915Declaration.pdf> (accessed June 10, 2016).

⁴⁰⁷ Thomas L. Haskell, “Justifying the Rights of Academic in the Era of “Power/Knowledge”: 54 in: Louis Menand, ed., *The Future of Academic Freedom* (Chicago & London: The University of Chicago Press, 1996).

⁴⁰⁸ Klaus Deiter Beiter, *supra* note 328, 244.

“their position may be linked to those of journalists and human rights defenders”.⁴⁰⁹ This implies, that in cases when considering whether there was a violation of human rights of academics, the special status of the academic should be taken into account. This would then require to establish a catalog of criteria that constitute the scope of academic freedom, some or all of which, must be evaluated when a claim of violation for the violation of human rights is brought by an academic. This idea of evaluating academic context when deciding on a violation of human rights will be elaborated in more detail in this chapter within the discussion on the case-law of the ECtHR.

This analysis demonstrates that although the linkage between academic freedom and human rights is undeniable, the standards and the scope of academic freedom protection as inferred from other human rights is not obvious. It is highly possible that the main reason for this uncertainty and the variety of opinions that fill this conceptual gap is the concept of academic freedom itself. Because of its multifaceted character, the perception and interpretation of academic freedom varies. In this respect, relevant international documents on academic freedom will be referred to in order to reveal the prevailing conception of academic freedom.

2.3. THE EU’S HUMAN RIGHTS POLICY: ACADEMIC FREEDOM – ENFORCEABLE RIGHT OR MERELY A GUIDING PRINCIPLE?

2.3.1. The Charter of Fundamental Rights of the EU: “Academic freedom shall be respected”

Without any doubts, the most significant recognition of academic freedom in the context of the EU can be inferred from Article 13 of the EU Charter, which states:

*“The arts and scientific research shall be free of constraint. Academic freedom shall be respected.”*⁴¹⁰

In 2000, EU leaders, the European Commission and the European Parliament announced the EU Charter, which embodies a set of civil, political, economic and social rights for the citizens of EU and all persons resident in the EU. Its ratification in 2009 in the context of the Treaty of Lisbon allows for judicial claims in European courts. The Preamble to the EU Charter states that it reaffirms rights recognized in EU Member States’ constitutional traditions and international obligations common to Member States, making specific reference to, inter alia, the ECHR and the case law of the ECtHR.

⁴⁰⁹ *Ibid.*

⁴¹⁰ *The Charter of Fundamental Rights of the European Union, supra note 247, art. 13.*

According to the Explanations to the EU Charter, freedom of the arts and science under Article 13 is primarily deduced from the freedom of thought (Article 10) and expression (Article 11).⁴¹¹ Furthermore, the freedoms set out in Article 13 must be exercised in compliance with Article 1 on human dignity and may be subject to limitations of the freedom of expression, as provided by Article 10(2) of the ECHR.⁴¹² Article 13 gives the impression that it simply reinforces freedom of thought and expression and its scope is not intended to extend beyond the ECtHR jurisprudence concerning these freedoms. This demonstrates a different approach than that of the General Comment of Article 13 of ICESCR, which revealed an inseparable link between academic freedom and the right to education. Neither the Commentary of the EU Charter, nor the Explanations provide more detailed information on freedom of research and academic freedom. It stays unclear why the provision of Article 13 grants freedom of scientific research and then separately mentions academic freedom. If Article 13 was taking a traditional approach, freedom of research should be one of the elements of academic freedom. In this case it is completely indefinite whether the freedom of research is perceived as not being the part of academic freedom, and what would then be the concept and content of academic freedom. It is argued that such distinction is intended to indicate that academic freedom is non-justiciable.⁴¹³ Another observation can be made in regard that such distinction is intentionally meant to stress the awareness of the absolute character of human dignity in the field of scientific research.

It has been also suggested that, to the extent that Article 13 is certainly an enforceable “right” and not merely a guiding “principle”, it is complicated to evaluate whether it is a new right without further clarification of its content.⁴¹⁴ Article 13 has not been discussed in the European Commission’s first four Annual Reports on the EU Charter.⁴¹⁵ The following, 2014 and 2015 Reports state that freedom of scientific research does not mean that it cannot be restricted and notes that restrictions are only possible under the strict conditions of Article

⁴¹¹ *Explanations relating to the Charter of Fundamental Rights*, OJ C 303/17, 14.12.2007, (2007/C 303/02) // http://www.cvce.eu/content/publication/2010/6/9/11b81cf7-22fc-4463-873f-1db65a733a8c/publishable_en.pdf (accessed June 10, 2016).

⁴¹² *Ibid.*

⁴¹³ Debbie Sayers, “Article 13 - Freedom of the Arts and Sciences”: 379; in: Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward, eds., *The EU Charter of Fundamental Rights. A Commentary* (Oxford and Portland, Oregon: Hart Publishing, March 2014).

⁴¹⁴ House of Lords European Union Committee, *supra* note 248.

⁴¹⁵ European Commission, “2010 Report on the Application of the EU Charter of Fundamental Rights,” (2011) // http://ec.europa.eu/justice/fundamental-rights/files/annual_report_2010_en.pdf (accessed June 10, 2016). European Commission, “2011 Report on the Application of the EU Charter of Fundamental Rights,” (2012) // http://ec.europa.eu/justice/fundamental-rights/files/charter_report_en.pdf (accessed June 10, 2016). European Commission, “2012 Report on the Application of the EU Charter of Fundamental Rights,” (2013) // <http://bookshop.europa.eu/en/2012-report-on-the-application-of-the-eu-charter-of-fundamental-rights-pbDSAL13001/> (accessed June 10, 2016). European Commission, “2013 Report on the Application of the EU Charter of Fundamental Rights,” (2014) // <http://bookshop.europa.eu/en/2013-report-on-the-application-of-the-eu-charter-of-fundamental-rights-pbDSAL14101/> (accessed June 10, 2016).

52(1)⁴¹⁶ of the EU Charter.⁴¹⁷ It also underlines an obligation for the EU institutions, which fund areas of research or science, to respect the EU Charter. Neither of the Reports mentions academic freedom. The very basic wording of Article 13 of the EU Charter and the extremely modest Explanations to the EU Charter leave the notion of academic freedom open to interpretation. The current absence of jurisprudence of the Court of Justice of the European Union also does not contribute to providing further guidance.

Article 14 of the EU Charter deals specifically with the right to education, which occasionally is associated with academic freedom. It provides in its first sentence “[e]veryone has the right to education and to have access to vocational and continuing training.”⁴¹⁸ This provision is phrased in positive terms, and guarantees a positive right to education.

According to the Explanations to the EU Charter, Article 14 is based on the common constitutional traditions of Member States and corresponds to Article 2 of the First Protocol to the ECHR. Neither the Commentary of the EU Charter, nor the Explanations or Reports that emphasize the right to education, mention a possibility of its application from the individual academic perspective. None of the documents expresses the notion established in the General Comment of Article 13 of the ICESCR, suggesting the inseparable relation between the right to education and academic freedom of staff and students.⁴¹⁹ However, certain implications can be inferred from the notion of the right to education. The wording of the first sentence of Article 14 is phrased in positive terms and it suggests Member State’s obligation not only to restrain from hindering the right to education but also to promote it through positive actions. That means that the right to education can also be read as imposing a duty on the state to ensure the existence and maintenance of education, otherwise “that right would be illusory”.⁴²⁰ Article 14(3)

⁴¹⁶ *The Charter of Fundamental Rights of the European Union*, *supra* note 247, art. 52(1).

Scope of guaranteed rights

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.

3. Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

⁴¹⁷ European Commission, “2014 Report on the Application of the EU Charter of Fundamental Rights,” (2015) // http://ec.europa.eu/justice/fundamental-rights/files/2014_annual_charter_report_en.pdf (accessed June 10, 2016). European Commission, “2015 Report on the Application of the EU Charter of Fundamental Rights,” (2016) // http://ec.europa.eu/justice/fundamental-rights/files/2015_charter_report_full_version_en.pdf (accessed June 10, 2016).

⁴¹⁸ *The Charter of Fundamental Rights of the European Union*, *supra* note 247, art. 14(1).

⁴¹⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, *supra* note 227, paragraph 38.

⁴²⁰ Jan De Groof, “Legal Framework for Freedom of Education”: 42; in: Charles L. Glenn, Jan De Groof, eds., *Balancing Freedom, Autonomy and Accountability in Education Volume I* (The Netherlands: Wolf Legal Publishers, 2012).

guarantees “respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions”.⁴²¹ This provision is based on the Article 2 of the First Protocol to the ECHR. The ECtHR in *Kjeldsen* in regard to the state’s duty to respect philosophical and religious convictions held that the state, when fulfilling the functions concerning education and teaching, must ensure that information or knowledge included in the curriculum is conveyed in an objective, critical and pluralistic manner.⁴²² Moreover, the state is forbidden to pursue the aim of indoctrination.⁴²³ Although the case dealt with the children’s right to primary education, it demonstrates that the right to education covers the state’s duty not to engage in the ideological indoctrination through education, which is one of the fundamental aspects of academic freedom. Based on this interpretation it can be argued that the right to education, encompasses, *inter alia*, the state’s duty to ensure education without interference from the state or a third party. Such intrinsic link leads to derivative relation between the right to education and academic freedom and serves as a justification for academic freedom as a right and as a responsibility.

The EU Charter itself does not mention that the EU is bound by judgments of the ECtHR, however, the Explanations to the EU Charter state that the meaning and scope of corresponding rights are the same as those laid down by the ECHR and its Protocols, as well as the case law of the ECtHR and the ECJ.⁴²⁴ Accordingly, the analysis of the case law of the ECtHR will help to elaborate more precisely on the notion of academic freedom.

2.3.2. Separate elements of academic freedom under the case law of the Court of Justice of the European Union

2.3.2.1. A right of public access to documents within the scope of freedom of research

Pitsiorlas v. Council and ECB raised the question of a right of public access to documents that included certain aspects of freedom of research.⁴²⁵ The applicant was denied access to the

⁴²¹ *The Charter of Fundamental Rights of the European Union*, *supra* note 247, art. 14(3).

⁴²² *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, ECtHR (1976, Applications no. 5095/71; 5920/72; 5926/72).

⁴²³ *Ibid.*

⁴²⁴ *Explanations relating to the Charter of Fundamental Rights*, *supra* note 411.

⁴²⁵ Pitsiorlas, a doctoral student was seeking access to the Basle/Nyborg Agreement on the reinforcement of the European Monetary System endorsed by the Council of Economic and Finance Ministers at their informal meeting at Nyborg (Denmark) as a relevant source for his doctoral thesis. Pitsiorlas addressed a request to the General Secretariat of the Council and to the Public Relations department of the European Central Bank (ECB). The applicant was informed that the documents of the Committee of Governors were covered by Article 23.3 of the ECB Rules of Procedure which stated, in particular, that the documents of the Committee of Governors were to be freely accessible after 30 years. Pitsiorlas requested the ECB to re-examine his requirement as in special cases the period of confidentiality could be shortened. He claimed that the subject of his research could fall within the meaning of ‘special cases’. The ECB responded that the Basle/Nyborg Agreement was not a single document but only

documents of the European Central Bank (hereinafter ECB), a right which has been established under Article 255 EC (now Article 15 TFEU).⁴²⁶ In order to ensure the effective exercise of this right, certain public and private interests are safeguarded by exceptions to the right of access.⁴²⁷ The Court noted that protection of the public interest related to monetary policy in the Community constituted a legitimate reason for restricting the right of access to documents. However, in assessing the ECB's duty to state reasons, the Court asserted that "it is not clear from [the ECB's] decision that the applicant's interests had been weighed against the public interest constituted by monetary stability".⁴²⁸ The decision of the ECB to refuse access to documents was annulled as it had failed to give sufficient reasons capable of refuting the applicant's arguments. Pitsiorlas stated that because of the refusal to grant him access to the requested document, he was prevented from finishing and submitting his doctoral thesis on time.

Three conclusions can be drawn from this case. First, it can be stated that the ECB has interfered with the freedom of research, and not necessarily by merely refusing to give access to the documents in particular. The absence of any reasons for the ECB's decision to refuse access to the documents from the very beginning had left the doctoral student who had addressed the request for access to the ECB with uncertainty and possibly an expectation, as to the possibility to gain access at a later point. The reply of the ECB in subsequent communication in which it questioned the applicant's choice of a research methodology constitutes an infringement of the freedom of research. The assumption that "[s]ince [the applicant] dispose[d] of all essential

existed in the form of reports and minutes of meetings of both the Committee of Governors and of the Monetary Committee. The Governing Council noted that a very elaborate press communiqué on this subject was released which was already forwarded to the applicant. This press communiqué set out in great detail all points of the agreement reached among the Central Bank Governors. The Governing Council decided not to grant access to the archives of the Committee of Governors. The applicant brought a claim to the Court of First Instance of the European Communities. *Athanasios Pitsiorlas v. Council of the European Union and European Central Bank*, The Court of First Instance (Fifth Chamber) (2007, Joined Cases T-3/00 and T-337/04).

⁴²⁶ Art. 255 reads as follows:

"1. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3.

2. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the Council, acting in accordance with the procedure referred to in Article 251, within two years of the entry into force of the Treaty of Amsterdam.

3. Each institution referred to above shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents."

Treaty establishing the European Community (Amsterdam consolidated version), OJ C340, 10.11.1997.

⁴²⁷ Art. 4. Exceptions: "1. The institutions shall refuse access to a document where disclosure would undermine the protection of: a) the public interest as regards: — public security, — defence and military matters, — international relations, — the financial, monetary or economic policy of the Community or a Member State; b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data. 2. The institutions shall refuse access to a document where disclosure would undermine the protection of: — commercial interests of a natural or legal person, including intellectual property, — court proceedings and legal advice, — the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure." *Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents*, OJ L145/43, 31.5.2001.

⁴²⁸ *Athanasios Pitsiorlas v Council of the European Union and European Central Bank*, *supra* note 425.

information on the Basle/Nyborg [A]greement, [... the] research work will nevertheless develop fruitfully”⁴²⁹ was not for the commission to make. It’s not for the ECB to decide on whether certain information is sufficient to perform a research. Such kind of scientific choices are primarily linked to the freedom of research and they must be made by the researcher. Instead of such statement the ECB could have provided reasonable grounds for refusal of access which could have led the researcher to implement timely changes for his research and to complete it on time.

The second conclusion concerns the limits of the freedom of research. Access to the documents of EU institutions is not unlimited and there is a list of exceptions which binds the institutions to refuse the access to the documents. It was the decision of the researcher to take the risk to rely for his entire research on a document to which access could have possibly been denied. While shaping and conceptualizing his research and choosing the methodology and sources to perform it, the researcher must consider potential practical and legal obstacles.

The third conclusion concerns the character of academic freedom in general. Although the applicant in the case claimed that the denial of access to the documents violated his freedom of research, the Court did not discuss this issue in its judgment. Nor did the Court bring attention to the special purpose the document was requested for. This leads to the conclusion that researchers are not given any different rights to access EU documents in comparison to regular citizens. The scope of that right, accordingly, is not altered depending on the character of the applicant. It is also necessary to keep in mind that this case was brought before the ECJ prior to the ratification of the EU Charter, so it is not obvious whether the special academic context would be evaluated differently now. As freedom of research and academic freedom are fundamental values protected by the EU Charter, it can be argued that if a case was brought today in which an applicant claimed a violation of the right of public access to documents, the Court should take the academic context into account. The main reason for this is a wider meaning of academic freedom and a wider function and the true role of universities and higher education in general which would be the primary justification for considering the violation in an academic context. This would further reinforce towards the protection of academic freedom as a human right.

This case also demonstrates the importance of the recognition of academic freedom not as an unconditional right, but as a right that is subject to certain responsibilities. These responsibilities rest not only with the EU institutions, but, as demonstrated in this case, also with the researcher. The facts of the case indicate that freedom of research or academic freedom in general is not absolute and must be balanced with the professional responsibility or obligations

⁴²⁹ *Ibid.*

of academics. The researchers must act reasonably and must keep in mind that they cannot fully rely on academic freedom as *a priori* permission to any kind of academic activity and the necessary means for this exercise.

In comparison to this case, it is worth mentioning another case which was brought to the ECtHR on a similar matter. The applicant was a historian, Mr. János Kenedi, who, in order to publish a study, requested access to certain documents deposited with the Ministry of the Interior.⁴³⁰ His request was denied based on the grounds that the documents were classified as state secrets until 2048. The applicant brought action against the Ministry claiming a right of unrestricted access to the documents and submitted that the data he sought was necessary for the purposes of his ongoing historical research. For several years Kenedi sought access to the documents but after continuous denials a domestic court granted him access to the documents for research purposes. The Ministry kept obstructing him from accessing the document by imposing various requirements and restrictions.

The ECtHR emphasized 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. The Court noted that the domestic courts granted Kenedi access to the documents in question, however the administrative authorities had persistently resisted their obligation to comply with the domestic judgment and thus hindered his access to documents. In these circumstances, the Court concluded, the national authorities had misused their powers and infringed the applicant's right to freedom of expression.

This case demonstrates that the documents, although classified as state secrets and not accessible under other circumstances, have been made available for conducting research. Although the ECtHR did not elaborate on academic freedom or freedom of research and the case does not contribute to any further conceptual clarity, it shows the recognition of research as an important element of academic freedom and supplements this aspect with a right of access to the documents as one of its elements.

2.3.2.2. *A right not to disclose information*

In *ABZ Aardbeien Uit Zaad Holding BV and Others v Parliament and Council*, the ECJ only ruled on the question of admissibility without considering the merits of the case due to lack of individual concern.⁴³¹ The applicants, a number of Dutch undertakings active in the plant

⁴³⁰ *Kenedi v. Hungary*, ECtHR (2nd section) (2009, Application no. 31475/05).

⁴³¹ *ABZ Aardbeien Uit Zaad Holding BV and Others v European Parliament and Council of the European Union*, Order of the General Court (Fifth Chamber) (2015, Case T-560/14).

breeding sector, sought annulment of the Regulation (EU) No. 511/2014⁴³² as it allegedly infringed the “breeders’ exemption” of Article 15(1)(iii) of the 1961 International Convention for the Protection of New Varieties of Plants.⁴³³ The breeders’ exemption, claimants argued, provides that, “for purpose of discovering and developing new varieties, breeders of plant varieties should have full and free access to protected varieties, without their having to discharge any obligation of information”.⁴³⁴ However, Article 4(3) of the contested regulation impedes that exemption, since “any breeder of a protected variety is obliged to disclose confidential commercial information about that variety to a second party breeder wishing to develop a new variety, whilst conversely the breeder of the new variety is obliged to disclose its intention to use the material from the protected variety”.⁴³⁵ Accordingly, applicants were arguing that a legal conflict existed between two international treaties, which were implemented by the EU in two directly effective regulations. The earlier Regulation 2100/94 recognized the fundamental right of freedom of research to the benefit of the appellants, and the later contested Regulation 511/2014 severely restricted it.⁴³⁶ Correspondingly, the applicants claimed that the contested Regulation is in conflict with higher rules of law, specifically Article 13 of the EU Charter.

Although the ECJ order does not explore the violation of Article 13, certain aspects provided in the application to the Court should be mentioned. First, the traditional understanding is that the freedom of research, as an element of academic freedom, is an individual right. And it is not any individual’s right, but in particular the right of academics. In this regard this case is significantly different than all the others which were analyzed in our research, as the claim was brought by a private company on a specific regulation on the access to genetic resources and the fair and equitable sharing of benefits arising from their utilization and the protection of new plants varieties. As it was already mentioned in the first chapter, although in some cases academic freedom is understood as an institutional right, it is more commonly recognized as a right of an individual academic. Even in cases when academic freedom is perceived as an institutional right, it could only be recognized as a right of the HEI. However, in this case, because of the specific legislation, the private research company had a right to claim the

⁴³² *Regulation (EU) No. 511/2014 of the European Parliament and of the Council of 16 April 2014 on compliance measures for users from the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation in the Union* (OJ L150/59, 20.5.2014).

⁴³³ *International Convention for the Protection of New Varieties Plants of 2 December 1961, as revised at Geneva on 10 November 1972, 23 October 1978 and 19 March 1991*, art. 15(1)(iii).

⁴³⁴ *ABZ Aardbeien Uit Zaad Holding BV and Others v European Parliament and Council of the European Union*, *supra* note 431.

⁴³⁵ *Ibid.*

⁴³⁶ *ABZ Aardbeien Uit Zaad Holding BV and others v European Parliament, Council of the European Union*, Appeal brought on 24 July 2015 by ABZ Aardbeien Uit Zaad Holding BV and Others against the order of the General Court (Fifth Chamber) delivered on 18 May 2015 in Case T-560/14 (2015, Case C-409/15P).

freedom of research which would not be possible under its national constitution, national law on higher education, or the EU Charter.

Second, the applicant was seeking annulment of the Regulation which guarantees the second party breeder access to information, traditional knowledge and benefit sharing associated with genetic resources. The applicant, having a commercial interest, was claiming the right to full and free access to protected varieties, without having an obligation to disclose information, which according to applicant is protected by Article 13. Accordingly, it can be argued that one's right to access information and one's right not to disclose information are considered as important aspects of freedom of research. Regulation 511/2014 states that genetic resources are used by academics, universities, non-commercial researchers and companies (as in this case) for research, development and commercialization purposes.⁴³⁷ It requires access and benefit sharing of genetic resources in order to pursue the Nagoya Protocol's wider objective of contributing to the conservation and sustainable use of biological diversity.⁴³⁸ In this regard, it could be argued that the applicants' claim actually contradicted the essence of freedom of research. And contrary to the applicants' claim, the existing regulation, limiting the right not to disclose information and supporting the right to access information adheres to the protection of freedom of research.

A case that touched upon the issues of the right to access information (Article 10 of the ECHR contains the freedom "to receive and impart information and ideas without interference by public authority and regardless of frontiers")⁴³⁹ and the right not to impart information was also brought to the ECtHR in 2010. The court delivered a judgment in the case *Gillberg v. Sweden* that dealt with a combination of issues related to freedom of expression, freedom of research, medical data, privacy protection and access to official documents.⁴⁴⁰ A university professor, as a public employee, refused to give access to the research material that belonged to the university. A researcher from another university and a pediatrician requested access to the

⁴³⁷ Regulation (EU) No. 511/2014 of the European Parliament and of the Council of 16 April 2014 on compliance measures for users from the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation in the Union, *supra* note 432, preamble, paragraph 4.

⁴³⁸ Regulation (EU) No. 511/2014 of the European Parliament and of the Council of 16 April 2014 on compliance measures for users from the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation in the Union, *supra* note 432, preamble, paragraph 22.

⁴³⁹ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, Council of Europe (4 November 1950), art. 10.

⁴⁴⁰ The applicant was a university professor. During the period between 1977 and 1992 he was carrying out the research in the field of neuropsychiatry based on interviews with children and their parents. In 2002 a researcher from another university and a pediatrician requested access to the research material. Their request was refused and they both appealed to the Administrative Court of Appeal. Access was granted to appellants. In order to protect the interests of the individuals involved in the research, the university was required to formulate the conditions it considered necessary to avoid the risk of any of the release of the documents. The Administrative Court of Appeal also noted that the conditions of access could only be imposed if they were used to remove particular risk of damage, and that a condition should be framed to restrict the appellants' right of disposal over the data. The applicant refused to disclose the research materials. According to the applicant, the research materials were destroyed by three of his colleagues. Criminal proceedings were initiated against the applicant and he was convicted of misuse of office. *Gillberg v. Sweden*, ECtHR (Grand Chamber) (2012, Application no. 41723/06).

research material. The professor claimed to have a negative right within the meaning of Article 10 of the ECHR not to impart the research material as he had guaranteed confidentiality to the participants in the research and had attempted to protect their integrity, in spite of being ordered by a court to reveal the confidential data.

The right to receive and impart information explicitly forms part of the right to freedom of expression under Article 10. That right basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him.

The jurisprudence of the Swedish courts and of the ECtHR indicates that confidentiality of data used for scientific research and protection of sensitive personal data must be balanced with the interests and guarantees related to transparency and access to documents of interest for the research society or for society as a whole.⁴⁴¹ Finding that the applicant had a negative right under Article 10 of the ECHR would impinge rights of the other researchers under Article 10 to receive information in the form of access to the public documents concerned. The refusal to deny access to the research material would hinder the free exchange of opinions and ideas on the research, especially on the evidence and methods used by the researchers in achieving their findings, which in the Gillberg case constituted the main subject of the researchers interest.

Accessibility of data necessary to perform an academic research is crucial for a researcher. It is not sufficient for a researcher to rely on information that is generally available or commonly known. In order to produce a research of high importance and quality researchers need “a robust and enforceable access to information.”⁴⁴² The freedom of information is considered as being inseparable from the constitutional freedom of science and research,⁴⁴³ which means that a person may not be hindered from seeking, receiving and imparting information and ideas. According to the Courts’ decisions, it seems that (in an academic context) the right to access information deserves a wider protection than a negative right information, i.e. refusal to deny access to information.

2.3.2.3. *A right to disseminate research results*

In *Carlo Albertini and Mario Montagnani v Joint Nuclear Research Centre and Commission of the European Communities*, the applicants, who were scientific officers at the

⁴⁴¹ *Ibid.*

⁴⁴² Jogchum Vrielink, Paul Lemmens, Stephen Parmentier and the League of European Research Universities (LERU) Working Group on Human Rights, *supra* note 3, 14.

⁴⁴³ *Constitution of the Republic of Lithuania*, Official Gazette (1992, no. 33-1014), art. 25(2).

Joint Research Centre, Ispra, were seeking annulment of the decision of a Head of Division.⁴⁴⁴ The applicants had asked their employer for permission to publish a paper which they had prepared with their colleagues and which was intended to be presented at the scientific conference. Before asking for permission, they had forwarded the paper to the organizers of the conference and had been accepted for presentation and publication. Subsequently, the applicants were informed their request had been denied by the Head of Division and they were denied permission to publish and to attend the conference. The applicants claimed that the denial of the right to publish a paper violated fundamental principles of the Community laid down in Article 2(a) of the Treaty establishing the European Atomic Energy Community (hereinafter EURATOM)⁴⁴⁵ and also the Staff Regulations established in the Centre.

The Court found that when rejecting the request, the Head of Division had expressed criticism in regard to the form and the substance of the paper, noticing that a major part of it was taken from another published research and observing that “unfortunately the only two pages which could give some substance to the paper are very poor.”⁴⁴⁶ Applicants were asked to withdraw the paper. The reasons for denying permission to attend the conference were that it was not profitable to send anyone to the conference and the conference was of no or little interest to the Centre. In regard to the Court’s judgment it is important to underline certain aspects.

First, although the applicants claimed a violation of Article 2(a) of EURATOM, the Court emphasized only the provisions of the Staff Regulations, and that demonstrates the importance of the employer’s obligation to establish appropriate internal regulation concerning academic freedom. Second, the only ground for the refusal to publish established in the Staff Regulation was prejudice to the interests of the Communities. The Court’s judgment suggests that the right to publish must be guaranteed if it is compatible with the interest of the Community. Two elements were considered essential in determining the compatibility with the interests of the Community. The first was the scientific value of a paper, as its assessment was deemed necessary to determine the effect of its publication on the scientific reputation of the institution.⁴⁴⁷ The second element was the competence of the body assessing the paper. Third, the employer has the full authority to allow staff to participate in the conference in their official capacity.

⁴⁴⁴ *Carlo Albertini and Mario Montagnani v. Joint Nuclear Research Centre and Commission of the European Communities*, Order of the President of the Court (1983, Case 338/82 R).

⁴⁴⁵ Art. 2: “In order to perform its task, the Community shall, as provided in this Treaty: (a) promote research and ensure the dissemination of technical information.”

Consolidated version of the Treaty establishing the European Atomic Energy Community, OJ C203/1, 7.6.2016.

⁴⁴⁶ *Carlo Albertini and Mario Montagnani v Joint Nuclear Research Centre and Commission of the European Communities*, *supra* note 444.

⁴⁴⁷ *Ibid.*

This case indicates the necessity to understand the importance of academic freedom as a right and as a responsibility. It is obvious that freedom of research and publication or academic freedom in general is not a license produce and disseminate research of bad or insufficient quality. It was already argued before that academics while enjoying academic freedom must adhere to the standards of their profession and must maintain produce quality research.

The Court also discussed the necessity to establish adequate internal institutional policies and rules for researchers. Any requirements or limitations for publications, participation in the conferences and other activities should be known to researchers. However, an institution's right to introduce certain restrictions cannot be unlimited. The assessment of the scientific value of a paper by an institution also raises certain doubts. Although it could be justified in this case because of a very specific research activity in the nuclear field, it would constitute an excessive limitation of freedom of research and publication in any regular HEI. The paper composed by the academics in this case had been subject to peer-review, accordingly there was no need for the institute to evaluate it again.

2.4. SEARCHING FOR LEGAL GROUNDS FOR THE PROTECTION OF ACADEMIC FREEDOM WITHIN THE HUMAN RIGHTS FRAMEWORK OF THE COUNCIL OF EUROPE

2.4.1. No explicit recognition of academic freedom in the European Convention on Human Rights

One of the most germane international documents to education is the European Convention on Human Rights, which was signed in Rome on 4 November 1950 and entered into force on 3 September 1953. It did not include an article on specifically on education, although it was considered to include on during the drafting phase of the Convention. The CoE intended to protect the right to education as it believed that “one of the most dangerous methods which was used by totalitarian movements, parties or Governments to subjugate a people, was the method of education”.⁴⁴⁸ The ECHR contains an article on freedom of thought which is also relevant to educational matters, Article 9 ECHR states “Everyone has the right to freedom of thought, conscience and religion ...”.⁴⁴⁹ However, it is argued that it is quite difficult to sustain a

⁴⁴⁸ Council of Europe, ECtHR, “Preparatory work on Article 2 of the Protocol to the Convention,” (May 1967) // [http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-P1-2-CDH\(67\)2-BIL2292567.pdf](http://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-P1-2-CDH(67)2-BIL2292567.pdf) (accessed June 10, 2016).

⁴⁴⁹ *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, *supra* note 439, art. 9.

successful application to the ECtHR which is grounded solely in this article.⁴⁵⁰ A specific provision on education was included in the First Protocol to the Convention, which came into force 18 May 1954. It reads:

*“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”*⁴⁵¹

When drafting its recommendation for the article on education, the Consultative Assembly of the CoE was considerably influenced by the Article 26 of the UDHR.⁴⁵² Although the provision is more oriented towards children’s right to and parents’ right and duty to education, however the views expressed in the preparatory works are significant to higher education as well. The idea expressed in Article 2 of the First Protocol to the Convention that “man is by nature an incomplete being, that the richest personality cannot incorporate all the spiritual wealth of humanity; that it is the multiplicity of temperaments and of attitudes to life, which are given to children in their youth, that form the wealth of humanity”⁴⁵³ is a stark statement against of educational totalitarianism and the imposition of doctrines and dogmas. It must rather be understood as an appeal for free enquiry.

Article 2 of the First Protocol to the ECHR emphasizes the liberal character of the right to education.⁴⁵⁴ The first sentence of the provision means that the State cannot interfere with an individual’s right to education by excluding that person from the benefit of state-provided educational opportunities.⁴⁵⁵ It is phrased in negative terms, as a prohibition to deny the right to education, however it is understood that Article 2 implies an obligation for the states to establish at least minimum of educational facilities, as, otherwise, the right to education would be rendered meaningless.⁴⁵⁶

A number of adopted recommendations and other documents discussed above underlines the importance of academic freedom in the activities of the CoE. Academic freedom is not explicitly mentioned in the ECHR. However, further analysis of the case law of the ECtHR will demonstrate that the issue of academic freedom was brought within the scope of the ECHR in a number of cases. It was already mentioned that according to the Commentary to the EU Charter,

⁴⁵⁰ Dymyna Glendenning, *Education and the Law* (UK: Bloomsbury Professional, 2012), 418.

⁴⁵¹ *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, *supra* note 435, art. 2 of Protocol no.1.

⁴⁵² Council of Europe, ECtHR, *supra* note 444.

⁴⁵³ Council of Europe, ECtHR, *supra* note 448.

⁴⁵⁴ EU Network of Independent Experts on Fundamental Rights, “Commentary of the Charter of Fundamental Rights of the European Union,” (June 2006) // http://ec.europa.eu/justice/fundamental-rights/files/networkcommentaryfinal_en.pdf (accessed June 10, 2016).

⁴⁵⁵ Donna Gomien, *Short Guide to the Convention on Human Rights* (Council of Europe Press, 1991), 100-101.

⁴⁵⁶ *Ibid*, 142.

academic freedom is primarily deduced from the rights to freedom of thought and expression and it may be subject to the limitations established by Article 10 of the ECHR. It is also argued that as the ECtHR case-law deals with cultural rights, covering issues such as artistic expression, access to culture, cultural identity, linguistic rights, education, cultural and natural heritage, historical truth and academic freedom. These areas are interconnected and sometimes it may be difficult to separate one from the other, especially as these cultural rights are all inferred from the right to freedom of expression.⁴⁵⁷ This shows the necessity to evaluate the extent of the protection of academic freedom by the ECtHR under Article 10.

2.4.2. The level of protection of academic freedom under the case-law of the ECtHR

2.4.2.1. Declarative reference to academic freedom

In *Sorguç v. Turkey*, the ECtHR for the first time⁴⁵⁸ expressly referred to academic freedom and implicitly to freedom of intramural speech. It is important to note that in particular this aspect, together with the freedom of extramural speech, did not receive any attention in the previously discussed documents of the CoE. For this reason, the Court's recognition of this element of academic freedom, albeit implicit, is of significant importance.

The case concerned a speech, delivered during a scientific conference by the applicant, Vehbi Doğan Sorguç, a university professor, about the progress of the work in his field of discipline.⁴⁵⁹ During the conference he also distributed a paper in which he criticized the procedure of the examinations for assistant professors in his university. He was arguing that the existing procedure leads to the selection of inadequately qualified assistant professors.

The applicant's colleague, an assistant professor, who had passed the contested examination, brought a civil action for compensation against the applicant, claiming that certain

⁴⁵⁷ European Court of Human Rights Research Division, "Cultural rights in the case-law of the European Court of Human Rights," (2011) // http://www.echr.coe.int/Documents/Research_report_cultural_rights_ENG.pdf (accessed June 10, 2016).

⁴⁵⁸ Although this case is recognized as the first explicit reference to academic freedom, it should be mentioned that a hint of freedom of academic expression within the case-law of the ECtHR could be identified earlier in *Başkaya and Okçuoglu v. Turkey* case which concerned the conviction for disseminating separatist propaganda. In 1991 the publishing house owned by one of the applicants published a book, an academic essay on the socio-economic development of Turkey, written by another applicant, a professor and journalist. The applicants were charged with disseminating propaganda against indivisibility of the State. The applicants were convicted and sentenced imprisonment. A professor was subsequently dismissed from his position as a lecturer. The ECtHR concluded that there had been an interference with the applicants' right to freedom of expression stating that it was little scope under Article 10 for restrictions on political speech or on debate on matters of public interest. The Court has stressed that the book contained an academic analysis and did not incite to violence. The Court also noted that "the domestic authorities had failed to have sufficient regard to the freedom of academic expression and to the public's right to be informed of a different perspective on the situation in south-east Turkey". *Başkaya and Okçuoglu v. Turkey*, ECtHR (Grand Chamber) (1999, Applications nos. 23536/94 and 24408/94).

⁴⁵⁹ *Sorguç v. Turkey*, *supra* note 155.

remarks used by the applicant in the paper constituted an attack on his reputation. The national court attached greater importance to the reputation of the associate professor than to the freedom of expression and ordered the applicant to pay compensation. However, the reasoning of the first instance court is worth mentioning. The court did recognize the importance of academic freedom by arguing that: “[i]f these statements were uttered by a press member or a lawyer, it would have been regarded as freedom of the press or the rights of the defense. If we hold that these remarks made by an academic were against the law, then this would be a breach of his constitutional rights, such as freedom of expression, dissemination of ideas (Article 26) and freedom of science and the arts (Article 27).”⁴⁶⁰ It shows that the court derives the protection of, as it is called, freedom of intramural speech from a combination of the constitutional rights, the right to freedom of expression and freedom of science.

Relying on Article 10 of the ECHR, the applicant complained that his right to freedom of expression had not been adequately protected under domestic law. It is important to note that he also based his complaint on his duty, as an academic, to inform the scientific community and the public at large about the shortcomings of the system of appointment and promotion of academics in the university. In accordance with the notion of academic freedom discussed in chapter one, the so called “academic governance speech” or the speech of faculty that does not involve disciplinary expertise but rather concerns the activities, policy, or staff of a faculty member’s home institution is identified as intramural speech,⁴⁶¹ and the applicant’s right can be clearly recognized as one of the elements of academic freedom.

This case is of significant value to the doctrine of academic freedom as the ECtHR has underlined the importance of academic freedom under Article 10 of the ECHR, stating that it “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.”⁴⁶² By doing so, the ECtHR referred to the Recommendation 1762(2006). The Court held that there had been a violation of Article 10, noting that the Turkish authorities had failed to strike a fair balance between the relevant interests.

Although the reference to the Recommendation 1762(2006) and the emphasis on academic freedom by the ECtHR is a huge step towards evolution of a concept of academic freedom, the case does not bring any more clarity in the sense of how important academic freedom is in a democratic society. The applicant was underlining, quite accurately, the necessity to recognize the basis of the duty academics have towards the academic community and society at large. It

⁴⁶⁰ *Ibid.*

⁴⁶¹ Matthew W. Finkin and Robert C. Post, *supra* note 4, 113.

⁴⁶² *Sorguç v. Turkey*, *supra* note 155.

clearly suggests a much wider meaning of the freedom of academic expression, reflecting both the right and the duty to discuss academic matters. However the ECtHR did not mention the fundamental role of academic character under the freedom of expression.

A concluding argument within the context of this case is that academic freedom under the case-law of the ECtHR covers:

- (1) freedom of intramural speech which concerns freedom to express opinions about both, the HEI and the higher education system;
- (2) freedom to distribute knowledge and truth without restriction which applies to freedom of teaching, freedom of research and freedom of publication.

Another case in which academic freedom was explicitly mentioned is *Sapan v Turkey*.⁴⁶³ In this case, a book, which partly reproduced a doctoral thesis, analyzed, in its first part, the emergence of stardom as a phenomenon in Turkey and, in its second part, focused on the very well-known pop-singer Tarkan. Upon a complaint by the singer, the Turkish courts ordered the seizure of the book and a ban of its distribution.

It is important to note that the ECtHR, when ruling that the seizure constituted a violation of Article 10 of the ECHR, among other aspects, also relied on the fact that the book was a partial reproduction of a doctoral thesis. The Court stressed the importance of academic freedom within reference to *Sorguç v. Turkey* and held that the author had addressed the social phenomenon of stardom and its appearance in Turkey by using scientific methods through the example of the singer Tarkan. Accordingly, the book could not be compared to the type of material published in the tabloid press or gossip magazines, which usually aim at satisfying the curiosity of the reader for the private lives of celebrities.⁴⁶⁴ The ECtHR ruled that the seizure of the book had amounted to an interference with the applicant's right to freedom of expression.

It is important to stress the fact that the ECtHR by acknowledging the substantial scientific value of the published material, recognized a wider scope of protection for freedom of academic expression than of other, not scientific exercise of freedom of expression. It is argued that in the context of this case, it is relatively safe to conclude that the ECtHR places academic freedom "more or less on the same level as the 'serious' press when it comes to determining the level of

⁴⁶³ *Sapan v. Turkey*, *supra* note 8.

⁴⁶⁴ European Court of Human Rights (Council of Europe), "Information Note on the Court's case-law," (June 2010, no. 131) // http://www.echr.coe.int/Documents/CLIN_2010_06_131_ENG_878693.pdf (accessed June 10, 2016).

protection it deserves.”⁴⁶⁵ Although the ECtHR tends to attach the highest value to political speech⁴⁶⁶, however, the *Sorguç* and *Sapan* cases show that the Court did not link the importance of academic freedom explicitly to a democratic society as it does for the freedom of the press.⁴⁶⁷ Accordingly, it can be argued that although the ECtHR mentioned the concept of academic freedom in *Sapan* case, it did not emphasize its importance in a wider sense and did not provide any conceptual precision. It is also not clear whether the reference to academic context was actually decisive in this case.

Another case of the ECtHR with a reference to academic freedom and to the Recommendation 1762(2006) is *Lombardi Vallauri v. Italy*.⁴⁶⁸ Luigi Lombardi Vallauri was teaching legal philosophy at the Faculty of Law of the Catholic University of the Sacred Heart for more than twenty years on renewable annual contracts. The Congregation for Catholic Education, an institution of the Holy See, informed the university that some of the applicant’s views were not compatible with Catholic doctrine and requested not to renew his employment contract, a request which the faculty council followed. Vallauri applied to the national courts arguing that the university’s decisions were unconstitutional as they breached his right to equality, freedom of instruction and freedom of religion. The application was rejected: neither the university, nor the domestic court gave any reasons of their own that would have substantiated the refusal of the application.

The ECtHR has observed that the faculty council did not provide adequate reasons for its decision, so it was not clear what the extent of the contested unorthodox opinions in his teaching activities was, and how his opinions might have affected the university’s interest in providing an education based on its own religious beliefs.⁴⁶⁹ The Court went on to observe that, although the domestic courts had limited their examination of the legality of the contested decision to the fact that the faculty council had noted the existence of a decision by the Congregation, thereby refusing to call into question the non-disclosure of the applicant’s allegedly unorthodox opinions, in the interest of the principle of adversarial debate, the domestic courts should have addressed the lack of reasons for the decisions of the faculty council. Thus, in conclusion, the Court considered that the university’s interest in providing teaching based on Catholic doctrine could not extend so far as to impair the very essence of the procedural safeguards inherent in

⁴⁶⁵ Stijn Smet, “Academic Freedom and the European Court of Human Rights,” (2010) // <https://strasbourgobservers.com/2010/07/22/academic-freedom-and-the-european-court-of-human-rights/> (accessed June 10, 2016).

⁴⁶⁶ “The objectively and subjectively political nature of the expression is irrefutable, which significantly narrows the margin of appreciation of the respondent State”.

Fáber v. Hungary, ECtHR (2nd section) (2012, Application no. 40721/08).

⁴⁶⁷ Stijn Smet, *supra* note 465.

⁴⁶⁸ *Lombardi Vallauri v. Italy*, ECtHR (2nd section) (2009, Application no. 39128/05).

⁴⁶⁹ European Court of Human Rights Research Division, *supra* note 457.

Article 10.⁴⁷⁰ The Court held that the applicant was deprived of the basic procedural rights associated with the right to free expression.

This case mainly adds to the body of case-law that mentions the concept of academic freedom without paying any substantial attention towards its fundamental function and mission in a democratic and knowledge based society. The case suggests that the freedom of teaching cannot be unduly restricted, however it stays unclear what the limit of this freedom is. Some doubts can be raised in regard to freedom of teaching in the context of this judgment. Having in mind that it was a Catholic University with a particular focus in teaching based on Catholic doctrine, certain requirements and limitations stemming from the Holy See could be considered as justifiable in order to fulfill their mission. A dissenting opinion in the case also stated that academic freedom as declared in the Recommendation 1762(2006) finds its limits in the interest of the Catholic University to provide education which is inspired by its religious convictions.⁴⁷¹ It is also argued that in the context of the *Lombardi Vallauri* case, the protection of academic freedom found by the ECtHR leads to a requirement to provide procedural safeguards for academics upon their dismissal.⁴⁷²

Summarizing this case it can be stressed that the ECtHR under the umbrella of academic freedom recognized the freedom of teaching and procedural safeguards for academics upon dismissal. The case also proves the necessity to recognize the fundamental value of academic freedom and its role in democratic and knowledge based society. In addition, it demonstrates the lack of conceptual clarity of academic freedom as in this case it was important not only to discuss the matter of freedom of teaching but also its possible limitations which, in this case, could have possibly been justified because of the specific function of the university. And this is directly related to the responsibility of this particular university to provide teaching based on Catholic doctrine with certain requirements and limitations stemming from the Holy See. That is the reason why it is important to recognize both sides of academic freedom, as a right of an individual professor which cannot be unduly restricted and as a responsibility of both, a university and a teacher, to provide teaching based on Catholic doctrine.

Another case of the ECtHR dealt with the issue of the finding a balance between the author's right to perform a research and the right to respect for private life. *Aksu v. Turkey* concerned the book entitled *The Gypsies of Turkey*, which was written by an associate professor and published by the Ministry of Culture in Turkey.⁴⁷³ The applicant filed a petition submitting that it contained statements that insulted, humiliated and debased Gypsies and requested to stop

⁴⁷⁰ *Ibid.*

⁴⁷¹ *Lombardi Vallauri v. Italy*, *supra* note 468.

⁴⁷² Debbie Sayers, *supra* note 413, 396.

⁴⁷³ *Aksu v. Turkey*, ECtHR (Grand Chamber) (2012, Applications nos. 4149/04 and 41029/04).

the sale of the book and to seize all copies. The applicant also brought proceedings in regard to dictionaries entitled *Turkish Dictionary for Pupils* and *Turkish dictionary* printed by the Turkish Language Association in which, according to the applicant, certain entries were insulting and discriminatory against the Turkish Roma/Gypsy community. The domestic courts refused to award compensation and the applicant therefore invoked Article 6 and Article 14 of the ECHR. The ECtHR examined the applicant's complaints under Article 14 (non-discrimination) taken in conjunction with Article 8 (rights of privacy) of the ECHR. The Court identified the Turkish Roma community as "a specific type of disadvantaged and vulnerable minority"⁴⁷⁴ which calls for special protection.

In *Aksu* the applicant's right under Article 8 of the ECtHR to "respect for his private life", as a member of the Roma community had to be balanced against the right of the author of the book to perform academic/scientific research and to publish the results. The Court agreed with the decisions of the domestic courts that importance should be attached to the fact that the book was written by an academic, it was an academic study based on scientific research and, except for certain remarks on illegal activities of the Roma community, the book did not contain negative remarks about the Turkish Roma population in general. According to the Court, it was therefore consistent with its case-law "to submit to careful scrutiny any restrictions on the freedom of academics to carry out research and to publish their findings".⁴⁷⁵ In regard to the dictionaries, the Court noted that they both contained definitions which were prefaced with the comment that the terms were of a metaphorical nature. Accordingly, it found that the applicant's right for private life was not violated.

The ECtHR, when deciding the case, has evaluated the academic context, i.e. the fact that the book was written by an academic, that the book was considered as an academic work, and that academic works are considered to be of particular importance. The latter element was mentioned with reference to *Sorguç* and *Sapan*. However, just as these cases, the Court did not provide any further clarifications what freedom of research and publication entails, and whether there are any limits to this right. The Court also did not create a nexus between the fundamental value of academic freedom, or in this case freedom of research and publication, and the notion of a democratic and knowledge based society.

All analyzed cases demonstrate the same tendency. It seems that the ECtHR recognizes the concept of academic freedom or its separate elements by mentioning them or by paying attention to academic context in the respective case, however it does not develop a more detailed

⁴⁷⁴ *Ibid.*

⁴⁷⁵ *Ibid.*

approach and does not provide a strong fundamental basis for the protection of academic freedom as a human right.

2.4.2.2. *Academic freedom or freedom of expression: What difference does it make?*

The relationship of academic freedom with the other human rights, and in particular with the right to freedom of expression has already been mentioned a number of times in this research. The case-law discussed so far also showed that the ECtHR addressed academic freedom, freedom of research and publication, freedom of teaching or simply an “academic context” under the scope of Article 10. Sometimes it has been argued that there is no need to grant academics with a higher level of civil liberties for the same behavior than other persons, as the fundamental prevailing principle is that the same law applies equally to everyone.⁴⁷⁶ Some scholars argue that a restriction of freedom of expression automatically restricts academic freedom, except if a special freedom is granted to academics which is not given to others.⁴⁷⁷ On the contrary, restrictions on academic freedom influence academics’ freedom in the public debate.⁴⁷⁸ The question has repeatedly been asked whether “the incidental protection of academic freedom through the general instruments of human rights [is] sufficient?”⁴⁷⁹ With the analysis of the case-law of the ECtHR it was attempted to identify whether there is a difference whether academic freedom or freedom of expression is protected.

In *Cox v. Turkey*⁴⁸⁰ the ECtHR mainly addressed the issue of freedom of expression, however the case is also worth considering in regard to academic freedom. The applicant, an American lecturer, was teaching a number of years in Turkish universities. She had had discussions with her students and colleagues and expressed opinions during her lectures and also publicly on the politically sensitive issues concerning Kurdish and Armenian history. The applicant was expelled from Turkey and was denied a routine visa to re-enter the country due to her “separatist activities, which were incompatible with national security.”⁴⁸¹

According to the facts, the following aspects should be underlined:

- (1) she was a university lecturer;

⁴⁷⁶ Ronald B. Standler, *supra* note 38.

⁴⁷⁷ Terence Karran, “Academic Freedom: In Justification of a Universal Idea,” *Studies in Higher Education* Vol. 34, No. 3 (May 2009): 265 // DOI: 10.1080/03075070802597036.

⁴⁷⁸ *Ibid.*, 266.

⁴⁷⁹ CEPES Papers on Higher Education, *supra* note 209.

⁴⁸⁰ *Cox v. Turkey*, ECtHR (2nd section) (2010, Application no. 2933/03).

⁴⁸¹ *Ibid.*

- (2) the discussions took place in the classroom, with colleagues at the university and publicly;
- (3) because of her opinion and activities her contract of employment had been annulled, she had been expelled and banned from re-entering Turkey.

Some scholars argue that this case is directly related to academic mobility.⁴⁸² And although the proceedings asking for the ban to be lifted were brought in the national courts, the question could be raised what actually constitutes the concept of “academic mobility”. The ECtHR observed that although “the right of a foreigner to enter or remain in a country is not as such guaranteed by the Convention, immigration controls must be exercised consistently with Convention obligations”.⁴⁸³ It raises doubts whether the Court would consider academic mobility somehow differently than somebody else’s mobility. And also what particular circumstances lead to defining mobility as academic. Whether the mere fact that the applicant was a university lecturer is sufficient, or whether an infringement of academic mobility in the stricter sense should be required.

Similar uncertainties can be also raised in regard to academic freedom. The three aspects identified above suggest that the case is a clear example of a violation of academic freedom. At the same time it raises certain doubts. The facts show that the applicant was discussing politically sensitive issues in the classroom. It could be argued that such an activity deserves protection as it is protected under the right to freedom of teaching. Yet, as discussed in chapter one, the scope of freedom of teaching, although it extends to bringing controversial matters into the classroom, only applies when such matters are “germane to the subject matter”.⁴⁸⁴ And on the contrary, academics do not possess a right to introduce into their teaching “controversial matter which has no relation to their subject”.⁴⁸⁵ The “germane to the subject matter” standard should be applied in cases when the lecturer’s conduct can be seen as “appropriate to further a pedagogical purpose”.⁴⁸⁶ However, it should be noted that in some cases it might be very difficult to draw a clear line between pedagogy and indoctrination or, for example, creation of a hostile environment.

The facts of the case do not disclose what subject the applicant was teaching and whether the politically sensitive issues she discussed were related to it. So it is not clear whether her freedom of teaching could have been protected or whether the introduction of controversial

⁴⁸² Klaus Deiter Beiter, *supra* note 328, 255.

⁴⁸³ *Cox v. Turkey*, *supra* note 480.

⁴⁸⁴ Donna R. Euben, *supra* note 71.

⁴⁸⁵ American Association of University Professors, *supra* note 152.

⁴⁸⁶ *Kracunas v. Iona College*, U.S. Court of Appeals, Second Circuit (1997, 119 F.3d 80).

matters in the classroom would have fallen out of the scope of freedom of teaching. In any way, this case is a good example of the relation between the freedom of expression and the freedom of teaching. If we say that a lecturer in the classroom discussed issues which were not related to her teaching subject, it can be concluded that the freedom of teaching was not applicable here. However, as it is apparent from the case, the freedom of expression remains applicable. This is the reason why it is important to apply an academic context when protecting freedom of expression. Chapter one has demonstrated that the classroom should not be used for political indoctrination. Although lecturers should not be discouraged from introducing controversial matters, they should avoid to introduce material which has no relation to their subject matter. Accordingly the speech of professors in the classroom should be protected under the freedom of expression only if the speech is germane to the subject matter. That shows that in some cases the freedom of expression within an academic context should receive a narrower application.

Altering the facts of the case, let us assume that the issues discussed in the classroom, although politically sensitive and controversial, were germane to the teaching subject matter. In this case both, the right to freedom of expression and the right to freedom of teaching, would be applicable. However, let us further assume that the ECtHR found that the interference with the applicant's right to freedom of expression cannot be justified as being 'necessary in a democratic society'. It can be argued that under such circumstances the recognition of the right to academic freedom is significant. The Court should recognize not only the right itself but also its fundamental value to a democratic society which is based on the idea that "teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding".⁴⁸⁷ Accordingly, it should lead to a particularly strong protection of freedom of expression within the academic context. However this case demonstrates that the ECtHR did not elaborate on the "academic context" and limited its judgment only to an analysis of the right to freedom of expression.

The ECtHR found that the ban imposed amounted to an interference with her freedom of expression. The Court considered "that the ban on the applicant's re-entry is materially related to her right to freedom of expression because it disregards the fact that Article 10 rights are enshrined 'regardless of frontiers' and that no distinction can be drawn between the protected freedom of expression of nationals and that of foreigners."⁴⁸⁸ The scope of Article 10 of the ECHR includes the right to impart information. The applicant was prohibited from re-entering the country on grounds of her previously expressed opinions and, as a result, was no longer able to impart information and ideas in Turkey. The ECtHR concluded that the applicant's right

⁴⁸⁷ *Sweezy v. New Hampshire*, *supra* note 273.

⁴⁸⁸ *Ibid.*

guaranteed by Article 10 of the ECHR had been violated. Further, the Court considered whether that interference could be justified as being ‘necessary in a democratic society’ under Article 10(2). It pointed out that “freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment.”⁴⁸⁹ The Court reiterated that Article 10(2) is applicable not only to favorably received or inoffensive “information” or “ideas”, but also to those that offend, shock or disturb, as these are the demands of pluralism, tolerance and broadmindedness, without which there is no “democratic society”.⁴⁹⁰ The Court concluded that the applicant was not shown to have been engaged in activities that could be seen as harmful to the state and the ban on the applicant’s re-entry to the country was designed to restrain her freedom of expression.

Further continuing on the subject of academic freedom in the context of this case, there is another aspect that should be mentioned. The applicant was discussing politically sensitive issues not only in the classroom but also in public, although the Court did not draw a distinction between both types of speech. Such activity can be clearly identified as extramural speech or extramural expression. As discussed in the first chapter, extramural speech refers to speech made by academics in their capacity as citizens and not as officers of HEIs and on the matters of public concern that are not related to their expertise or institutional affiliation.⁴⁹¹ It was also discussed that because of their special position members of academic community should be aware that the public might judge their profession and their institution by their activities and expression. This requires academics to be accurate, to exercise appropriate restraint, and to show respect for the opinions of others.⁴⁹² This further suggests that in relation to their extramural activities, academics may enjoy a wider margin of appreciation for their freedom of expression than for their freedom of extramural speech. As in the latter case it would be necessary to keep in mind that academics bear the burden of being representatives of the academic profession and, accordingly, they are bound by obligations which must be regarded in the light of their responsibilities to their subject, to their students, to their profession, and to their institution. If we say that freedom of expression, and not freedom of extramural speech, is applicable here, then it remains unclear whether the Court should take into consideration the compatibility of the expression in the light of academic responsibilities towards the profession and institution. Such complexity of issues arising from academic freedom claims suggests that it could be one of the reasons why the applicants and the ECtHR are so reluctant to include them into their claims and judgments.

⁴⁸⁹ *Ibid.*

⁴⁹⁰ *Ibid.*

⁴⁹¹ Matthew W. Finkin and Robert C. Post, *supra* note 4, 127.

⁴⁹² American Association of University Professors, *supra* note 152.

Another case is *Boldea v. Romania*, which concerned a complaint against the applicant alleging defamation. The case exclusively addressed the issue of freedom of expression. However, the case can be clearly recognized as an example of a violation of the freedom of intramural speech.⁴⁹³

The applicant was a university lecturer. At his department meeting members of the teaching staff expressed their dissatisfaction in regard to the scientific quality of publications. The question of plagiarism was raised in regard to publications of a few members of the teaching staff. The applicant was the only one who considered unreservedly that the publications in question amounted to plagiarism. The authors of the publications in question received a verbal warning, however their publications were not classified as plagiarism, but were only held to constitute works of scientific reference.⁴⁹⁴ The authors of the publications brought proceedings for defamation and the applicant was ordered to pay an administrative fine. The applicant complained that his penalty for defamation had infringed his right to freedom of expression as guaranteed by Article 10.

It can be argued here that the above given facts correspond to the intramural utterances of academics and can be identified as an infringement of freedom of intramural speech. Intramural utterances can be defined as such, which take place within the university or academic context in pursuit of teaching and research excellence.⁴⁹⁵ It was also argued that intramural speech is the speech of faculty that does not involve disciplinary expertise but rather concerns the action, policy, or staff of a faculty member's home institution.⁴⁹⁶ In the context of this case, there are all elements which are required to declare the activity of the applicant as intramural utterances: (1) he was an academic; (2) his statement was made in the teaching staff meeting at the university; (3) his statement concerned the quality of publications, in particular the issue of plagiarism.

The ECtHR held that there had been a violation of Article 10, considering that the national authorities had not given relevant and sufficient reasons to justify ordering the applicant to pay a fine and that this sanction had not met a 'pressing social need'.⁴⁹⁷ The Court brought the following arguments: (1) the seriousness of allegations of plagiarism towards the colleagues; (2) the allegations had a factual basis; (3) the applicant acted in good faith and allegations "had not

⁴⁹³ *Boldea v. Romania*, ECtHR (3rd section) (2007, Application no. 19997/02).

⁴⁹⁴ ECtHR Press release issued by the Registrar, "Chamber judgment *Boldea v. Romania*," // <https://wcd.coe.int/ViewDoc.jsp?p=&id=1095869&Site=COE&direct=true> (accessed June 10, 2016).

⁴⁹⁵ Jogchum Vrielink, Paul Lemmens, Stephen Parmentier and the League of European Research Universities (LERU) Working Group on Human Rights, *supra* note 3, 18.

⁴⁹⁶ Matthew W. Finkin and Robert C. Post, *supra* note 4, 113.

⁴⁹⁷ ECtHR, "Factsheet - Protection of Reputation," (May 2016) // http://www.echr.coe.int/Documents/FS_Reputation_ENG.pdf (accessed June 10, 2016).

been designed to fuel a smear campaign against the colleagues”;⁴⁹⁸ (4) the authors received a verbal warning.

A few important aspects can be identified from the Court’s judgment. First, it seems that the Court here settles certain limits to freedom of expression stating that it deserves protection if such serious allegations have a factual basis. Alongside, it raises the question whether academic freedom would justify such critique without a well-founded basis. Having in mind the wider aim of such critique, it could be argued that speech which promotes critical inquiry, scholarly debate and contributes to teaching and research excellence should be protected. It must be stressed that intramural speech covers issues related not only to one’s disciplinary expertise, but academics are free to express their opinions and criticism on matters that relate to teaching, research, HEIs, the higher education system and matters that are out of the scope of their professional expertise. Accordingly, it can be argued that academics must enjoy freedom of intramural speech expressing their opinion and raising concerns on issues even if they are not fully aware of the facts that could support such claim.

Second, the enjoyment of this freedom does not exempt academics from performing professional responsibilities. The Court’s note on the seriousness of allegations of plagiarism towards the colleagues and the note on absence of intent to discredit the colleagues must be taken into account. Although academics must be free to express their criticism without fear of jeopardizing their employment relationships, the enjoyment of this freedom cannot interfere with the standards of academic ethics and respect towards colleagues. Disrespectful behavior or intentional defamation does not deserve protection under the freedom of intramural speech.

Third, the Court notes that the authors received a verbal warning and it actually adds to the fact that allegations had not been unfounded. However, the members of academic community should not be restricted to raise freely and without reservations only such concerns that have a well-founded factual basis. If an academic has doubts in regard to the quality or academic level of a colleague’s work, he should be free to address such concerns within the institution.

It can be concluded that this case, similarly to the previously discussed constitutes a clear example of the necessity to recognize the differences between the protection of freedom of expression and academic freedom. And even if the case is brought under the violation of freedom of expression, the academic context must be evaluated.

In *Hertel v. Switzerland* the ECtHR upheld the right of a researcher who carried out a study of the effects on human beings of the consumption of food prepared in microwave ovens and published a controversial paper. It included the statement that “[t]he measurable effects on human beings of food treated with microwaves, as opposed to food not so treated, include

⁴⁹⁸ ECtHR Press release issued by the Registrar, *supra* note 494.

changes in the blood which appear to indicate the initial stage of a pathological process such as occurs at the start of a cancerous condition.”⁴⁹⁹ Upon a request by the Swiss Association of Manufacturers and Suppliers of Household Electrical Appliances domestic courts prohibited Hertel from using statements that food prepared in microwave ovens was dangerous for the health of consumers and from using, in publications and public speeches on microwave ovens, the image of death.

The domestic courts noted that scientific freedom does not justify the publication (especially in non-specialist periodicals) of research results that are misleading or lack a scientific basis, and which do not provide conclusions with certainty. It was stressed that it is essential to determine how a scientific opinion is communicated when research findings and the resulting knowledge are still inconclusive; for example such research which is based on surveys that are based on relatively small statistical samples. It was argued that the publication overstepped the acceptable limits, acting unnecessarily woundingly, misled the intended readership and could improperly affect the competition. In cases when scientific data is used for positive or negative advertising, it must reflect established scientific knowledge, otherwise the advertising must clearly underline the existence of differing opinions. According to the courts’ opinion, scientific freedom allows to freely expound the results in the academic sphere, however in the case of market competition, absolute truth can not be claimed if the scientific results used to support that claim are disputed.

The ECHR noted that “the effect of the injunction was thus partly to censor the applicant’s work and substantially to reduce his ability to put forward in public views which have their place in a public debate whose existence cannot be denied. It matters little that his opinion is a minority one and may appear to be devoid of merit since, in a sphere in which it is unlikely that any certainty exists, it would be particularly unreasonable to restrict freedom of expression only to generally accepted ideas.”⁵⁰⁰ The Court reached the conclusion that Article 10 of the ECHR was violated.

This case demonstrates one of the most important aspects of academic freedom. As discussed in chapter one, its fundamental function is to grant freedom to deviate from and to question generally accepted beliefs, to introduce experimentation and speculation in the classroom, research and publication. *Hertel* underlines the importance of recognizing academic freedom as an individual human right with its particular limitations in regard to professional responsibility.

⁴⁹⁹ *Hertel v. Switzerland*, *supra* note 236.

⁵⁰⁰ *Hertel v. Switzerland*, *supra* note 236.

The cases analyzed here show that there is a difference whether the right to freedom of expression or the right to academic freedom is protected. They also demonstrated that, although in general academic freedom deserves a wider protection than freedom of expression, in some cases it is on the opposite. Therefore, it is important to apply an academic context when discussing the protecting under Article 10 ECHR in relation to activities related to academia in the wider sense.

2.4.2.3. The different elements of academic freedom in the case law of ECtHR

As it was already noted, the analysis of the case-law of the ECtHR demonstrates a lack of conceptual clarity of academic freedom and precision in regard to whether academic context has any significant influence on the Court's decisions. It can be also noted that the analyzed case-law is usually limited in its respective analysis to one or another academic aspect, or elements of academic context. However, it does not elaborate on different elements of academic freedom simultaneously. It can be argued that one of the reasons could be the difficulties that arise when distinguishing the separate elements. One of the examples of recognition of specific elements of academic freedom, is the case *Mustafa Erdoğan and Others v. Turkey* which concerned academic criticism of Turkish judges for dissolving a political party.⁵⁰¹

Mustafa Erdoğan, a university professor, published an article in an academic law journal, criticizing a decision of the Turkish Constitutional Court to dissolve a political party. The applicant questioned whether the conditions for dissolving the political party were met. The article also included statements on the professional competence and the impartiality of the majority of judges. Members of the Constitutional Court brought civil actions against the applicant and the editor, claiming that the article was a serious personal attack on their honor and integrity. The domestic courts held that expressions constituted defamation of the judges. The ECtHR held that the conviction violated the professor's right to freedom of expression. The Court also emphasized the importance of academic freedom as: (1) the article was written by a professor; (2) and it was published in an academic journal.

With reference to Recommendation 1762(2006) the Court noted that it is important to submit to careful scrutiny any restrictions on the freedom of research and publication. Furthermore, it observed that academic freedom 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

⁵⁰¹ *Mustafa Erdoğan and Others v. Turkey*, ECtHR (2nd section) (2014, Applications nos. 346/04 and 39779/04).

functioning of public institutions in a given political system, and a criticism thereof.”⁵⁰² This underlines that the ECtHR definitely recognizes freedom of research and freedom of publication as constituent elements of academic freedom.

The following observations by the Court show a huge step forward the evolution of academic freedom doctrine. It was indicated that an article written by an academic on an important and topical issue in a democratic society contributes to the fulfillment of the public’s legitimate interest to be informed and to a debate of general interest. The Court’s observation that an article was published in a quasi-academic quarterly as opposed to publication in a popular newspaper indicates that academic context deserves wider appreciation. The Court agreed that the article expressed the impugned and harsh remarks, which could be perceived as offensive. However, they were mainly value judgments, expressed by the applicant based on his own political and legal opinions and perceptions. Thus, they could not be construed as “a gratuitous personal attack against the claimants.”⁵⁰³ The Court observed that a clear distinction must be made between criticism and insult, and that an appropriate sanction in case of the sole intent to insult would not constitute a violation of Article 10. This idea corresponds to one of the fundamental principles of academic freedom doctrine, which states that academics should be loyal to the truth no matter where it may lead and whoever it may offend, and that academic freedom must be preserved as a tool invoked by academics to justify their potentially offending statements.⁵⁰⁴

In addition to the main judgment, special attention must be paid to a joint concurring opinion of three judges, as it addresses the meaning of academic freedom as a legal concept. It argues that academic freedom is not limited to debates in scholarly journals, academic settings and teaching. Interestingly the Court noted that academic freedom is protected under Article 10, which guarantees the freedom of expression in its different forms, including “extramural speech, which embraces not only academics’ mutual exchange (in various forms) of opinions on matters of academic interest, but also their addresses to the general public – of which, by the way, academics themselves are also part.”⁵⁰⁵ It can be seen here that the three judges introduce the concept of “extramural speech” and apply it under given circumstance differently than our suggested concept of “extramural speech”.

In chapter one it was already discussed that the prevailing theory of extramural speech refers to speech made by academics in their capacity as citizens on matters of public concern that are not related to their expertise or institutional affiliation. The facts in this case show that:

⁵⁰² *Mustafa Erdoğan and Others v. Turkey*, *supra* note 501.

⁵⁰³ *Ibid.*

⁵⁰⁴ Ronald B. Standler, *supra* note 38.

⁵⁰⁵ *Mustafa Erdoğan and Others v. Turkey*, *supra* note 501.

(1) the applicant acted as a university professor; (2) an article was published in an academic journal; and (3) his expressed opinion was within his professional expertise which is constitutional law. It suggests that such activities fall within the scope of freedom of research and publication rather than freedom of extramural speech. However, it should not be forgotten that in this case the applicant was criticizing a public institution and expressed his opinion not only on a legal matter but also on the professional competence and the impartiality of the judges. This fact taken alone corresponds to the essence of freedom of extramural speech, as it is aimed to ensure freedom from institutional censorship or discipline when expressing views and opinions on the matters of public concern. However, the Court did not apply such distinction in this case and it was not a question of disciplinary proceedings brought by university against the applicant but rather civil actions brought by the judges.

Let us, furthermore, as a variation of the true facts of the case, assume that such article was published by an academic having professional expertise in a different area than that covered by the publication. Let us further assume that an article was published not in an academic journal. Would, in this scenario, an academic be granted the same amount of academic freedom or would this fall within the scope of the right to freedom of expression outside an academic context? It remains unclear what are the principal grounds for a possible claim of violation of academic freedom, i.e. what counts as necessary to bring an activity within such context. How many of the elements of academic context would be sufficient? It can be argued that according to the Court's judgment, academic freedom does not cover the freedom of extramural speech in the form which was suggested as prevailing in chapter one.

Erdoğan clearly demonstrates the absence of a consistent understanding of the separate elements of academic freedom. It is nevertheless significant to develop an understanding of the development of a conceptual clarity of academic freedom in general. It may also serve as an argument to justify that in the case of interference with freedom of expression the Court should evaluate academic context rather than identify and apply the precise element of academic freedom.

Wille v. Liechtenstein can serve as another example. The applicant, president of the administrative court, gave a public lecture at a research institute on questions of constitutional jurisdiction and fundamental rights.⁵⁰⁶ He expressed the view that the Liechtenstein Constitutional Court was competent to decide on the interpretation of the Constitution in case of disagreement between the Prince (government) and the Diet (Landtag, Parliament). His opinion expressed at the institute was also published in an article in a local newspaper. The Prince addressed a letter to the applicant, expressing his disagreement with such interpretation of the

⁵⁰⁶ *Wille v. Liechtenstein*, ECtHR (Grand Chamber) (1999, Application no. 28396/95).

constitutional competence and declaring his intention not to reappoint the judge as president of the Administrative Court. The applicant complained that this constituted a breach of his right to freedom of expression. With the given facts, it is not entirely clear which of the elements of academic freedom should apply here.

According to the facts, the following aspects should be underlined:

- (1) the applicant was a judge;
- (2) a public lecture was given on questions of constitutional jurisdiction and fundamental rights;
- (3) the lecture took place at a research institute;
- (4) the applicant's opinion was also published in an article in the newspaper.

As a preliminary remark, notwithstanding an important one, could easily be that academic freedom is not applicable here as the applicant was not an academic in the first place. Accordingly, the ECtHR noted that the intention to sanction the applicant constituted "a reprimand for the previous exercise by the applicant of his right to freedom of expression and, moreover, had a chilling effect on the exercise by the applicant of his freedom of expression, as it was likely to discourage him from making statements of that kind in the future."⁵⁰⁷ It could be argued that this case demonstrates a clear interference with the applicant's right to freedom of expression and there is no need to evaluate academic context.

However, the Court further observed that the lecture was a part of a series of academic lectures at a research institute. During the lecture, the applicant was giving academic comments on a legal subject. Accordingly, the assessment of the academic context raises some additional questions, for example: what effect it had to the Court's decision and whether the academic context could be applied to cases of an interference with the right to freedom of expression which are brought by non-academics? Furthermore, what elements of academic freedom should be applicable here, whether the discussed utterances can be recognized as freedom of teaching, freedom of publication or rather as freedom of extramural speech? It is not so important to identify precisely which element of academic freedom is applicable in this case as the facts of the case as reported do not provide sufficient details in regard to the "academic lecture" in question to enable us to make this assessment. It is more important to demonstrate that due to the overly narrow limits between separate elements it may sometimes not be possible, excessively burdensome or even preposterous to make this rather artificial distinction. Therefore, the application of an academic context in general rather than the identification of a specific element of academic freedom may be more reasonable and, hence, preferable.

⁵⁰⁷ *Ibid.*

It seems that for the Court, according to the facts of this case, the sole fact that the opinion was expressed in an “academic lecture” is sufficient to establish an academic context. In addition, the supporting argument for “academic lecture” can be also found in the passage of the judgment in which the Court agreed that the given lecture, because of its specific subject matter, inevitably had political implications. However, the Court stressed that such implications alone should not have prevented the applicant from making statements of such matter. Moreover, the Court observed that there is no evidence that the applicant’s lecture contained “any remarks on pending cases, severe criticism of persons or public institutions or insults of high officials or the Prince.”⁵⁰⁸ The Court ruled that even allowing for a certain margin of appreciation, the Prince’s action was disproportionate to the aim pursued.

The Court’s arguments indicate that it has developed a quite similar idea to ours of freedom of teaching, as it argued that it covers “controversial or unpopular opinions”.⁵⁰⁹ However, at the same time, this freedom requires some professional responsibilities, such as avoiding to create a confrontational learning environment or intruding tendentious political or ideological commentaries and imposing personal opinions, as such academic practices may constitute indoctrination. Although the facts of the case suggested that it was an academic lecture, it could also qualify as an extramural expression, considering in mind that it was given by a judge on questions of the competence of the Constitutional Court supposedly within a political context.

In conclusion, both cases judgments display certain difficulties in identifying and applying separate elements of academic freedom. For this reason it can be argued that in order to ensure adequate protection of academic freedom as a human right, its conceptual clarity is needed first of all in regard to its basic elements. It is needed not necessarily for their individual application, but at least for an appropriate application of an academic context.

2.4.2.4. Academic freedom v. freedom of expression: what is the applicable test?

The necessity to bring more conceptual clarity in regard to academic freedom and its application was recognized by the ECtHR as well. It should be noted that the judges of the concurring opinion in *Mustafa Erdoğan and Others v. Turkey* agreed that the meaning, rationale and scope of academic freedom are not obvious, as the legal concept of that freedom is not

⁵⁰⁸ *Ibid.*

⁵⁰⁹ *Education Reform Act 1988, supra* note 279, Section 202(2)(a).

settled.⁵¹⁰ By discussing the relation between academic freedom and institutional autonomy, they created even more uncertainty. For example, it is not clear what is meant by the concept “scholars’ institutional autonomy”⁵¹¹ which is considered by the judges as meaningful only if scholars enjoy personal freedom.

Another important observation was made in regard to the justification of extramural speech.⁵¹² The Court, with reference to the Recommendation on the responsibility of public authorities for academic freedom and institutional autonomy (hereinafter Recommendation CM/Rec(2012)7)⁵¹³, observed that it would be superficial to find a justification of extramural speech only in a general reference to the needs of a democratic society which is the typical justification accepted for freedom of expression in the Court’s case-law. The Court noted a convincing justification for disputed extramural speech should include a consideration of “the need to communicate ideas, which is protected for the sake of the advancement of learning, knowledge and science.”⁵¹⁴ That highlights a broader mission for higher education. The Court further observed that there can be no democratic society without free science and free scholars, and that extramural utterances that are based on scholars’ research, professional expertise and competence serve the public interest.⁵¹⁵ As a result of this observation, the Court granted the highest level of protection under Article 10 to scientists’ judgments, which, as noted before, are of value no less than those of fact, and which express views and opinions on matters belonging to the area of their research, professional expertise and competence.⁵¹⁶ The Court, referring to Recommendation R(2000)12 of the Committee of Ministers to member States on the social sciences and the challenge of transition⁵¹⁷, stressed that to express such an opinion by its nature plays “a strategic role in guaranteeing an informed public and in building a society based on democracy”.⁵¹⁸ That highly contributes to the previously raised idea of the necessity to recognize the fundamental value of academic freedom and its role in a democratic and knowledge based society which, as idea that was missing in previous cases.

⁵¹⁰ *Ibid.*

⁵¹¹ *Mustafa Erdoğan and Others v. Turkey*, *supra* note 501.

⁵¹² Extramural speech is discussed here as it is understood by the Court, i.e. “which embraces not only academics’ mutual exchange (in various forms) of opinions on matters of academic interest, but also their addresses to the general public – of which, by the way, academics themselves are also part.” According to our research it should be called research and publication rather than extramural speech. *Mustafa Erdoğan and Others v. Turkey*, *supra* note 501.

⁵¹³ *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*, Council of Europe (Adopted by the Committee of Ministers on 20 June 2012 at the 1146th meeting of the Ministers’ Deputies). The document will be analyzed in more detail in chapter 3.

⁵¹⁴ *Mustafa Erdoğan and Others v. Turkey*, *supra* note 501.

⁵¹⁵ *Ibid.*

⁵¹⁶ *Ibid.*

⁵¹⁷ *Recommendation R(2000)12 of the Committee of Ministers to member States on the social sciences and the challenge of transition*, Council of Europe (Adopted by the Committee of Ministers in 2000).

⁵¹⁸ *Mustafa Erdoğan and Others v. Turkey*, *supra* note 501.

The concurring opinion in *Erdoğan* is also of significant value for elaborating on the relation between academic freedom and freedom of expression. The Court has noted that academic freedom, being a broader concept, transcends the scope of Article 10 in certain areas.⁵¹⁹ It underlined that a public comment or utterance on any subject, irrespective of who has expressed it, does not need to have an “academic element” or, as it is called here, “academic context” in order to be protected under Article 10.⁵²⁰ However, the judges stressed that an “academic element” in a comment or utterance in question may be decisive in concluding whether a particular speech, which otherwise would constitute an unlawful infringement of personal rights, is protected under Article 10.⁵²¹

Considering whether academic freedom and not only freedom of expression as an “umbrella concept”, has been infringed upon, an applicable test to decide whether the speech has an “academic element” was suggested to determine:

- (1) *whether the person making the speech can be considered an academic;*
- (2) *whether that person’s public comments or utterances fall within the sphere of his or her research;*
- (3) *whether that person’s statements amount to conclusions or opinions based on his or her professional expertise and competence.*⁵²²

These conditions were identified as the most important when deciding whether a particular speech has an academic context. Additional factors, such as where and how, i.e. in what form, to who was the speech disseminated are secondary, auxiliary and often not decisive. Accordingly, if the conditions suggested in the test are met, the speech should enjoy the utmost protection under Article 10.

Returning to the facts of *Erdoğan*, it was observed that a justification of “strong and harsh remarks [...] with respect to the judges of the Constitutional Court” should have not been the fact that the article was published in a quasi-academic journal, but the fact that value judgments of the applicant, as an academic with professional expertise in the field of constitutional law, were part of an explanatory opinion based on scholarly analysis. In addition, it was also noted that it was an informed opinion and it is must not necessarily be factually correct but be research- and fact-related. Strong support for academic freedom can also be found in the fact that the offensive speech was directed towards judges of the Constitutional Court as the case-

⁵¹⁹ Unfortunately, the Court did not elaborate more on this matter as noted that it is irrelevant to the present case.

⁵²⁰ *Ibid.*

⁵²¹ *Ibid.*

⁵²² *Ibid.*

law of the ECtHR recognizes that “the courts – the guarantors of justice, whose role is fundamental in a State based on the rule of law – must enjoy public confidence; and it may therefore prove necessary to protect judges from offensive and abusive verbal attacks”.⁵²³

Summarizing the present case, two very important aspects should be highlighted: first, the recognition of the wider role of academic freedom in a democratic society and second, the establishment of an applicable test, as a tool for assessing violations of academic freedom. However, none of these aspects is reflected in more recent case-law of the ECtHR. The Court continues to take a traditional approach to evaluating academic context, and it fails to mention the role of academic freedom and to develop a more elaborate test.

For example, in *Kharlamov v. Russia*,⁵²⁴ the Court stated that the domestic courts had failed to take into account the specific features of academic relations and that they failed to strike a balance between the need to protect the university’s reputation and the applicant’s freedom of expression in an academic context. The only more valuable aspect in regard to the development of academic freedom doctrine is recognition of freedom of intramural speech, stating that the concept of academic autonomy encompasses “academics’ freedom to express their opinion about the institution or system in which they work.”⁵²⁵ The Court also noted that engaging in debates of this nature, employees have recourse to exaggerations as long as they do not overstep the limits of admissible criticism. The Court decided that in the present case the applicant had not resorted to offensive and intemperate language.

⁵²³ See *De Haes and Gijssels v. Belgium*, ECtHR (Chamber) (1997, Application no. 19983/92); *Janowski v. Poland*, ECtHR (Grand Chamber) (1999, Application no. 25716/94); and *Ungváry and Irodalom Kft. v. Hungary*, ECtHR (Chamber) (2013, Application no. 64520/10).

⁵²⁴ A university professor in the university conference which was convened for the election of university’s academic senate, expressed his views criticizing the procedure for electing the academic senate and questioning its legitimacy. The university sued the applicant in defamation, claiming that his speech “had undermined the professional reputation of the university and of its academic senate”. The applicant was found liable for defamation. He complained that the defamation proceedings brought against him had breached his right to freedom of expression. The ECtHR held that there had been a violation of Article 10 of the Convention. The Court observed that the applicant expressed his views on a matter of professional concern of a public interest at an academic conference open to university staff. *Kharlamov v. Russia*, ECtHR (1st section) (2015, Application no. 27447/07).

⁵²⁵ *Kharlamov v. Russia*, *supra* note 524.

In the most recent case *Cengiz and Others v. Turkey*,⁵²⁶ which concerned some aspects of academic freedom, the Court dedicated little attention to the academic context. It observed that the applicants' (who were using their YouTube accounts for professional purposes) right to receive and impart information and ideas was violated as they had no equivalent means for accessing, sharing and communicating video material of relevance to their academic and teaching activities.⁵²⁷

Summarizing the analysis of the case-law of the ECtHR, a few main conclusions should be drawn. First, although the ECHR does not explicitly recognize academic freedom, it found its protection in the case-law of the ECtHR under Article 10 which protects freedom of expression. And although it obviously demonstrates the lack of conceptual clarity and precision of academic freedom, it reflects a tendency of evaluating the academic context under the claim of freedom of expression.

Second, it can be concluded that under the case-law of the ECtHR academic freedom is understood as covering the following elements: freedom of teaching, freedom of research and freedom of publication and freedom of intramural expression. Although freedom of extramural speech was explicitly mentioned by the ECtHR as one of the elements of academic freedom, as it was interpreted by the Court differently than the prevailing common perception of this element, it can be argued that freedom of extramural expression (with its conception discussed in chapter one) is not considered as an element of academic freedom within the case-law of the ECtHR. However, it must also be acknowledged that the application of different elements remains quite vague.

Third, although for a long time the case-law lacked an emphasis on academic freedom in a wider sense, the recent cases showed that the Court finally recognized academic freedom as a

⁵²⁶ *Cengiz and Others v. Turkey*, ECtHR (2nd section) (2015, Applications nos. 48226/10 and 14027/11): case concerned wholesale blocking of access to YouTube and the question of victim status. The domestic court found that the content of ten pages on the YouTube website infringed the prohibition on insulting memory of Atatürk and imposed a blocking order on the entire website. The applicants, law professors, were active users of YouTube for professional purposes and academic work, not only for accessing and downloading videos but also for publishing records about their academic activities. They all appealed against the decision of the domestic court, however their appeal was dismissed. The applicants brought their application with the ECtHR claiming that the blocking order had affected their right to receive and impart information or ideas. The Court carefully observed the specific characteristics of the applicants' situation. It stressed that their situation could not be compared to that of an ordinary Internet user complaining of restrictions on access to particular websites, or of a reader of a newspaper contesting a prohibition on its circulation. All applicants were using their YouTube accounts for professional purposes. Consequently, although not directly targeted at them, the impugned decision affected negatively their right to receive and communicate information and ideas. The Court highlighted the importance of YouTube as a tool for receiving and disseminating information and ideas, including on matters which are not provided for by the traditional media. Accordingly, the blocking order had not satisfied the condition of lawfulness. Council of Europe, ECtHR, "Overview of the Case-Law of the European Court of Human Rights," (2016) // http://www.echr.coe.int/Documents/Short_Survey_2015_ENG.pdf (accessed June 10, 2016).

⁵²⁷ Council of Europe, ECtHR, "Overview of the Case-Law of the European Court of Human Rights," (2016) // http://www.echr.coe.int/Documents/Short_Survey_2015_ENG.pdf (accessed June 10, 2016).

fundamental value for a democratic and knowledge-based society. It can be argued that this is the primary and strongest justification for academic freedom as a fundamental right and as a responsibility.

Fourth, although academic freedom seems to enjoy a wider protection than freedom of expression, in some cases it should be the opposite. In order to be able to evaluate such circumstances which lead to a narrower application of freedom of expression within academic context it is necessary to have a clear and consistent understanding of the elements of academic freedom. Furthermore, it is necessary to assess an academic context and to recognize necessary and justifiable limitations of this right in regard to the responsibilities by academics, HEIs and the state.

Fifth, the case-law suggests that the notion of “academic context” would include the following, non-exclusive, and non-exhaustive criteria:

- (1) the person is an academic;
- (2) public comments or utterances fall within the sphere of his or her research;
- (3) statements amount to conclusions or opinions based on his or her professional expertise and competence;
- (4) the opinion relate to the institution or system in which they work;
- (5) published material includes the use of scientific methods or is based on scientific research;
- (6) the person, who is not an academic, gives a lecture which is a part of a series of academic lectures and gives academic comments on the subject.

Sixth, although all of these cases showed that the right to freedom of expression was protected, it is not entirely clear whether the academic context was a consciously decisive element or actually it did not have an decisive impact on the decisions of the Court. For this reason it is not certain whether academic freedom is given adequate protection within the case-law of the ECtHR or whether it received coincidental protection.

CHAPTER 3. THE CONTENT OF ACADEMIC FREEDOM: IT'S SCOPE AND LIMITS

3.1. INTRODUCTION

The previous chapter discussed the perception of academic freedom as a human right and demonstrated its relation to the right to education, the right to freedom of expression and other fundamental rights. This chapter will further elaborate on the multifaceted character of academic freedom established in a number of international and regional documents. Issues of, or related to academic freedom receive considerable appreciation by the UN, UNESCO, EU, the CoE, and a variety international and regional networks of HEIs.

For a long time, higher education policies in different countries have generally been shaped at national level. Over the last decade or so, Europeanization has significantly influenced national higher education policies. The major contributors to the de-nationalization and to internationalization of EHEA the Bologna Process and the EU with the Lisbon Strategy. The purpose of this chapter is not only to analyze documents which concern academic freedom directly but also those that include the discourse on the knowledge-based economy driving higher education into greater competition. It can be argued that the EU higher education policies may contain both, direct and indirect limitations of academic freedom. Accordingly, the Member States with an increasing sense of being bound by them, introduce them into their national higher education systems.

The influence of managerialization, commercialization and Europeanization on higher education raises many different concerns in regard to the academic profession, and potentially impact academic freedom. Academics claim demotivation and frustration in performance of their function because of increasing control of their academic work.⁵²⁸ Significant concerns are being raised in regard to research funding; research relevance to policy and practice; issues concerning the means of sustaining and communicating research findings and their analysis to both institutions and policymakers.⁵²⁹ Research is often significantly shaped by corporate culture or business interests in an increasingly competitive and market-oriented global environment.⁵³⁰ Research and teaching methods are highly influenced by increasing

⁵²⁸ Georg Krücken, "Higher education reforms and unintended consequences: a research agenda," *Studies in Higher Education* Vol. 39, No. 8 (2014): 1447 // DOI: 10.1080/03075079.2014.949539.

⁵²⁹ The Shanghai Statement, "The Need for Research and Training for the Higher Education Enterprise," *International Higher Education* No. 74 (2014): 6 // DOI: 10.6017/ihe.2014.74.5460.

⁵³⁰ Marek Kwiek, "The social functions of the university in the context of the changing State/Market relations (the global, European Union, and accession countries' perspectives)," *Issue Paper for the European Commission, Research Directorates General, High Level Expert Group STRATA Project, "Developing Foresight for higher education/research relations developing in the perspective of the European Research Area (ERA)"* (2002): 8.

internationalization of higher education, including the predominance of the English language and the Internet and electronic communication. This reinforces the question whether in the realm of the development of a competitive European higher education market the traditional function of the university which serves as the fundamental ground for academic freedom remains the same.

The analysis of different documents of UNESCO, the Bologna Process, the EU and the CoE concerning academic freedom is intended to identify the content of academic freedom and also to continue the discussion on whether academic freedom is protected as an independent human right.

3.2. ACADEMIC FREEDOM IN INTERNATIONAL DOCUMENTS AND NORMATIVE INSTRUMENTS

3.2.1. Academic freedom as an imperative of the academic profession in the normative instruments of UNESCO

The pioneering work in the field of academic freedom has been done by UNESCO which was assisting and actively participating together with the international academic community in concentrating on various issues regarding academic freedom and institutional autonomy. UNESCO is entrusted with the mission of dissemination of knowledge, “as a means of creating solidarity between peoples and contributing to international peace”.⁵³¹ Over the years, academic freedom and institutional autonomy of HEIs has received a great amount of attention within UNESCO, most notably it has been the subject of or included as a topic in a number of international conferences and the recognition of both concepts in a number of documents drafted by UNESCO which are analyzed in this chapter. Although UNESCO’s declarations and recommendations are not legally binding, it would be incorrect to regard them as immaterial as these instruments have “a normative character in their intent and effects and the States concerned regard them as political or moral commitments”⁵³².

In 1960, the General Conference of UNESCO adopted the Convention Against Discrimination in Education, which aim was to strive against any form of discrimination in all types and levels of education, including access to education, the standard and quality of

⁵³¹ Jogchum Vrielink, Paul Lemmens, Stephen Parmentier and the League of European Research Universities (LERU) Working Group on Human Rights, *supra* note 3, 8.

⁵³² Yves Daudet, Singh Kishore, “The Right to Education: An Analysis of UNESCO’s Standard-setting Instrument,” UNESCO (2001) // <http://unesdoc.unesco.org/images/0012/001238/123817e.pdf> (accessed June 10, 2016).

education, and the conditions under which it is provided.⁵³³ In 1966 the Special Intergovernmental Conference on the Status of Teachers organized by UNESCO adopted the Recommendation concerning the Status of Teachers (hereinafter 1966 Recommendation), which was intended only for teachers up to the completion of the secondary stage of education. Although the document reflected a quite vague perception of what academic freedom might be,⁵³⁴ the acceptance that the teaching profession enjoys academic freedom was itself significant. Certain provisions concerning research and experimentation were established in a 1974 instrument adopted by the General Conference of UNESCO. It stated that international education must be build on “a sound psychological and sociological basis by applying the results of research <...> on the formation and development of favorable or unfavorable attitudes and behavior, on attitude-change, on the interaction of personality development and education and on the positive or negative effects of educational activity”.⁵³⁵

3.2.1.1. *The status of the scientific researcher and the importance disseminating research results*

In 1974, the General Conference of UNESCO adopted a more specific document, the Recommendation on the Status of Scientific Researchers (hereinafter - 1974 Recommendation). The document contains various provisions regarding freedom of research and freedom to disseminate research results. This instrument was adopted in order to help Member States to create and execute adequate policy frameworks for science and technology production, intending, inter alia, to support researchers and encourage new entrants.⁵³⁶ It emphasizes the importance of the dissemination of research results, hypotheses and opinions as being the

⁵³³ *Convention Against Discrimination in Education*, the General Conference of the UNESCO (1960), art. 1.

⁵³⁴ “The teaching profession should enjoy academic freedom in the discharge of professional duties. Since teachers are particularly qualified to judge the teaching aids and methods most suitable for their pupils, they should be given the essential role in the choice and the adaptation of teaching material, the selection of textbooks and the application of teaching methods, within the framework of approved programmes, and with the assistance of the educational authorities.” *Recommendation concerning the Status of Teachers*, UNESCO (5 October 1974), art. 61 // http://portal.unesco.org/en/ev.php-URL_ID=13084&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed June 10, 2016).

⁵³⁵ *Recommendation concerning Education for International Understanding, Co-operation and Peace and Education relating to Human Rights and Fundamental Freedoms*, the General Conference of UNESCO (19 November 1974), art. 42 // http://portal.unesco.org/en/ev.php-URL_ID=13088&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed June 10, 2016).

⁵³⁶ Since November 2013, the 1974 Recommendation is a subject to a revision, as UNESCO decided to start a process with the intention to enrich the existing text so “that it reflects better today’s concerns about science in relation to society.” The modification of the document should be finally debated in the end of 2017 and should indicate current challenges relating to ethical issues, governance of science and the correlation between science and society. UNESCO, “Call for Advice: Revision of the UNESCO Recommendation on the Status of Scientific Researchers,” (2013) // <http://www.unesco.org/new/en/social-and-human-sciences/themes/bioethics/call-for-advice-revision-of-unesco-recommendation-on-the-status-of-scientific-researchers/> (accessed June 10, 2016).

essence of the scientific process. The researcher's respect towards public accountability is regarded as an integral part of the performance of a scientific research and the enjoyment of its autonomy.

The document stresses the necessity to create conditions in which scientific researchers could “work in a spirit of intellectual freedom to pursue, expound and defend the scientific truth as they see it”.⁵³⁷ It thereby reasserted the provision contained in Article 15(3) of the ICESCR regarding the freedom indispensable for scientific research and creative activity.⁵³⁸ However, it is doubtful whether today, when HEIs are more dependent on corporate funding, and as Lieberwitz argues, “are so intertwined with corporate business world”⁵³⁹, researchers can really enjoy such freedom.

The 1974 Recommendation advocates for free expression “on the human, social or ecological value of certain projects”⁵⁴⁰ and supports the freedom to withdraw from any project if it contradicts the conscience of a researcher. According to the document, researchers should be entitled to the freedom of publication, in addition, and supplementary to this freedom, the Member States are required to encourage the researchers to publish the results.⁵⁴¹ However, the question may be raised whether the researchers are always free to publish the research results. Today corporate funding may provide incentives to select what research findings can be made public.

It should be also observed that the document urges for as little restrictions as possible upon the right to publish, but only when the results are consistent with public interest and the rights of the employers and fellow workers.⁵⁴² Possible restrictions should be clearly expressed in the terms and conditions of the employment and the procedures for the application of the restrictions must be made clear. These provisions suggest that the freedom of research and publication can be enjoyed only to the extent established under the conditions of a contract, when a researcher may not have a right to decide whether the findings of a research can be made public. Although the restriction of the right to publish *per se* does not necessarily mean a violation of academic freedom, however the provision raises concerns in regard to what extent the employer has a right to apply possible restrictions even if they are made clear. The same concern may be raised in regard to public interest, as it is clearly an indefinite concept. It can be argued that such restrictions should be carefully evaluated and the balance with academic

⁵³⁷ UNESCO, *Recommendation on the Status of Scientific Researchers*, *supra* note 228, art. 14(a).

⁵³⁸ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, *supra* note 226, art. 15(3).

⁵³⁹ Risa L. Lieberwitz, *supra* note 99, 73.

⁵⁴⁰ UNESCO, *Recommendation on the Status of Scientific Researchers*, *supra* note 228, art. 14(c).

⁵⁴¹ *Ibid.*, art. 37(a).

⁵⁴² *Ibid.*, art. 37(b).

freedom must be maintained. This is the only possible way to sustain the protection of academic freedom as a right and as a responsibility. It is especially relevant today, when a third-party university research funding is tremendously growing. That corresponds an overspreading perception of the university as a business entity with the aims at “investing existing capital in such a way as to produce benefits and achieving an accumulation of capital.”⁵⁴³

The 1974 Recommendation also includes certain obligations and responsibilities for scientific researchers, i.e. the requirement to determine the methods adopted in a humanely, socially and ecologically responsible manner and to contribute to science, culture and education in their own country, to the achievement of national goals, improvement of the whole society’s well-being and to the advancement of the international ideals and objectives of the United Nations.⁵⁴⁴ The document stresses the importance of the publication of the research findings in a way that it would positively contribute to the acquirement of the reputation which they merit and to the promotion of the advancement of science and technology, education and culture in general.⁵⁴⁵

The main conclusions that can be drawn are that the freedom of research and the freedom of publication of research findings are obviously considered to be of the highest importance at both national and international level. Researchers are required to act in accordance with the professional standards and adhere to the needs and interests of the country and society. The concern can be raised in regard to the balance between the freedom of research and publication and the limitations and requirements that can be imposed by the state, employer or other entities sponsoring the research. Various studies express detrimental effect of widespread conflicts of interest resulting from the corporate sources of funding, from the financial interests of researchers and universities promotion of intellectual property claims and commercialization.⁵⁴⁶ Furthermore, corporate funding may impart incentives for the selective publication of research results to limit or even prevent the disclosure of data concerning the ineffectiveness or detrimental nature of a product thereby “violating fundamental canons of evidence-based science”.⁵⁴⁷ Research sponsored by the private sector is endorsed by the profit motive rather than scientific curiosity or adherence to the social needs. Research is generally selected and funds are allocated in terms of the potential profitability, often disregarding important areas of research. Stuhr notes that the partnership between HEIs and business “redefines educational

⁵⁴³ Richard Münch and Len Ole Schäfer, “Rankings, Diversity and the Power of Renewal in Science. A Comparison between Germany, the UK and the US,” *European Journal of Education* Vol. 49, No. 1 (2014): 61 // DOI: 10.1111/ejed.12065.

⁵⁴⁴ UNESCO, *Recommendation on the Status of Scientific Researchers*, *supra* note 228, art. 14(d).

⁵⁴⁵ UNESCO, *Recommendation on the Status of Scientific Researchers*, *supra* note 228, art. 35.

⁵⁴⁶ Audrey R. Chapman, “Towards an Understanding of the Right to Enjoy the Benefits of Scientific Progress and Its Applications,” *Journal of Human Rights* 8 (2009): 8.

⁵⁴⁷ *Ibid.*, 8.

missions”⁵⁴⁸ and also obscures traditional distinctions between “the public and the private, the role of government and the role of business, and the aims of education.”⁵⁴⁹ In this context it is misleading to consider HEI as an autonomous institution and its employees as impartial seekers of truth.⁵⁵⁰ Increasing involvement of industry in academic research raises the concerns of possible constraints of the free exchange of knowledge, promotes secrecy and twist research priorities to comply with commercial aims.”⁵⁵¹ Bok argues that this relationship between research and profit may lead to the sacrificing of “essential values.”⁵⁵² For this reason the legislation should include certain restrictions of the rights of different involved parties to limit the freedom of research and publication.

3.2.1.2. *Academic freedom of teaching personnel*

In 1989, UNESCO, in collaboration with the World University Service (hereinafter WUS) organized an international seminar on Factors and Conditions Conducive to Academic Freedom, where it was agreed that despite the extensive international instruments in the field of human rights in general, there existed a lack in the field of higher education which would cover academic freedom and institutional autonomy.⁵⁵³ However, for a while the efforts to adopt a special international instrument regarding all aspects of academic freedom have remained ineffective. Finally, an important step, in this direction was taken in 1997, when the General Conference of UNESCO adopted the UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel (hereinafter 1997 Recommendation). It was designed to complement the 1966 Recommendation and it covers all higher education teaching and research personnel.⁵⁵⁴ Both Recommendations were intended to serve as a basis for national laws or practices with regard to teachers and also to affect the development of such laws and

⁵⁴⁸ John J. Stuhr, *Genealogical Pragmatism: Philosophy, Experience, and Community* (Albany: State University of New York Press, 1997), 17.

⁵⁴⁹ *Ibid.*, 17.

⁵⁵⁰ *Ibid.*, 17.

⁵⁵¹ Peter D. Blumberg, “From “Publish or Perish” to “Profit or Perish”: Revenues from University Technology Transfer and the 501(c)(3) tax Exemption,” *University of Pennsylvania Law Review* Vol. 145 (1996): 91.

⁵⁵² Derek Bok, “Universities: their Temptations and Tensions,” *Journal of College and University Law* Vol. 18, No. 1 (1991): 15.

⁵⁵³ Jochen A. Frowein, Rüdiger Wolfrum, “Max Planck Yearbook of United Nations Law,” (Volume 5, 2001) // http://www.mpfpr.de/fileadmin/media/pdf/weitere_Dokumente/MPUNY_Vol.5_2001.pdf (accessed June 10, 2016).

⁵⁵⁴ “‘higher-education teaching personnel’ means all those persons in institutions or programmes of higher education who are engaged to teach and/or to undertake scholarship and/or to undertake research and/or to provide educational services to students or to the community at large.” UNESCO, *Recommendation concerning the Status of Higher-Education Teaching Personnel*, *supra* note 229, art. 1(f).

practices.⁵⁵⁵ The 1997 Recommendation specifically recognizes institutional autonomy and academic freedom. The document stresses the need for thorough respect of academic freedom, noting that higher education teaching personnel are entitled to academic freedom, and to fulfill their functions without discrimination, and without fear of repression by the state or from any other source. Academic freedom is understood and defined by the Recommendation 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 institutional censorship and freedom to participate in professional or representative academic bodies.”⁵⁵⁶ Table 3 demonstrates the dimensions of academic freedom and their content in more detail as they can be identified in this instrument.

Academic Freedom	Content	Limitations/Requirements
Freedom of Research	<ul style="list-style-type: none"> • the right to carry out research; • the right to information. 	<ul style="list-style-type: none"> • in accordance with professional responsibility and subject to nationally and internationally recognized professional principles of intellectual rigor, scientific inquiry and research ethics, according to the national and international laws and regulations; • a duty to base research and scholarship on an honest search for knowledge and truth; • a duty to make the research results and the data on which it was based available to scholars and researchers in the host institution, except if it threatens respondents or anonymity has been guaranteed.
Freedom of Teaching	<ul style="list-style-type: none"> • the right to teach; • the right to instruct according to their own best knowledge and conscience; • the right not to be forced to use curricula and methods contrary to national and international human rights standards; • the right to take part in determining the curriculum. 	<ul style="list-style-type: none"> • subject to accepted professional principles including professional responsibility and intellectual rigor with regard to standards and methods of teaching; • a duty to teach students effectively within the means provided by the institution and the state, to be fair and treat all students equally, to encourage the free exchange of ideas, and to be available to them for guidance in their studies.
Freedom of Publication	<ul style="list-style-type: none"> • the right to publish and communicate the conclusions of the research; • freedom to choose where to publish; • the right to legal protection of intellectual property; • the right to undertake professional activities outside of the employment. 	<ul style="list-style-type: none"> • professional activities outside of the employment must be undertaken in compliance with the primary commitments to the home institution, in accordance with institutional policies and regulations or national laws and practice; • a duty to avoid misleading the public on the nature of the professional expertise.

⁵⁵⁵ *The ILO/UNESCO Recommendation concerning the Status of Teachers (1966) and the UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel (1997) with a User's Guide*, UNESCO and ILO (2008) // <http://unesdoc.unesco.org/images/0016/001604/160495e.pdf> (accessed June 10, 2016).

⁵⁵⁶ UNESCO, *Recommendation concerning the Status of Higher-Education Teaching Personnel*, *supra* note 229, art. 27.

Freedom of Intramural Speech	<ul style="list-style-type: none"> • the right to take part in the governing bodies; • freedom to participate in professional or representative academic bodies; • the right to express opinion and criticise the institution, the functioning of HEIs or higher education system; • freedom from institutional censorship. 	<ul style="list-style-type: none"> • a duty to respect the right of others to participate in the governing bodies.
Freedom of Extramural Speech	<ul style="list-style-type: none"> • the right to speak or write on matters not related to professional expertise. 	<ul style="list-style-type: none"> • a duty to be conscious of a responsibility.
Freedom to Studying	N/A	N/A
Obligations of Academics	<ul style="list-style-type: none"> • to respect the academic freedom of others; • to ensure the fair discussion of contrary views; • to conduct academic functions in full accordance with ethical and the highest possible professional standards and, where appropriate, respond to contemporary problems facing society as well as preserve the historical and cultural heritage of the world. 	

Table 3. *Academic freedom under the 1997 UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel.*⁵⁵⁷

When analyzing the structure of the 1997 Recommendation, it is not clear why publication rights, which essentially include freedom of publication, are listed separately from academic freedom as systematically do not seem to form an element of the latter. The same observation can be made in regard to the international exchange of information, which commonly should include freedom of information, and to self-governance and collegiality, which usually is related to freedom of intramural expression. Despite that, throughout the entire text of the document all elements of academic freedom with the exception of freedom of studying can be identified.

In the context of freedom of research, it is important to notice that there is a requirement to make available the research results and data on which it was based, to scholars and researchers in the host institution, except when this can place respondents in peril or when obligation to guarantee anonymity exists.⁵⁵⁸ Consequently, an existing duty to disclose such information leads to the conclusion that the freedom of research includes the right of other members of the academic community to acquire such information. However, it is not entirely clear why availability of the research findings is limited only to scholars and researchers in the host institution.

When exercising their right to speak or write on the matters of expertise outside their employment relationship, which especially is encouraged in cases of possible enhancement of

⁵⁵⁷ *Ibid.*, art. 27.

⁵⁵⁸ *Ibid.*, art. 34(g).

professional skills or application of knowledge to the problems of the community,⁵⁵⁹ academics must keep their utterances in consistence with the requirements and policies of the institution and to avoid misleading the public on the nature of the professional expertise.

In the context of freedom of publication, it should be mentioned that contrary to the 1974 Recommendation, the 1997 Recommendation does not provide more favorable conditions to publish for researchers whose research findings are consistent with public interest and the right of their employers and fellow workers. The document clearly grants a right to a researcher to freely decide where to publish the research results, determining the freedom to publish in books, journals and databases of their own choice.⁵⁶⁰ Here it could be argued that the current widespread requirement, stemming from the state and HEIs and their respective publication policies, to publish in certain journals can be identified as a limitation of the freedom of publication. Differently from the 1974 Recommendation, the 1997 Recommendation recognizes the necessity to protect the intellectual property of the personnel of the HEIs which should benefit from appropriate legal protection, and in particular the one provided by national and international copyright law.⁵⁶¹

In the context of freedom of teaching, an important right is given to teachers not to be forced to teach against their own best knowledge and conscience or be forced to use curricula and methods not compatible with national and international human rights standards.⁵⁶² The significant role of teachers is recognized by stressing the importance of their participation in determining the curriculum.

The freedom of extramural speech can be identified in the document very fragmentary, only from the established duty to be aware of a responsibility, when speaking or writing outside scholarly channels on subjects which are not related to their professional expertise.⁵⁶³ Apparently, academics are free to speak not only on matters which fall under the scope of their expertise, but also on those which do not, however they should remind themselves of their special position in such cases. Doubts may be raised in regard to the relation between the freedom of extramural speech and human rights. It is also unclear whether the established duty to be aware of a responsibility when speaking or writing on subjects which are not related to the professional expertise is to be viewed from the perspective of an academic or from the citizen's perspective.

⁵⁵⁹ *Ibid*, art. 30.

⁵⁶⁰ *Ibid*, art. 12.

⁵⁶¹ *Ibid*, art. 12.

⁵⁶² *Ibid*, art. 28.

⁵⁶³ *Ibid*, art. 34(k).

The 1997 Recommendation also notes that academics should not be hindered in exercising their internationally recognized civil, political, social and cultural rights applicable to all citizens. However, the academic context in application of these rights is not clear. The question would be whether there are certain limitations and/or privileges because of an academic status while exercising these rights. The same provision determines the right for academics to appeal in cases of gross violation of their rights to the relevant bodies and additionally establishes the duty for organizations representing HEIs personnel to extend full support in such cases.⁵⁶⁴ That indicates special protection to academics which is not applicable to other citizens while exercising their rights.

Concerns can also be raised in regard to professional duties and responsibilities. While enjoying their rights and freedoms, academics are required to act in accordance with “professional responsibility”, nationally and internationally “recognized professional principles of intellectual rigour, scientific inquiry and research ethics”, “in accordance with ethical and professional standards”, “with response to contemporary problems facing society, and preserving the historical and cultural heritage of the world”.⁵⁶⁵ Neither of those seems to serve as a sufficiently clear criterion. The document reflects an intention to make academic freedom conditional on by tying it to a vague concept of “responsibility”.

When discussing rights, freedoms and responsibilities of academics, it is important to underline HEIs’ duty to ensure the most conducive employment conditions. The 1997 Recommendation recognizes the need to prepare teaching personnel who possesses ethical, intellectual and teaching qualities, obtain required professional knowledge and skills.⁵⁶⁶ The document highly encourages tenure. And it also stresses the need of fair evaluation, assessment, appraisal and remuneration systems, fair and equitable workload, healthy and safe work environment, social security, study and research leave, protection and just disciplinary and dismissal procedures.⁵⁶⁷ However, the 1997 Recommendation does not set any limitations in regard to HEIs’ right to include requirements for and restrictions of freedom of research and publication, freedom of teaching, freedom of intramural speech and extramural speech under the employment policies.

An in-depth analysis of the 1997 Recommendation makes visible the complexity of matters related to the functions of academics. And although the main guiding dimensions of academic freedom can be identified its inseparable duet with academic responsibilities remains vague.

⁵⁶⁴ *Ibid.*, art. 26.

⁵⁶⁵ *Ibid.*, art. 33.

⁵⁶⁶ *Ibid.*, art. 37.

⁵⁶⁷ *Ibid.*, art. 48, 49, 57, 62, 63, 65.

3.2.2. *What are guiding dimensions of academic freedom?*

With the assistance or the active participation of UNESCO, up to date, various non-governmental national and international organizations, have focused their attention on a number of questions that relate to of academic freedom in order to set the standards that should govern the status of higher education teaching personnel and the principles that should regulate the operation of HEI's in particular and the entirety of higher education systems in general.⁵⁶⁸ As a result, a number of declarations relating to academic freedom and institutional autonomy was adopted by non-governmental organizations. Taken as a whole, they demonstrate the concern of the academic community to elaborate and establish principles, norms and practices aimed to regulate higher education and the status of teachers, researchers and other members of the academic community at the institutional, national and international levels. In 1950, at an International Conference convened by UNESCO in Siena, leaders of universities worldwide laid down three interrelated principles for which each university should stand:

- the right to pursue knowledge for its own sake and to follow wherever the search for truth may lead;
- the tolerance of divergent opinion and freedom from political interference;
- the obligation as social institution to promote, through teaching and research, the principles of freedom and justice, of human dignity and solidarity, and to develop mutually material and moral aid on an international level.⁵⁶⁹

In 1982 the International Association of University Professors and Lecturers in Siena adopted the Declaration of Rights and Duties Inherent in Academic Freedom (hereinafter Siena Declaration). The document already indicated the new challenges brought by the recognition of the significant interrelations between economic progress and higher educational, a growing financial dependence of HEIs, and the necessity to adhere to the needs and interests of modern societies. These challenges were recognized as imperiling the fundamental principles of university autonomy and academic freedom. The global academic society found it important to reconfirm its fundamental role in higher education. The Siena Declaration reaffirmed the role of the university in the advancement of knowledge and the pursuit of truth, without any ideological constraints, vested interests, or party or government affiliation. Academic freedom was declared as imperative in order to nurture the conditions necessary to perform academic functions

⁵⁶⁸ The General Conference of UNESCO, "Study on the Desirability of Preparing an International Instrument on Academic Freedom," (1993, 27 C/44) // <http://unesdoc.unesco.org/images/0009/000952/095284Eo.pdf> (accessed June 10, 2016).

⁵⁶⁹ Global Colloquium of University Presidents, "Academic Freedom Statement of the First Global Colloquium of University Presidents," (2005) // http://www.hawaiiitokai.edu/policies/docs/Atch2%20BOT_PM_Academic_Freedom.pdf (accessed June 10, 2016).

without “discrimination or fear of reprisal from any authority or interest, external or internal to the university”.⁵⁷⁰ The document presents the rights and the duties inherent in academic freedom which are demonstrated in Table 4.

Elements of Academic Freedom	Content
Freedom of research	<ul style="list-style-type: none"> • the right to pursue research; • the right to have adequate time to carry out research in the field of expertise; • access to the resources for research at the institution.
Freedom of publication	<ul style="list-style-type: none"> • freedom to express the conclusions of research; • the right to publish the results of research.
Freedom of teaching	<ul style="list-style-type: none"> • the right to teach without any hindrance; • the right to establish the content of courses; • the right to choose the method of teaching.
Freedom of intramural speech	<ul style="list-style-type: none"> • freedom to speak on any subject within the university.
Freedom of extramural speech	<ul style="list-style-type: none"> • freedom to speak on any subject outside the university.
Freedom of studying	<ul style="list-style-type: none"> • freedom to learn.

Table 4. Elements of academic freedom established in Siena Declaration.

The analysis of the text of Siena Declaration reasserts the traditional perception of what elements academic freedom entails. The Declaration states that academics should be granted the freedom to teach and to disseminate the findings of research, in compliance with “canons of scholarship and intellectual rigour”.⁵⁷¹ A right to perform research and to make the results public even if they are unsatisfactory to outside authorities or interests reasserts the foundational statement of many of the documents discussed in this study *to follow wherever the search for truth may lead*. The document goes beyond the traditional elements of the freedom of research (a right to choose the subject, a right to access the resources). In addition, it also includes a right of a researcher to be provided with sufficient time to conduct a research, which is an evidence of a growing interest in research rather than other academic activities and its relative importance in higher education and, as a consequence, also for the welfare of the whole society.

Very basic, but also relatively generous, is the provision regarding freedom of intramural and extramural speech, which simply states that the “academic must be subject to no constraints from within the university in speaking responsibly on any subject, within or without the

⁵⁷⁰ The International Association of University Professors and Lecturers, *The Declaration of Rights and Duties inherent in Academic Freedom (The Siena Declaration)*, *supra* note 230, art. 3.

⁵⁷¹ *Ibid*, art. 4(1).

university”.⁵⁷² It grants academics the right to speak freely on any subject (that means both in the field of their expertise and on any other subject) in the university (this could be considered as intramural speech) and also on matters unrelated to scholarly expertise outside the university (this could be considered as extramural speech) as long as they do it responsibly (according to the professional standards). However, the document does not specify the requirement of responsible behavior in this context. The freedom of extramural speech can be also recognized from the provision establishing the duty for academics to be aware of their responsibility when speaking on issues not related to professional expertise outside the scholarly channels.⁵⁷³ That confirms the notion that even exercising their right to freedom of expression as citizens, academics are bound by their professional status and must avoid misleading the society on the essence of their professional knowledge. That also contributes to the statement that academics, even when speaking about issues not related to their expertise, cannot be granted the same amount of freedom of expression as any other citizen.

As a result of a rising tendencies to diminish and restrict academic freedom and institutional autonomy, and an increasing number of violations of the rights of the members of academic community, the idea of a Declaration on Academic Freedom and Institutional Autonomy emerged. The WUS held one of the first international meetings entirely dedicated to address issues of academic freedom and the notion of its fundamental origins. The idea of a Declaration originated due to realization that the substantive general international human rights instruments widely ignored higher education as a field of application of human rights. As a result, specific rights and freedom, such as academic freedom and institutional autonomy, were not expressly covered.⁵⁷⁴ After consultations with the international networks of WUS, review of comments and suggestions from numerous specialist organizations, the Declaration on Academic Freedom and Autonomy of Institutions of Higher Education was adopted in 1988 (hereinafter Lima Declaration). The Lima Declaration was intended to bring more understanding, debates and actions towards defending academic freedom and institutional autonomy. It echoed the previous attempts by academic communities at both national and international levels to react to the various challenges arising from the impediment of academic freedom. As the key problem the drafters faced in endeavoring to respond to these challenges was the absence of “a clear concept of academic freedom, its various dimensions and implications”.⁵⁷⁵

⁵⁷² *Ibid*, art. 4(7).

⁵⁷³ *Ibid*, art. 5(5).

⁵⁷⁴ World University Service, *The Declaration on Academic Freedom and Autonomy of Institutions of Higher Education (The Lima Declaration)*, *supra* note 231.

⁵⁷⁵ *Ibid*.

The drafters of the Lima Declaration, bearing in mind the UDHR and the Covenants noted that the concept of academic freedom derives from the right to education. They also acknowledged its interconnection with the right to freedom of thought and freedom of opinion and expression and identified it as “a human right of special importance to the higher education sector”.⁵⁷⁶ Although academic freedom was not yet recognized at that time as a human right, the Lima Declaration demonstrates the first attempts of awarding academic freedom the special status and significant value of a human right.

The Lima Declaration 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”.⁵⁷⁷ The Lima Declaration marks a considerable achievement in the fulfillment of the efforts aimed at codifying academic freedom and institutional autonomy. The value of the document is reflected in its adoption by the governments as the recognition of academic freedom by the state as the basis of its consolidation. However the task of codifying academic freedom was not so simple. It was acknowledged that in academic life unwritten norms of conduct prevail. These norms which evolved and were elaborated through traditions and which were acquired through experience indicate what is tolerable, recommendable and unacceptable in the conduct of academics and students.⁵⁷⁸ Table 5 presents a set of rights concerning academic freedom established in the Lima Declaration.

Elements of Academic Freedom	Content
Freedom of research	<ul style="list-style-type: none"> the right to carry out research.
Freedom of publication	<ul style="list-style-type: none"> the right to communicate the conclusions; the right to publish.
Freedom of teaching	<ul style="list-style-type: none"> the right to teach without any hindrance.
Freedom of intramural speech	N/A
Freedom of extramural speech	N/A
Freedom of studying	<ul style="list-style-type: none"> the right to choose the field of study; the right to receive official recognition of the knowledge and experience acquired; the right to be provided with adequate resources for students in need; the right to participate in students’ governing bodies and express opinions on any national and international questions.

Table 5. Elements of academic freedom established in Lima Declaration

⁵⁷⁶ *Ibid.*

⁵⁷⁷ *Ibid.*

⁵⁷⁸ CEPES Papers on Higher Education, *supra* note 209.

The Lima Declaration is an important instrument in a global context which addressed the combination of concepts of academic freedom. However, it did not contribute to wider elaboration on the concept of academic freedom, but it rather promotes only certain aspects of academic freedom.

In regard to traditionally recognized freedoms, it can be argued that established rights to carry out research and to teach lack more detailed elaboration. And the document does not focus on the freedom of intramural and extramural speech. The requirement to perform academic functions in accordance with the professional standards, and the requirement to perform research and teaching according to universal and accepted principles and methods are more of a declarative nature and do not bring any clarity on the balance between freedoms and responsibilities.

The document defines “academic community” as covering all persons “teaching, studying, researching and working at an institution of higher education”⁵⁷⁹ which demonstrates that freedom of studying is perceived as one of the dimensions of academic freedom. The latter received quite generous recognition in the document. Nevertheless, the Lima Declaration, which imposes certain requirements on the State, HEI’s and in general to all members of academic community in order to ensure the rights of the students and their freedom to study, lacks specific responsibilities and duties from students perspective.

In 1990, at a workshop, sponsored by the Council for the Development of Social Science Research in Africa (hereinafter CODESRIA), delegates from the Staff Associations of Institutions of Higher Education in Tanzania adopted the Dar Es Salaam Declaration on Academic Freedom and Social Responsibility of Academics (hereinafter Dar Es Salaam Declaration). The document came up at the time when African higher education systems were in serious, multi-dimensional and long-lasting crisis, that was characterized by the collapse of infrastructures, incompetent teaching personnel and their insufficient development and motivation.⁵⁸⁰ The text of the document reflects the difficult period the African higher education was experiencing and indicates the need of commitment of the government, society and all members of the academic community to protect and guarantee the right to education, to ensure the equal access to education. The document is also indicative of “increasingly greater, deeper,

⁵⁷⁹ World University Service, *The Declaration on Academic Freedom and Autonomy of Institutions of Higher Education (The Lima Declaration)*, *supra* note 231, paragraph 1(b).

⁵⁸⁰ Chachage Seithy L. Chachage, “Academic Freedom and the Social Responsibilities of Academics in Tanzania”: 1; in: Chachage Seithy L. Chachage, ed., *Academic Freedom and the Social Responsibilities of Academics in Tanzania* (Oxford: African Books Collective, 2009).

and more frequent encroachments on academic freedom and freedom to pursue truth and knowledge”.⁵⁸¹

Another attempt by African members of the academic community to establish guiding principles for academic freedom and institutional autonomy at regional level took place in 1990, at a symposium of academics and student representatives that was convened by CODESRIA, where the Kampala Declaration on Intellectual Freedom and Social Responsibility (hereinafter Kampala Declaration) was adopted. Just as the former, this document also relates to events and conditions which were then common in African universities and was drafted in response to threats to academic freedom and institutional autonomy. These included the invasion and occupation of campuses by paramilitary police or armies, censorship, restrictions on freedom of association, movement, speech, publication.⁵⁸² Both declarations focus on the connection between academic freedom, institutional autonomy, civil and political rights and social responsibility. However, scholars who critically examined the provisions of both declarations have argued that in order for the declarations to serve their purpose, they have to do more than generate an African debate on the established issues and stress the need for an effective practical implementation mechanisms.⁵⁸³ It was also argued that most problematic matters addressed in the declaration were left to be solved by common sense, and most notably that of the members of the academic community themselves, to manage academia in the best possible way.⁵⁸⁴ Years after the adoption of both declarations, the state of academic freedom in Africa and the future of African universities as sites of knowledge and social commitment are still far from satisfactory.⁵⁸⁵ However, despite the ineffective implementation of the provisions of the declarations in the specific geographic regions, it is important to note the understanding of the content of academic freedom outlined in the documents.

Different from documents analyzed previously, the declarations indicate the necessity to ensure the performance of academic functions without fear of interference or repression not only from the State or any other public authority but also from the HEIs. For this reason they are required to prevent the misuse of science and technology to the detriment of academic freedom and as well to prevent scientific, technological and other forms of dependence of the society.⁵⁸⁶

⁵⁸¹ *The Dar Es Salaam Declaration on Academic Freedom and Social Responsibility of Academics* (1990) // <http://www.codesria.org/spip.php?article351> (accessed June 10, 2016).

⁵⁸² Taye Assefa, *Academic Freedom in Ethiopia: Perspectives of Teaching Personnel* (Ethiopia: Forum for Social Studies, 2008), 3.

⁵⁸³ Josaphat L. Kanywanyi, “Academic Freedom, the Autonomy of Institutions of Higher Education and the Social Responsibility of Academics,” *Journal of Higher Education in Africa / Revue de l'enseignement supérieur en Afrique* Vol. 4, No. 2 (2006): 69.

⁵⁸⁴ Josaphat L. Kanywanyi, “Academic Freedom, the Autonomy of Institutions of Higher Education and the Social Responsibility of Academics”: 22; in: Chachage Seithy L. Chachage, ed., *Academic Freedom and the Social Responsibilities of Academics in Tanzania* (Oxford: African Books Collective, 2009).

⁵⁸⁵ Chachage Seithy L. Chachage, *supra* note 580, 2.

⁵⁸⁶ *The Dar Es Salaam Declaration on Academic Freedom and Social Responsibility of Academics*, *supra* note 581, art. 41.

The content of academic freedom stemming from the declarations is demonstrated in the table below.

Elements of Academic Freedom	Content
Freedom of research	<ul style="list-style-type: none"> • the right to carry out research work • the right to information.
Freedom of teaching	<ul style="list-style-type: none"> • the right to teach.
Freedom of publication	<ul style="list-style-type: none"> • the right of dissemination of research results.
Freedom of intramural speech	<ul style="list-style-type: none"> • the right to initiate, participate in and determine academic programmes.
Freedom of extramural speech	N/A
Freedom of studying	<ul style="list-style-type: none"> • the right to choose the field of study; • the right to receive official recognition of the knowledge and experience acquired; • the right to participate in the governing bodies of an institution; • the right to express and disseminate opinions on any national or international question; • the right to challenge or differ from their instructors in academic matters.
The right to publication	<ul style="list-style-type: none"> • the right to write, print and publish own newspapers or any other form of media including wall literature, posters and pamphlets.

Table 6. Elements of academic freedom established in the Dar Es Salaam Declaration and the Kampala Declaration.

The text of both declarations concerning academic freedom is relatively overlapping. Both documents reassert basic rights and freedoms of academics without specifying more detailed content. It is apparent from the content of the document that it reflects problematic issues of human rights protection in the region. Both documents recognize the freedom of research, teaching, dissemination of research results and studying. The freedom of intramural speech, although very vaguely, can be identified in both documents only under one aspect – the right of the members of academic community to initiate, participate in and determine academic programmes.

Both declarations do not disclose more detailed content of the freedom of teaching, research and dissemination of research results with a minor exception of the right to receive information which is included under the freedom of teaching in the Dar Es Salaam declaration. It also rather extensively focuses on the freedom of studying and provides possibly the most detailed content out of all established freedoms.

From one point of view it could be argued that such a predetermined understanding of academic activities, just as in the Lima Declaration, can be considered as not being in

compliance with academic freedom. However, from another point of view, these declarations demonstrate how differently academic freedom can be perceived in various countries according to the national particularities of higher education systems, the level of human rights protection and the threats academic community is facing. The latter may be indicated as an obstacle for a unified international document on academic freedom. Different interpretations can be identified not only in regard to its content, i.e. elements academic freedom cover, but also to its relationship with other human rights. Such conceptual inconsistencies also lead to its problematic application and protection.

In 1992 the International Conference on Academic Freedom and University Autonomy was held by UNESCO in Sinaia, Romania. The important outcome of this conference was the Sinaia Statement on Academic Freedom and University Autonomy (hereinafter Sinaia Statement). The Sinaia Conference by its Statement urged UNESCO “to give the matter of academic freedom and university autonomy its utmost attention and to prepare an international instrument for the protection and promotion of these values”.⁵⁸⁷ The Sinaia Statement stressed that universities are affected by the social, political and economic upheavals. They also bear an obligation to contribute to the development of society they serve and even though they play a key role in the quest for solutions, they cannot face the challenges and resolve the problems alone.⁵⁸⁸ It specified the defining characteristics of the university which contribute to its commitment of the pursuit of truth: an open and independent inquiry, research in unrestricted manner to produce knowledge and understanding, unfettered teaching and dissemination of knowledge.⁵⁸⁹ These requirements established towards the university corresponds our idea that academic freedom should be perceived as a right and as a responsibility. The document not only advocates for academic freedom of individual members of the academic community but it also requires HEIs to ensure such freedom.

Despite of commonly recognized elements of academic freedom, further the analysis will cover additional components of academic freedom.

3.2.3. Beyond the generally accepted elements - broadening the scope of academic freedom

Notwithstanding the traditional dimensions of academic freedom, each of the discussed documents adds additional components to broaden the content of academic freedom. All additional elements are covered in Table 7.

⁵⁸⁷ CEPES Papers on Higher Education, *supra* note 209.

⁵⁸⁸ The Sinaia Statement on Academic Freedom and University Autonomy, *supra* note 109.

⁵⁸⁹ *Ibid.*

Elements of Academic Freedom	Content
<i>Siena Declaration</i>	
Tenure	<ul style="list-style-type: none"> the right to tenure; the right to due process procedures in case of dismissal; evaluation and promotion must be based only on academic criteria interpreted by academic peers.
Freedom to Travel	<ul style="list-style-type: none"> freedom to travel; freedom to consult with other members of academic community.
<i>Lima Declaration</i>	
Civil, political, economic, social and cultural rights	<ul style="list-style-type: none"> freedom of thought, conscience, religion, expression, assembly and association; the right to liberty and security of person and liberty of movement.
Access to the academic community	<ul style="list-style-type: none"> equality for all members of society; no discrimination; stable and secure employment; the right to a fair hearing.
Freedom to communicate	<ul style="list-style-type: none"> freedom to maintain contact with counterparts on national and international levels; freedom to pursue the development of educational capacities.
Freedom of association	the right to form and join trade unions.
<i>Dar Es Salaam Declaration and Kampala Declaration</i>	
Freedom of movement	<ul style="list-style-type: none"> within and outside the country; re-enter the country.
The right to equal access to the academic community	<ul style="list-style-type: none"> according to ability; without discrimination of any kind.
The right to fair disciplinary proceedings	<ul style="list-style-type: none"> the right to demand and receive explanation on the performance affecting the member or the whole academic community; the right to know any report on performance in the course of the execution of the duties; the right to a fair hearing before a democratically elected body of the academic community.
The right to communicate with peers and to develop the educational capacities	<ul style="list-style-type: none"> the freedom to maintain contact with counterparts in any part of the world; the freedom to pursue the development of educational capacities.
The right to enjoy human rights	<ul style="list-style-type: none"> civil, political, social, economic and cultural rights; the freedom of thought, enquiry, conscience, expression, assembly, association; the right to liberty, security and integrity of the person.
The right of tenure	<ul style="list-style-type: none"> the right to a fair and reasonable remuneration; the right to security of tenure

Table 7. Additional elements of academic freedom established in the Siena Declaration, the Lima Declaration, the Dar Es Salaam Declaration and the Kampala Declaration.

The Siena Declaration includes the freedom to travel and to share scientific ideas with international colleagues. In this sense it brings uncertainty whether academics' freedom to travel

differs from anybody's else freedom to travel and how it is different. The document also advocates for a tenure system, establishment of a due process procedures in case of a dismissal and also a fair evaluation and promotion procedure which should be based only on academic criteria in research, teaching and other academic duties as interpreted by academic peers. The extension of academic freedom into other areas communicates the message of concern in regard to existing or possible attacks on employment relationships.

Despite commonly recognized elements, such as freedom of teaching, research and publication, the Lima Declaration specifies the obligation of the state to respect and ensure to all members of the academic community the civil, political, economic, social and cultural rights recognized in the ICCPR and the ICESCR. Furthermore, it includes the right to equal access to the academic community and the right, without any kind of discrimination, to become a member of the academic community. This right falls under the scope of the right to education.

The Lima Declaration restates the Siena Declaration by its reference to the requirement to guarantee stable and secure employment and, as a procedural safeguard, a fair hearing in cases of potential dismissal, as well as to the freedom to communicate. Additionally, the document recognizes the right to freedom of association which is detailed as the right to form and join trade unions. The variety of these provisions listed in the Lima Declaration broaden the traditional concept of academic freedom which in essence consists of the freedom to pursue the academic profession according to the standards of that profession. However, provisions regulating access to HEIs, employment, the right to be a part of trade unions, are more elements of a wider meaning of academic freedom and their application is not limited to employees in the HEIs only. There is no doubt that these freedoms are of high importance for the fulfillment of professional functions but it is debatable whether they can be defined as facets of academic freedom. The prolonged list of different rights and freedoms, including those which could be linked with the free inquiry, the dissemination of knowledge and pursuit of truth indirectly, makes the concept of academic freedom more complex and indefinite.

The Dar Es Salaam and the Kampala Declarations also distinguish: the freedom of movement within and outside the country, the freedom to communicate with peers and the freedom to pursue the development of the educational capacities and the right of tenure (both declarations); the equal access to the academic community, the right to fair disciplinary proceedings (the Dar Es Salaam Declaration).⁵⁹⁰ Attention should be paid to a very specific right determined in the Dar Es Salaam Declaration, which provides that "all members of the academic

⁵⁹⁰ *The Dar Es Salaam Declaration on Academic Freedom and Social Responsibility of Academics*, *supra* note 581, art. 16, 17, 21, 22, 29. *The Kampala Declaration on Intellectual Freedom and Social Responsibility* (1990): art. 4, 5, 8 // <http://hrlibrary.umn.edu/africa/KAMDOK.htm> (accessed June 10, 2016).

community shall have the right to write, print and publish their own newspapers or any other form of media including wall literature, posters and pamphlets”.⁵⁹¹ It can be recognized as the freedom of expression or also as the freedom of extramural speech as in its present formulation does not mention professional knowledge or academic journals. However, the same provision requires academics, while exercising this right, to have due regard to the obligation not to interfere with the right to privacy of others and not to induce religious, ethnic, national or gender hatred. As the requirement does not involve any professional obligations in regard to the academic profession and HEIs, the provision should be understood as the freedom of expression and not as the freedom of extramural speech. Accordingly, the Kampala Declaration protects the right of the members of the intellectual community to freely express their opinions in the media and to establish their own media and means of communication.⁵⁹² Although the provision does not expressly state whether it concerns speech in the field of expertise or not, more likely it is intended as the freedom of expression and not as the freedom of extramural speech.

In conclusion it can be noticed that all analyzed Declarations reconfirm the traditional composite nature of academic freedom as covering the main five elements and, additionally each of them includes a number of mutually non-repeatable supplementary components. It should be noted that adding additional elements under the scope of academic freedom makes its concept even more vague.

3.2.4. The boundaries of academic freedom: limitations and responsibilities

As it has been argued so far, academic freedom must be recognized both, as a right and as a responsibility. In order to have an overall conception of academic freedom, it is important to evaluate the limitations of its every component, as well as responsibilities arising from each member of academic community and HEIs as they are indeed required by academic freedom itself, otherwise it will be undermined. The responsibilities, limitations and requirements stemming from the declarations are demonstrated in the table below.

⁵⁹¹ *The Dar Es Salaam Declaration on Academic Freedom and Social Responsibility of Academics*, *supra* note 581, art. 27.

⁵⁹² *The Kampala Declaration on Intellectual Freedom and Social Responsibility* (1990): art. 9 // <http://hrlibrary.umn.edu/africa/KAMDOK.htm> (accessed June 10, 2016).

<i>Siena Declaration</i>
<ul style="list-style-type: none"> • subject only to canons of scholarship and intellectual rigor; • adherence to institutional curriculum; • speaking responsibly; • a responsibility to avoid misleading the public mind on the nature of the professional knowledge; <p>A responsibility to:</p> <ul style="list-style-type: none"> • assist in continuing the development of professional discipline through scholarly research activity and publication of research results; • respect and to acknowledge the scholarly work of other academics; • teach effectively and to be available to students; • undertake required duties in the bodies of the institution. <p>The academic must always respect the primacy of professional duties.</p>
<i>Lima Declaration</i>
<ul style="list-style-type: none"> • subject to universal principles and methods of scientific enquiry; • research must respond to contemporary problems facing society; • subject to accepted principles, standards and methods of teaching; • must adhere to respective professional standards; • the rights may be subject to certain restrictions necessary for the protection of the rights of others.
<i>Dar Es Salaam Declaration and Kampala Declaration</i>
<ul style="list-style-type: none"> • possible limitations on grounds of public health, morality or in circumstances of clear, present and imminent danger to the nation and its independence and which restrictions are justifiable in a democratic society; • in accordance to the universal principles and methods of scientific enquiry; • in accordance with the generally accepted principles, standards and methods of teaching; • in accordance with the highest standards of education and the basic principles; • in compliance with morality of principles of democracy; • in accordance with the right of others to privacy; • not to arouse religious, ethnic, national or gender hatred; • except for reasons of gross misconduct, proven incompetence or negligence incompatible with the academic profession. <p>To fulfill academic functions:</p> <ul style="list-style-type: none"> • with competence, integrity and to the best of their abilities; • in accordance with ethical and scientific standards; • without prejudice to the rights of others and the needs of the society; • in tolerance towards different views; • without detriment of the people or the academic community; • without compromising scientific, ethical and professional principles and standards; • having a duty to contribute towards redressing historical and contemporary inequalities in society based on differences of class, beliefs, gender, race, nationality, region and economic condition; • voluntarily giving time to impart education to disadvantaged sectors of the population.

Table 8. Responsibilities, limitations and requirements subject to academic freedom.

Although the Siena Declaration reasserts the notion of the balance between academic rights and freedoms and academic responsibilities, it stays unclear what “academic responsibilities” stand for. The document also does not require any responsibilities from HEIs in order to ensure proper enjoyment of academic freedom and in order to provide adequate conditions for academics to fulfill their academic obligations. The Declaration also does not address the linkage between academic freedom and human rights.

A provision established in the Lima Declaration, which is worth mentioning, is the requirement to conduct teaching and research as a response to contemporary problems society is facing. As an example, a German case can be mentioned where four university professors contested the law on higher education in the Constitutional Court of the Land. They sought its annulment for its unconstitutionality as the law, although it acknowledged the academic freedom and institutional autonomy guaranteed by the Federal Constitution, qualified those rights by linking them “to responsibility for the human being, society, and nature and to the public character of their activities”⁵⁹³. The law was rendered unconstitutional. It was noted that “academic activity” in the sense of the constitution must be regarded as “a serious methodological attempt to ascertain truth”⁵⁹⁴ and is not limited to “a particular perception of academic activity, and it may neither be restricted quantitatively nor qualitatively, in order not to render the fundamental right of academic freedom as such subject to wilful disposition”.⁵⁹⁵ Accordingly, it can be argued that such a predetermined understanding of academic activities in the Lima Declaration can be considered as not being in compliance with the academic freedom.

The Dar Es Salaam and the Kampala Declaration state that while retaining the granted rights and freedoms members of the academic community must comply with certain requirements and also be aware of certain limitations. The academic functions have to be fulfilled preserving the competence, integrity, adhering to ethical and scientific standards, respecting the rights of others, the needs of the society and different views. A specific duty is established inherent to the region and its distinctive problems. The members of academic community are required to contribute towards the improvement of historical and contemporary inequalities in society based on differences of class, beliefs, gender, race, nationality, region and economic condition; furthermore voluntarily give their time to disseminate education to disadvantaged sectors of the population.⁵⁹⁶ The limitations of the freedom of research and the freedom of movement are allowed on the grounds of public health, morality or in circumstances of clear, present and imminent danger to the nation and its independence and which restrictions are justifiable in a democratic society.⁵⁹⁷

The Sinaia Statement was built on the recognition of the expanding importance of internationalization for higher education and society at large. It stressed the necessity to

⁵⁹³ Jürgen Kohler, “Application to the State Constitutional Court of Mecklenburg-Vorpommern (Germany) for Annulment of Sect. 5 Subsect. 5 LHG-MV”: 12; in: Observatory for Fundamental University Values and Rights, *Case Studies. Academic Freedom and University Institutional Responsibility in Mecklenburg-Vorpommern* (Bologna: Bononia University Press, 2003).

⁵⁹⁴ *Ibid.*, 15.

⁵⁹⁵ *Ibid.*, 15.

⁵⁹⁶ *The Dar Es Salaam Declaration on Academic Freedom and Social Responsibility of Academics*, *supra* note 581, art. 50. *The Kampala Declaration on Intellectual Freedom and Social Responsibility*, *supra* note 592, art. 25.

⁵⁹⁷ *The Dar Es Salaam Declaration on Academic Freedom and Social Responsibility of Academics*, *supra* note 581, art. 16, 19.

implement academic freedom and institutional autonomy, as essential elements for the achievement of the fundamental mission of universities, and at the same time also the necessity to maintain the accountability and the social responsibility of universities. The participants of the Sinaia Conference underlined that it is a responsibility of both, the universities to develop academic freedom within their own communities and also the governments and the public to respect the rights of universities. This is a fundamental justification of our “academic freedom as a right and as a responsibility” idea, which should also serve as a basis in further elaboration on more concrete responsibilities and obligations the governments, HEIs and public must have towards the protection of academic freedom.

Another significantly important aspect was recognition of the relationship between academic freedom and the right to higher education. As a reaction to higher education massification, the conference raised concerns regarding the perceived tendency of the decreasing value and utility of the elite teaching university. In order to maintain academic standards and to ensure the “right of higher education” for future students the university must preserve its ability to offer the possibility of acquiring recognized academic careers; this includes the offer of sufficient high quality teaching. As one of the alternative methods in order to combine both, students’ demands and the demands of society at large, the possibility to introduce an entrepreneurial attitude in graduates was suggested. Although such obligation cannot be focused entirely on the universities, it would make those who do not stay in the academy aware of their duty to use their skills for the creation of wealth. Such task should be considered as part of their reciprocal obligations to the societies which provide their resources for HEIs.⁵⁹⁸

The participants of the Sinaia Conference suggested some interesting facets for the concept of academic freedom. Although they did not provide a comprehensive overview of different aspects of academic freedom, but they stated that the concept is not absolute and demonstrated certain boundaries. One of the provisions declares that the freedom of research must be enjoyed in compliance with the plans established by the HEI. That may raise concerns in respect of violations of academic freedom in cases when the HEI establishes its plan under the influence of or with interference by political or economic actors. However it was indicated that the plans must be established in the exercise of a university’s autonomy in the light of their resources. It stays unclear whether the HEI may establish the plan which would include limitations of academic freedom. And even if the limitation itself does not necessarily mean a violation of academic freedom as it may be justified under certain circumstances and

⁵⁹⁸ CEPES Papers on Higher Education, *supra* note 209.

requirement. However, it stays indefinite what limitations would qualify as acceptable and what as excessive.

Another requirement is to conduct research “according to the standards of competence generally recognized in its field, and it must be successful so far as an impartial evaluation is concerned in order to merit publication”.⁵⁹⁹ It was also discussed that certain restrictions may be placed on research topics (for example, embryo experimentation) and research methods (for example, testing on live animals).⁶⁰⁰ In case of such restrictions universities do not have any right to be exempted from them.

Another observation is that academics who claim special tolerance and freedom in order to perform their professional functions must apply the same tolerance standards towards their colleagues. A “solidarity compact” between the western and eastern European universities was suggested in order to encourage cooperation, training and exchange opportunities with academics from the universities in the countries undergoing restoration and restructuring of their academic programmes.⁶⁰¹ This acknowledgement of the different status and better opportunities of academics who work in economically better situated countries under and non-threatening circumstance and those academics who do not, an active advocating for cooperation between both, shows a moral basis of university collegiality and emphasizes the necessity of the protection of academic freedom at the international level.

The debates raised the question whether academic freedom can be adequately protected through the general instruments of human rights. However, participants of the conference concluded that a human right to academic freedom had not yet been recognized, even if it argued that it can be derived from other recognized fundamental and human rights. This stressed the inevitable necessity and important role in this context of an international agreement on academic freedom. Although the expressed fundamental and final goal was to have a legally binding international agreement, it was agreed that a number of tasks should be accomplished first in order to achieve it. As the main elements for consideration were mentioned: the provision for conflicts between academic freedom and other rights, the fact that the component parts of academic freedom could not be stated in absolute terms, and the circumstances under the which the country could not limit the rights and the possibility to review certain terms by an independent body.⁶⁰² This statement highly contributes to our research subject. It demonstrates existing concerns in regard to conceptual vagueness of academic freedom and its relationship with other human rights. In addition, it supports our argument in regard to academic freedom as

⁵⁹⁹ *Ibid.*

⁶⁰⁰ *Ibid.*

⁶⁰¹ *Ibid.*

⁶⁰² *Ibid.*

a responsibility and suggests that legislation should include the circumstances under the which the rights and freedoms could not be limited. This assertion will be applied when analyzing and evaluating existing regional and Lithuanian legislation in higher education field.

While usually freedom to teach, freedom of research and freedom of publication are generally accepted dimensions of academic freedom, freedom of intramural and extramural speech raise certain doubts. The participants of the conference argued whether academic freedom goes beyond the generally accepted freedoms and grants academics the freedom to freely criticize university administration. This idea was met quite conservatively as was considered as too dangerous and possibly threatening the status of teaching staff. However, this idea was positively met by the members of those countries, where academics have the status of civil servants, which protects their positions at universities. In regard to extramural speech, it was stated that although the right to be politically active is considered as a human right, it is important that the value judgments and political opinions are clearly made in the name of individual, without reference to the institution. The freedom to study, although evoked by the International Union of Students, did not receive sufficient attention and was not analyzed in more detail, as it was pointed out that “students should respect their obligations and not simply claim their rights.”⁶⁰³

3.2.5. An International Instrument on Academic Freedom: Desirable and Feasible?

In the Sinaia Statement the UNESCO was urged to prepare an international instrument for the protection and promotion of academic freedom and university autonomy. In 1993 UNESCO reacted when the General Conference submitted the Study on the Desirability of Preparing an International Instrument on Academic Freedoms. The study acknowledged that in order to have a concrete proposal it would be necessary to carefully explore the concepts of academic freedom and institutional autonomy. The preliminary draft declaration, which was adopted at a seminar organized by the Poznan Human Right Centre, and was examined in the International Congress on Education for Human Rights and Democracy,⁶⁰⁴ stressed the need to improve the draft substantially.⁶⁰⁵ Despite the final agreement that it was too early for an international standard-

⁶⁰³ *Ibid.*

⁶⁰⁴ UNESCO, “The International Congress on Education for Human Rights and Democracy,” (1993) // <http://unesdoc.unesco.org/images/0016/001610/161096eo.pdf> (accessed June 10, 2016).

⁶⁰⁵ The General Conference of UNESCO, “Study on the Desirability of Preparing an International Instrument on Academic Freedom,” *supra* note 568.

setting instrument the document still provides important observations regarding the legal justification of academic freedom.

After lengthy discussions and preparatory work on the subject, two approaches were presented. One of them focused on the close relationship between academic freedom and human rights. Another one focused on the interdependence of academic freedom and university autonomy, with the aim of adopting a document that would deal with both matters. It was noted that “academic freedom has its roots in fundamental freedoms and rights, particularly freedom of expression”⁶⁰⁶ and accordingly can be guaranteed either by a country’s constitution or by its constitutional case law. On the other hand, the nature of academic freedom derives from the fundamental goal of higher education and from the specific mission of HEIs – the delivery of higher training and the pursuit for truth through the deepening, broadening, advancement and dissemination of knowledge. That demonstrated the need to protect academic freedom through positive law provisions governing either education in general or higher education and HEIs in particular and through institutional setting.⁶⁰⁷ The latter in the form of an international standard-setting instrument concerning the status of higher education teachers was considered to be the more desirable option to protect academic freedom. Such view supports our argument that legislation in the field of higher education must reflect the responsibility of the state and HEIs and include respective provisions which would contribute to the protection of academic freedom. Education as a public responsibility of the state necessitates “the regulation of some vital issues by law.”⁶⁰⁸ Such presumption will be verified when analyzing existing regional and Lithuanian legal higher education framework. As unavoidable responsibility of the state is considered contribution to the improvement of higher education by means of the adoption of appropriate policies, strategies and the diversification of its sources of funding.⁶⁰⁹ It is argued that as higher education is a public good, it is also a public responsibility. Despite the increasing autonomy of HEIs, as it is suggested, the state should remain responsible for HEIs, quality assurance and accreditation processes.⁶¹⁰

In the first-ever World Conference on Higher Education, held in Paris in 1998, it was reaffirmed that in order to enable higher education to fulfill its mission, institutional autonomy

⁶⁰⁶ *Ibid.*

⁶⁰⁷ *Ibid.*

⁶⁰⁸ Charles Glenn and Jan De Groof, *supra* note 67, 51.

⁶⁰⁹ UNESCO, “World Conference on Higher Education, Higher Education in the Twenty-first Century: Vision and Action, Volume I, Final Report,” (October 1998) // <http://unesdoc.unesco.org/images/0011/001163/116345e.pdf> (accessed June 10, 2016).

⁶¹⁰ Josef Lange, “Welcome Address at the Bologna Seminar “The Quality Assurance System, for Higher Education at European and National Level”,” (2007) // https://www.hrk.de/fileadmin/redaktion/hrk/02-Dokumente/02-10-Publikationsdatenbank/Beitr-2007-13_Quality_Assurance_System_for_HE.pdf (accessed June 10, 2016).

and academic freedom must be guaranteed and respected by the State and society.⁶¹¹ UNESCO was once again requested to continue its work on academic freedom and to take the initiative to draw up a Universal Charter of Academic Freedoms or another international instrument on academic freedom, autonomy and the social responsibility in connection with the 1997 Recommendation, which would contribute to strengthening the principles of excellence, tolerance, pluralism, and academic solidarity between HEIs, individual scholars and students. Certain points particularly important in regard to academic freedom were made during the different thematic debates. The thematic debate, guided by the IAU, observed that the goal-oriented research raises the fundamental question of intellectual property which was defined as a sub set of academic freedom.⁶¹² It was noted that the university is facing massive changes which are driven forward by two main trends: “acceleration in the pace of change itself and the globalisation of the economy and of technology”.⁶¹³ The latter factor was considered as the one which would continue to operate and even with increasing weight. However, universities that lack entrepreneurial stimulus, especially in the sphere of economics and technology development, are not destined to prosper.

It is necessary to draw attention to the fact that academic freedom was recognized more as a duty than a right or a freedom. It was argued that HEIs can fulfill the aspirations stemming from the society only when academics are granted conducive working conditions, albeit varying in the degree to which they are applied in different countries and to different types of institutions. Because of significant changes in the landscape of higher education, correspondingly academic profession has been undergoing changes as well. Surveys show that these changes generated an increase of administrative work-load, new approaches to teaching and research had negative impact on academic profession and that administrative work undermined the quality of teaching.⁶¹⁴ Academics are required to be more professional in teaching, more productive in research and are expected to have entrepreneurial skills.⁶¹⁵ In addition, it can be stressed that existing legislation should include obligations and

⁶¹¹ UNESCO, “World Conference on Higher Education, Higher Education in the Twenty-first Century: Vision and Action, Volume I, Final Report”, *supra* note 609.

⁶¹² UNESCO, “Working document drafted by Mr. Guy Neave at the World Conference on Higher Education “Higher Education in the Twenty-first Century: Vision and Action”, Thematic Debate: Autonomy, Social Responsibility and Academic Freedom,” (October 1998) // <http://portal.unesco.org/education/en/files/12346/10427272460autonomy.pdf/autonomy.pdf> (accessed June 10, 2016).

⁶¹³ *Ibid.*

⁶¹⁴ Ming Cheng, “Audit cultures and quality assurance mechanisms in England: a study of their perceived impact on the work of academics,” *Teaching in Higher Education* 15 (3) (2010): 267 // doi:10.1080/13562511003740817.

⁶¹⁵ Marie Clarke, Jonathan Drennan, Abbey Hyde, and Yurhgos Politis, “Academics’ Perceptions of Their Professional Context”: 130; in: Tatiana Fumasoli, Gaële Goastellec, Barbara M. Kehm, eds. *Academic Work and Careers in Europe: Trends, Challenges, Perspectives* (Switzerland: Springer International Publishing, 2015).

responsibilities of the state and HEIs which would ensure conducive working conditions for academics as that contributes to the protection of academic freedom.

It can be seen from the document that academic freedom is recognized not only from the perspective of individual academics but also from students' perspective as the freedom to learn. In particular the freedom to teach is distinguished as the one which encompasses "the obligation upon academic staff to contribute through enquiry and research to the advance of fundamental knowledge which shapes the particular area of study to which they are individually committed (Wissenschaftsfreiheit)".⁶¹⁶ This is an example of a clear recognition of the relationship between academic freedom and the right to education. It also highlights the importance of the responsibility of academics in the advancement of knowledge which, in balance with academic freedom, is instrumental in safeguarding the right to education. The responsibility of the state is to ensure that the legislation does not affect the substance of the right to education and that it is consistent with other human rights.⁶¹⁷

The document also discloses the link between academic freedom and other human rights, stating that academic freedom is "a necessary condition for Human Progress".⁶¹⁸ It can be argued that such remark about academic freedom serves as a fundamental justification for its perception as a human right. In addition, it is inseparably related to the responsibility of HEIs. This also is reflected in the document which states that the assurance of the progress which is driven by the ability to question, criticize and inquire is a responsibility of a university and it reasserts the linkage between academic freedom and human rights. The document also sets certain limits, noting that this general principle does not extend in certain areas, such as the research connected to national defense and industrial research and development (hereinafter R&D). Such statement, especially in regard to the latter, is highly questionable as to why in particular this area deserves an exception and to what extent.

The concern was also expressed in regard to universities striving to acquire external revenue sources and to establish closer links with industry through entrepreneurial activities. This raised the question "what safeguards should the university seek from its contractual partners to uphold the terms of its overall mission, its commitment to academic freedom and the concerns of the individual scholar?"⁶¹⁹ This in particular concerns our idea of academic freedom as a responsibility. It can be argued that not only universities should seek safeguards but also the state should contribute by establishing certain safeguards in existing legislation. It would limit

⁶¹⁶ UNESCO, "Working document drafted by Mr. Guy Neave at the World Conference on Higher Education "Higher Education in the Twenty-first Century: Vision and Action", Thematic Debate: Autonomy, Social Responsibility and Academic Freedom", *supra* note 612.

⁶¹⁷ Charles Glenn and Jan De Groof, *supra* note 67, 360.

⁶¹⁸ *Ibid.*

⁶¹⁹ *Ibid.*

certain third-party funders' rights and would restrain them from excessive restrictions, and consequently violations, of academic freedom. It would also help HEIs to negotiate favorable contractual conditions and to uphold its overall mission. Differently from other instruments concerning academic freedom which usually express the necessity to protect members of academic community from interference from the state, public and private stakeholders, this document stresses the necessity to prevent interference also from the society that can prevent universities to fulfill their various missions.

As for the content of academic freedom, the document identifies the liberty to teach, research and to express the opinion in one's area of expertise. However, it does not mention the right to express freely opinions on particular institutions or a higher education system (intramural expression) or express opinions outside the scope of expertise of individual academic (extramural expression). It also does not mention the right to participate in professional or representative academic bodies. Academic freedom and institutional autonomy are restricted only to universities but not to all HEIs. Another observation can be made in regard to provision stating that "freedom to carry out research and *the obligation to publish* lie at the heart of academic freedom."⁶²⁰ Furthermore, it was also suggested that as universities strive for additional external revenue sources and attempt to develop tight links with industry through joint research, setting up science parks, spin-off firms and business ventures, contractual agreements can limit this commitment.⁶²¹ Whereas previously this research merely suggested that academics should be granted the *freedom* of publication or that they could be encouraged to publish, this document advocates for an *obligation* to publish. The question can be raised how the balance between the freedom of research and publication and the demands arising from entrepreneurial relationship can be maintained. In conclusion it should be noticed that although certain remarks were made which are essential in further elaborating on different elements of academic freedom, the working document on Autonomy, Social Responsibility and Academic Freedom did not provide more explicit view on the content of academic freedom and even raised previously mentioned concerns.

In response to the continuous advocating of the adoption of an international instrument on academic freedom and institutional autonomy, in 1995 UNESCO invited the IAU to assess the feasibility, desirability and possible content of an International Charter on Academic Freedom

⁶²⁰ *Ibid.*

⁶²¹ UNESCO, "Working document drafted by Mr. Guy Neave at the World Conference on Higher Education "Higher Education in the Twenty-first Century: Vision and Action", Thematic Debate: Autonomy, Social Responsibility and Academic Freedom", *supra* note 612.

and University Autonomy.⁶²² In 1998, the IAU concluded that the proposal to proceed to the development of an international instrument was both feasible and desirable, that it could be seen as a normative instrument within the UNESCO network or as a declaration recognized by the academic community alone, and neither of both should contradict ideas already laid down and in particular to the 1997 Recommendation.⁶²³ The IAU in its report defined academic freedom as “the freedom for the members of the academic community – that is, teaching personnel, students and scholars – to follow their own scholarly enquiries and are thereby not dependent on political, philosophical or epistemological opinions or beliefs though their own opinions may lead them in this direction.”⁶²⁴ A slightly different interpretation of academic freedom the IAU expressed in its Statement on Academic Freedom, University Autonomy and Social Responsibility, suggesting that academic freedom “can be defined as the freedom for members of the academic community – that is scholars, teachers and students – to follow their scholarly activities within a framework determined by that community in respect of ethical rules and international standards, and without outside pressure.”⁶²⁵ The biggest concern may be raised in regard to the provision stating that academic freedom engages the obligation by academics to excellence, to innovation, and to advancing the frontiers of knowledge through research and the dissemination of its results through publication and teaching.⁶²⁶ From the first look such obligation does not look harmful, rather on the opposite. However, if we take a closer look, what does an obligation by academic to innovation stands for? This requirement could also be qualified as a “predetermined understanding of academic activities”.⁶²⁷ However the essence of academic freedom lies in understanding that the fundamental task of academic research and teaching is “to defend the quest for knowledge and truth as elements and conditions of freedom, peace and prosperity against “political correctness” and majority opinion on “truths”.”⁶²⁸ If such a requirement would be established by law, then all academics would be obliged to examine the consequences of their academic activities and to conduct them with regard to excellence, to innovation, and to advancing the frontiers of knowledge. Accordingly, these considerations, regardless of whether the academic disciplines and activities in question deal with “examining

⁶²² On August 29th 1997 UNESCO and International Association of Universities signed a contract which called for a document on the feasibility, desirability and possible content of an international instrument on Academic Freedom and University Autonomy as one of the inputs from the International Association of Universities to UNESCO’s World Conference on Higher Education.

⁶²³ International Association of Universities, “Report on the Feasibility and Desirability of an International Instrument on Academic Freedom and University Autonomy,” (1998) // http://archive.www.iau-aiu.net/he/af/afreedom_instrument.html (accessed June 10, 2016).

⁶²⁴ *Ibid.*

⁶²⁵ International Association of Universities, “Statement on Academic Freedom, University Autonomy and Social Responsibility,” (1998) // <http://archive.www.iau-aiu.net/he/af/index.html> (accessed June 10, 2016).

⁶²⁶ *Ibid.*

⁶²⁷ Jürgen Kohler, *supra* note 593, 16.

⁶²⁸ *Ibid.*, 16.

such consequences by virtue of the very nature of their academic approach”⁶²⁹ are suggested to be contrary to “the prerequisite for legal limitation of academic freedom.”⁶³⁰

Taken as a whole, all analyzed declarations reflect the attempt of the academic community to develop principles, norms and practices designed to safeguard academic freedom in higher education at the institutional, national and international levels. However, the concept of academic freedom as reflected in the declarations appears to be rather blurry, lacking a consistent and systematic conceptual approach and precise borders that could delimit its scope and separate the elements covered. The current image academic freedom gives merely allows to distinguish certain main standards and principles academic freedom stands for, however it could scarcely prevail as providing comprehensive and precise guidelines for national policies and its unambiguous practical application is hardly attainable.

The analysis of the documents shows that the scope of academic freedom varies covering different aspects, and even the main elements of academic freedom are not perceived in the same manner. It is apparent that the extent of academic freedom highly depends on the concerns the academic community is facing at that moment. The documents reflect challenges higher education systems are confronted with, including massification and internationalization of higher education, regional concerns on human rights violations and employment issues. It can be also noticed, that with an increasing role of HEIs, a growing level of their autonomy and the increasing role of research, academics must accept additional requirements and responsibilities. Accordingly, it becomes necessary to establish certain criteria under which academic freedom could not be limited.

In conclusion, it should be noticed that none of the analyzed documents could contribute to establishing a comprehensive notion of academic freedom. Furthermore, each of them adds additional uncertainty by listing obligations and responsibilities academics must adhere. Although it can be argued that this is necessary, existing conceptual vagueness of both, academic freedom and responsibilities, often raises an issue of possibly too burdensome limitations of academic freedom. Such term as “responsibility” which sometimes has been called as “a fashionable political buzzword with legally unclear meaning”,⁶³¹ or obligations for academics to adhere to excellence, innovation and advancement of frontiers of knowledge are not only vague, but also, as a part of international guidelines, create potential risk of unjust national interpretation and consequently not sufficient protection of academic freedom.

⁶²⁹ *Ibid*, 17.

⁶³⁰ *Ibid*, 18.

⁶³¹ *Ibid*, 20.

3.3. ACADEMIC FREEDOM IN THE EUROPEAN HIGHER EDUCATION AREA: THE BOLOGNA PROCESS

3.3.1. *Freedom of research and teaching as fundamental principles of university life in the Magna Charta Universitatum and its “successors”*

In 1888, the University of Bologna celebrated its 800th anniversary. On this occasion the idea to develop Italian academic institutions as expressions and preservers of an Italian identity was born. Hundred years later, celebrating the 900th anniversary of this Alma Mater of European higher education this fundamental idea was extended to Europe.⁶³² On 18 September 1988 the Magna Charta Universitatum was signed by hundreds of rectors and heads of universities from Europe and beyond. The document contains fundamental values, rights and obligations of the University. It encompasses principles of academic freedom and institutional autonomy as the guiding principles towards good governance and shared identity.

The Magna Charta emphasizes that the university is an autonomous institution, where research and teaching “must be morally and intellectually independent of all political authority and economic power”⁶³³, where “[f]reedom in research and training is the fundamental principle of university life” which must be respected by governments and universities and where students are “entitled, able and willing to enrich their minds with that knowledge”.⁶³⁴ Although the document does not specifically establish the concept of academic freedom, several dimensions of this principle can be identified: freedom of research, freedom of teaching and freedom of studying.

The document also includes the means to achieve foreseen goals, noting that in order to maintain freedom in research and teaching, appropriate instruments to realize that freedom must be made available to all members of the university community. Furthermore, students’ freedom must be protected, the European universities should cooperate in exchange of information, documentation, encourage mobility among teachers and students as it is essential for the advancement of knowledge. It is also worth noting that the document supports the traditional understanding of the academic profession stating that recruitment of teachers and regulation of their status must adhere to the principle that research is inseparable from teaching.⁶³⁵

The Magna Charta expresses an intention to safeguard the autonomy of universities, ensuring the interrelation between teaching and research, protecting the freedom of research and

⁶³² Andris Barblan, “Foreword”: 7; in: Observatory for Fundamental University Values and Rights, *Autonomy and Responsibility. The University’s Obligations for the XXI Century. Proceedings of the Launch Event for the Magna Charta Observatory 21-22 September 2001*, (Bologna: Bononia University Press, 2002).

⁶³³ *The Magna Charta Universitatum*, *supra* note 232.

⁶³⁴ *Ibid.*

⁶³⁵ *Ibid.*

teaching and preserving European identity with the purpose of serving the society as a whole. However, the document does not provide a clear definition neither of autonomy nor of academic freedom and also includes some limitations. The Magna Charta mentions only universities but not other types of HEIs, does not address the issues of responsibility and accountability of university and individual professors. However, as Smith argues the Magna Charta is a short declaration which was not meant as a complete regulation of academic values and responsibilities.⁶³⁶

As Europe was heading towards the regional integration of higher education in order to strengthen the cultural, social, technical and intellectual position of the continent, efforts also outside the institutional framework of the EU were made, encouraging European governments to reform their higher education systems in order to harmonize them and create the EHEA. This process, under the name of the “Bologna Process”, was initiated in 1998, when participating in the celebration of the 800th anniversary of the Sorbonne University, the ministers of education of France, Germany, the United Kingdom and Italy decided on a “Joint declaration on harmonisation of the architecture of the European higher education system”⁶³⁷ (the Sorbonne Declaration). Although being a non-binding soft law instrument, the Sorbonne Declaration is considered to be an important document, as it was the starting point of major changes in the higher education systems in Europe.

The aims of the Sorbonne Declaration were confirmed in Bologna the following year. In June 1999 ministers responsible for higher education from twenty-nine European countries signed the Bologna Declaration⁶³⁸, as a “successor” of the Magna Charta. It aims at increasing the international competitiveness of the European system of higher education and stresses the need to ensure “that the European higher education system acquires a world-wide degree of attraction equal to our extraordinary cultural and scientific traditions”⁶³⁹. The main objectives of the Bologna Declaration were: the adoption of a system of easily readable and comparable degrees, the introduction of undergraduate and postgraduate levels, the establishment of the ECTS credit systems, the promotion of mobility, and the promotion of European co-operation in quality assurance and promotion of the necessary European dimensions in higher education.⁶⁴⁰

⁶³⁶ Lucy Smith, “The Structure and Role of the Observatory”: 32; in: Observatory for Fundamental University Values and Rights, *Autonomy and Responsibility. The University’s Obligations for the XXI Century. Proceedings of the Launch Event for the Magna Charta Observatory 21-22 September 2001*, (Bologna: Bononia University Press, 2002).

⁶³⁷ *Joint declaration on harmonisation of the architecture of the European higher education system (Sorbonne Joint Declaration)* (May 1998) // http://www.ehea.info/Uploads/Declarations/SORBONNE_DECLARATION1.pdf (accessed June 10, 2016).

⁶³⁸ The Bologna Declaration, *supra* note 190.

⁶³⁹ *Ibid.*

⁶⁴⁰ *Ibid.*

The Bologna Declaration, different from the Sorbonne Declaration, avoids the word “harmonization”. Garber suggests that the states seem to resist the supranational implication of the concept, as it is associated with undesirable top-down enforcement of European standards, restricting the liberty of states to organize their systems as they want.⁶⁴¹ Although both declarations advocate for building a Europe of knowledge, which is considered to be an indispensable element for strengthening and contributing to the intellectual, cultural, social and technical development of the continent and acquiring the necessary competence to face the challenges, the principles of autonomy and academic freedom are mentioned only in passing.

The Bologna Declaration takes for granted the acceptance of the fundamental principles laid down in the Magna Charta and notes that “[t]his is of the highest importance, given that Universities’ independence and autonomy ensure that higher education and research systems continuously adapt to changing needs, society’s demands and advances in scientific knowledge”.⁶⁴² Both Declarations concentrated on the vision of creating an EHEA, however they did not observe, or even address, more carefully the role of the principles of autonomy and academic freedom in this process. Nor did they consider the potential risks to academic freedom which may appear when the member countries and the HEIs will concentrate on adhering to the rising demands from the state and from the society.

3.3.2. *The relevance of the fundamental values of higher education amongst the commitments and priorities of the European Higher Education Area*

As follow-up to the Bologna Declaration, the Ministerial Conferences take place every two years in different European cities. The Communiqués bear the name of the respective city in which the ministers convened.⁶⁴³ They reflect the main aspects of and the progress made within

⁶⁴¹ Sacha Garben, *The EU Higher Education Law: The Bologna Process and Harmonization by Stealth* (The Netherlands: Kluwer Law International, 2011), 18.

⁶⁴² The Bologna Declaration, *supra* note 190.

⁶⁴³ *Towards the European Higher Education Area Communiqué of the meeting of European Ministers in charge of Higher Education in Prague on May 19th 2001 (Prague Communiqué)* (2001) // http://media.ehea.info/file/2001_Prague/44/2/2001_Prague_Communique_English_553442.pdf (accessed June 10, 2016). *Realising the European Higher Education Area Communiqué of the Conference of Ministers responsible for Higher Education in Berlin on 19 September 2003 (Berlin Communiqué)* (2003) // http://media.ehea.info/file/2003_Berlin/28/4/2003_Berlin_Communique_English_577284.pdf (accessed June 10, 2016).

The European Higher Education Area - Achieving the Goals Communiqué of the Conference of European Ministers Responsible for Higher Education (Bergen Communiqué) (2005) // http://media.ehea.info/file/2005_Bergen/52/0/2005_Bergen_Communique_english_580520.pdf (accessed June 10, 2016). *London Communiqué Towards the European Higher Education Area: responding to challenges in a globalised world (London Communiqué)* (2007) // http://media.ehea.info/file/2007_London/69/7/2007_London_Communique_English_588697.pdf (accessed June

the EHEA and also include the decisions made during the Ministerial Conferences on the new steps to be taken, on the main necessary changes, on further developments of the EHEA and on commitments of the Member States.

Table 7 displays whether a particular Communiqué addresses a matter academic freedom. The table is also designed to highlight the trends, commitments and future priorities of the EHEA which may in one way or another have influence to the scope of academic freedom. There is no doubt that each listed aspect highly contributes towards building on a diverse, successful, prospering European higher education system which is perceived, today, as the key to the empowerment of people and national development. However, it can be argued that they also may contain possible risks and threats to academic freedom. Their potentially negative effects on academic freedom find their counterweight in positive effects on different, but possibly equally important, societal goals. However, this process is accompanied by different challenges that HEIs must face while striving for desirable progress. One of the major challenges is to determine the right mechanisms that would allow HEIs to participate in the global knowledge network alongside with other leading academic institutions. For this reason the question is often raised whether on their way towards the established goals, while experiencing the continuing need to adapt higher education systems to the process of academic globalization and to effectively respond these challenges, HEIs are still capable of preserving the traditional values of higher education.

The Document	Academic freedom	Commitments and priorities of the EHEA established in the document
Prague Communiqué (2001)	No	<ul style="list-style-type: none"> • competitiveness of HEIs in Europe; • the mobility of students, teachers, researchers; • development of national qualification frameworks; • the social dimension.
Berlin Communiqué (2003)	No	<ul style="list-style-type: none"> • development of quality assurance at institutional, national and European level; • evaluation of programmes or institutions, including internal assessment, external review, participation of students and the publication of results; • higher education equally accessible to all;

10, 2016). *The Bologna Process 2020 - The European Higher Education Area in the new decade Communiqué of the Conference of European Ministers Responsible for Higher Education (Leuven/Louvain-la-Neuve Communiqué)* (2009) // http://media.ehea.info/file/2009_Leuven_Louvain-la-Neuve/06/1/Leuven_Louvain-la-Neuve_Communique_April_2009_595061.pdf (accessed June 10, 2016). *Budapest-Vienna Declaration on the European Higher Education Area (Budapest-Vienna Declaration)* (2010) // http://media.ehea.info/file/2010_Budapest_Vienna/64/0/Budapest-Vienna_Declaration_598640.pdf (accessed June 10, 2016). *Making the Most of Our Potential: Consolidating the European Higher Education Area Bucharest Communiqué (Bucharest Communiqué)* (2012) // http://media.ehea.info/file/2012_Bucharest/67/3/Bucharest_Communique_2012_610673.pdf (accessed June 10, 2016). *Yerevan Communiqué* (2015) // http://media.ehea.info/file/2015_Yerevan/70/7/YerevanCommuniquéFinal_613707.pdf (accessed June 10, 2016).

		<ul style="list-style-type: none"> • mobility of students, academic and administrative staff; • attractiveness and openness of the European higher education; • encouraging to increase the role and relevance of research to technological, social and cultural evolution and to the needs of society.
Bergen Communiqué (2005)	No	<ul style="list-style-type: none"> • enhancing research and its importance in underpinning higher education for the economic and cultural development; • the importance of research and research training in maintaining and improving the quality of and enhancing the competitiveness and attractiveness of the EHEA; • the social dimension; • mobility of students and staff; • attractiveness of EHEA to other parts of the world.
London Communiqué (2007)	Yes	<ul style="list-style-type: none"> • competitiveness of EHEA; • ability to respond effectively to the challenges of globalization; • stimulation of research; • a move towards student-centered higher education and away from teacher driven provision; • mobility if staff, students and graduates; • the social dimension; • the EHEA in a global context.
Leuven/Louvain-la-Neuve Communiqué (2009)	Yes	<ul style="list-style-type: none"> • striving for excellence; • constant focus on quality; • a respond to the changing demands of the fast evolving society; • employability; • student-centered learning, new approaches to teaching and learning; • fostering research and innovation; • engagement in global collaboration for sustainable development; • mobility of students, early stage researchers and staff; • seeking new and diversified funding sources and methods.
Budapest-Vienna Ministerial Declaration (2010)	Yes	<ul style="list-style-type: none"> • mobility of students and staff; • improving teaching and learning; • enhancing graduate employability; • quality higher education for all; • student-centered learning; • higher education is a major driver for social and economic development and innovation; • the social dimension.
Bucharest Communiqué (2012)	Yes	<ul style="list-style-type: none"> • widening overall access to quality higher education; • the social dimension; • student-centered learning, characterized by innovative methods of teaching; • quality assurance; • attractiveness of the EHEA; • employability; • a stronger link between research, teaching and learning; • learning mobility in order to promote an element of internationalization of higher education.
Yerevan Communiqué (2015)	Yes	<ul style="list-style-type: none"> • enhancing the quality and relevance of learning and teaching; • promoting pedagogical innovation in student-centered learning; • a stronger link between research, teaching and learning; • employability; • the social dimension; • wider participation; • mobility.

Table 9. Academic freedom and possible threats to it in European Ministerial Conferences Communiqués.

It is important to note that among the established goals to construct and uphold the EHEA and to achieve ambitious expectations, academic freedom is given only little attention. The first three communiqués do not even mention academic freedom. For example, the Berlin Communiqué, highlights the necessity of the quality assurance system which should include an evaluation of programmes or institutions, including internal assessment, external review, participation of students and the publication results. However, the evaluation of performance of academics often meets criticism. It is argued that the measurement of scientific performance by standards and benchmarks of quantity rather than quality encourages and a result leads to, amongst other measurable outputs, publications with less significance, joint authors whose contributions are negligible and the unnecessarily excessive use of cross-citations.⁶⁴⁴ Accordingly, research assessment must also include qualitative criteria. Doubts are also raised in regard to citations, as citation analysis, if not performed by experts, can be an “extremely blunt instrument”⁶⁴⁵, which, if applied blindly, without focusing on quality, can lead to conclusions that are far from reasonable. Some scholars note that the frequency of citations does not account for the quality of the researchers because it more often than not depends on the social recognition of the researcher rather than the excellence of the publication. It also favors those who work on trendsetting topics, and can also give an advantage to publications of a lower quality, or such that contain grave errors, but which are then criticized and find stark opposition in scholarly circles, but are also, as an effect, cited relatively often.⁶⁴⁶

The Bergen Communiqué emphasizes the importance of research over teaching underlining that the efforts to improve the quality of teaching should not detract from the efforts to strengthen research and innovation.⁶⁴⁷ It is argued that the preference of research over teaching often results in remarkably little attention being paid to the preparation of academics.⁶⁴⁸ The document reiterates that academic values should prevail in international academic cooperation, however it is not entirely clear what academic values were envisaged in formulating this claim. Although academic freedom or any of its elements are not expressly

⁶⁴⁴ Letter to the President of the Conference of Chancellors of the Swiss Universities (CRUS) - Project for the analysis of the services of research of Swiss universities based on bibliometric criteria // <http://www.sarit.ch/crusletter/index.html#footnote3> (accessed June 10, 2016).

⁶⁴⁵ D. Adam, “Citation Analysis: The counting house,” *Nature* 415 (2002): 726-729.

⁶⁴⁶ Friedemann Mattern, “Bibliometric Evaluation of Computer Science – Problems and Pitfalls,” (2006) // <https://www.vs.inf.ethz.ch/publ/slides/Mattern-Bibliometry-SARIT06.pdf> (accessed June 10, 2016).

⁶⁴⁷ *The European Higher Education Area - Achieving the Goals Communiqué of the Conference of European Ministers Responsible for Higher Education (Bergen Communiqué)* (2005) // http://media.ehea.info/file/2005_Bergen/52/0/2005_Bergen_Communique_english_580520.pdf (accessed June 10, 2016).

⁶⁴⁸ High Level Group on the Modernisation of Higher Education, “Report to the European Commission on Improving the Quality of Teaching and Learning in Europe’s Higher Education Institutions,” (2013) // http://ec.europa.eu/dgs/education_culture/repository/education/library/reports/modernisation_en.pdf (accessed June 10, 2016).

mentioned in the Bergen Communiqué, the document points out that the HEIs should enjoy the necessary autonomy and that the states should recognize the need for sustainable funding for institutions.

The London Communiqué is the first one to mention that the development of the EHEA is based on “institutional autonomy, academic freedom, equal opportunities and democratic principles that will facilitate mobility, increase employability and strengthen Europe’s attractiveness and competitiveness”.⁶⁴⁹ However, it does not elaborate any of the concepts any further. The Leuven/Louvain-la-Neuve Communiqué restates that a reform of the European higher education systems and policies is being enacted in accordance with “the European values of institutional autonomy, academic freedom and social equity and will require full participation of students and staff”.⁶⁵⁰ The document stresses the recognition of the values of various missions of higher education, ranging from teaching and research to community service and engagement in social cohesion and cultural development. That indicates a shift from a total concentration on research as opposed to the earlier communiqués, which had highlighted research as the dominant object of the threats that academic freedom was facing. The Leuven/Louvain-la-Neuve Communiqué reasserts the importance of the teaching mission of HEIs, the importance of student-centered learning, calling for new approaches to teaching and learning and asking HEIs to pay particular attention to improving the quality of teaching quality.⁶⁵¹ The document encourages doctoral programmes which would provide high quality disciplinary research, accordingly public authorities and HEIs are expected to improve the attractiveness of academic positions and subsequent opportunities for career development.⁶⁵² The document notes that as HEIs gain greater autonomy, expectations also grow that HEIs are responsive to societal needs and accountable to the state and the society. Public funding remains the main priority in order to guarantee access and sustainable development of autonomous HEIs, however attention should also be paid to seeking new and diversified funding sources and methods.⁶⁵³

The Budapest-Vienna Communiqué recommits to “academic freedom as well as autonomy and accountability of HEIs as principles of the European Higher Education Area”.⁶⁵⁴ It pays a special attention to the key role of the academic community by emphasizing the need

⁶⁴⁹ *London Communiqué*, *supra* note 235.

⁶⁵⁰ *The Bologna Process 2020 - The European Higher Education Area in the new decade Communiqué of the Conference of European Ministers Responsible for Higher Education (Leuven/Louvain-la-Neuve Communiqué)* (2009) // http://media.ehea.info/file/2009_Leuven_Louvain-la-Neuve/06/1/Leuven_Louvain-la-Neuve_Communique_April_2009_595061.pdf (accessed June 10, 2016).

⁶⁵¹ *Ibid.*

⁶⁵² *Ibid.*

⁶⁵³ *Ibid.*

⁶⁵⁴ *Budapest-Vienna Declaration*, *supra* note 234.

for a more supportive environment for the academic staff to fulfill their tasks and to participate in decision-making structures at European, national and institutional levels.⁶⁵⁵ The Bucharest Communiqué advocates for higher education as an open process in which students develop intellectual independence and self-confidence together with disciplinary knowledge and skills. It stresses the importance of developing more efficient governance and managerial structures at HEIs, students and staff engagement in governance structures; it also supports the “commitment to autonomous and accountable higher education institutions that embrace academic freedom”.⁶⁵⁶

The Yerevan Communiqué indicates that the reform and convergence of higher education systems is based on “public responsibility for higher education, academic freedom, institutional autonomy, and commitment to integrity”.⁶⁵⁷ The document recognizes the serious challenges the EHEA is facing, such as ongoing economic and social crisis, high levels of unemployment, demographic changes, new migration tendencies and conflicts within and between countries. For the first time, the Ministers expressed their will to support and protect members of the academic community in exercising their right to academic freedom and ensure their representation in the governance of autonomous HEIs. The support was guaranteed for HEIs promoting intercultural understanding, critical thinking, political and religious tolerance, gender equality, and democratic and civic values.⁶⁵⁸ The Yerevan Communiqué, instead of favoring to orient curricula to strengthen students’ competences mainly to increase their employability and prepare them for the labor market, notes that study programmes should enable them to develop the competences that best satisfy their different personal aspirations and societal needs. Recognition and support of quality teaching is linked with ensuring opportunities for academics to improve their teaching skills.

In conclusion it should be noted that the Communiqués reflect high ambitions of ensuring the competitiveness and attractiveness of the EHEA. Amongst the commitments, trends and priorities of the EHEA little attention was devoted to the fundamental values of higher education. Only few last Communiqués indicate the increasing interest towards academic freedom, institutional autonomy, academic profession and working environment of academics. It can be argued that the documents should address the question of responsibility of the state and the HEIs in regard to academic freedom in the process of development of the EHEA more

⁶⁵⁵ *Ibid.*

⁶⁵⁶ *Making the Most of Our Potential: Consolidating the European Higher Education Area Bucharest Communiqué (Bucharest Communiqué)* (2012) // http://media.ehea.info/file/2012_Bucharest/67/3/Bucharest_Communique_2012_610673.pdf (accessed June 10, 2016).

⁶⁵⁷ *Yerevan Communiqué* (2015) //

http://media.ehea.info/file/2015_Yerevan/70/7/YerevanCommuniqueFinal_613707.pdf (accessed June 10, 2016).

⁶⁵⁸ *Ibid.*

accurately and thoroughly. As each of the Communiqués include the part of the commitments, there should be a provision included which would require the member countries to review their respective national legislations and to ensure their full compliance with the protection of academic freedom as a right and as a responsibility.

3.3.3. The Bologna Process' implications on academic freedom

Although the reforms initiated by the Bologna Process have been highly appreciated and considered as a vital contribution to the versatile development of the region, each of its states and the respective societies, the oftentimes excessive concentration on commercialization and competition in higher education without due regard to academic freedom raises various concerns among the members of the academic community. As the main subject of this research is protection of academic freedom as a human right, it can be argued that it may be fully achieved when academic freedom is recognized as a right and as a responsibility. Accordingly, this must be reflected in regional and national higher education regulation. This part of the research is devoted to demonstrate more specifically how academic freedom as a responsibility should be perceived. It includes explicit examples of practical aspects of the academic profession and the academic workplace. Although these aspects (for example, working environment, employment conditions, requirements for publication and etc.) are not identified in our research as the elements falling under the scope of academic freedom, however, they highly influence the ambit of academic freedom and can even lead to its violation. It can be claimed that in order to avoid such consequences regional and national legal higher education framework should include the conditions under the which the state and the HEIs could not limit academic freedom. That is an explicit expression of the responsibility of the state and the HEIs.

Reports in this area show that higher education and the research sector experienced a number of attacks which “have undermined the principles of academic freedom and collegiality, and the intrinsic value of knowledge acquisition, transmission and analysis”.⁶⁵⁹ It is suggested that the decline in academic freedom can be related to the worsening of democratic governance, “often introduced in the name of restricted budget, however in fact representing spread of ideas of the new public management”.⁶⁶⁰

⁶⁵⁹ Education International, “6th World Congress Report: Building the Future through Quality Education,” (2012) // https://download.ei-ie.org/Docs/WebDepot/CongReport%20ENG_web.pdf (accessed June 10, 2016).

⁶⁶⁰ Education International, “Academic Perception of the Bologna Process. Report of the Education International to the Bologna Ministerial meeting in Bucharest,” (April 2012) //

Mobility remains the driving force of the Bologna Process and the fundamental notion on which the EHEA was designed. Scholars argue that when academic freedom varies between the states, the likelihood of mobility is decreased.⁶⁶¹ In such cases academics and students are unwilling to work or study at the university in which the level of academic freedom is significantly lower than in their home institution. Considered of utmost importance through all the Bologna documents, there is no doubt that mobility is extremely important for personal development of students and academics, for the increase of the quality of teaching and excellence in research, and for cooperation and competition between HEIs. Gaining and deepening knowledge, improving the foreign language proficiency over the training period abroad, contributes not only to the individual qualifications and abilities of the academic, but also enhances the quality of study programmes and, accordingly, helps HEIs to become more open to international influences and more attractive for students and researchers. At the time of massive higher education internationalization, non-English speaking countries aim at expanding educational processes by offering courses for international students and performing and publishing research in English. It is stated that in nowadays English is the main element fostering economic development and its proficiency is “conducive to better performances in exports, income-generating business activities and innovation”.⁶⁶² As academics in non-English speaking countries are often not only encouraged but also required to perform research and to teach in English, it requires special attention from decision-makers and HEIs to ensure attractive academic staff conditions as a prerequisite for the successful implementation of the Bologna Process. Academic staff should be perceived as key players on whom the practical implementation of this fundamentally disruptive process relies on a daily basis. It is argued that in the context of increasing pressures on higher education, it is essential to find ways and means how to decrease the unnecessary pressure on academic staff and support and motivate them in the exercise of their work.⁶⁶³

The fact that the main focus of the Bologna Process was placed on national and regional social and economical prosperity without paying due regard to traditional values of higher education, including academic freedom, demonstrates its negative impact on the academic environment. The main objectives of the EHEA correspond to the global trends in higher education. Europe is striving for quality assurance and excellence in higher education and

http://media.ehea.info/file/Education_International/69/2/EI_report_Bologna_ministerial_2012_610692.pdf (accessed June 10, 2016).

⁶⁶¹ Terence Karran, *supra* note 13, 289.

⁶⁶² Marc Pilkington, “Converging Higher Education Systems in a Global Setting: the example of France and India,” *European Journal of Education* Vol. 49, No.1 (2014): 118 // DOI: 10.1111/ejed.12057.

⁶⁶³ Education International, “Academic Perception of the Bologna Process. Report of the Education International to the Bologna Ministerial meeting in Bucharest,” *supra* note 660.

research in order to become more competitive in a global higher education market. Investment in higher education and R&D is considered crucial for providing knowledge necessary to foster economic growth. Alongside, it is argued that academic freedom for higher education staff has decreased and that academics' working conditions have deteriorated since the introduction of the Bologna Process.⁶⁶⁴ The reforms led by national governments across Europe have deeply affected the academic profession. Studies show that academic staff is facing a great increase in workload, while at the same time job security is decreasing as part-time academic jobs and fixed and short-term contracts are becoming the norm rather than the expectations, and teaching and research conditions are also deteriorating.⁶⁶⁵

The members of the academic community highlighted various problems in regard to the exercise of the academic profession which also raise concerns in relation to the separate elements of academic freedom. A study on Academics' Perception of the Bologna Process performed by the Education International Pan-European Structure pointed out a number of different problematic aspects of the working environment of academics. Table 8 demonstrates the identified key issues which highly impact the enjoyment of academic freedom and the capability to fulfill academic responsibilities.⁶⁶⁶

⁶⁶⁴ Education International, "Enhancing Quality: Academics' Perception of the Bologna Process," (March 2010) // http://download.ei-ie.org/Docs/WebDepot/EI_BolognaReport2010_en.pdf (accessed June 10, 2016).

⁶⁶⁵ *Ibid.*

⁶⁶⁶ Marie Clarke, "Creating a Supportive Working Environment in European Higher Education," (Education International Research Institute: 2015) // <http://download.ei-ie.org/Docs/WebDepot/HigherEducation.pdf> (accessed June 10, 2016).

Academic activities	Key issues that impact upon academic freedom and professional responsibilities
Teaching	<ul style="list-style-type: none"> • increase of the workload of teaching-related activities; • teaching-related activities are not adequately funded; • academics are under pressure to teach more students; • increasing student diversity, students with a greater variety of needs require special training and greater supports which academics lack; • research led teaching is not supported; • teaching is less valued in regard to career progression; • academics are not encouraged to improve instructional skills in response to teaching evaluations.
Research and publication	<ul style="list-style-type: none"> • not enough time to devote to the research; • the international aspect of publishing requires them to publish in English and spend time abroad, however there is often an issue of providing adequate opportunities for leave; • no sufficient support by the HEIs in attending national and international conferences, and often funding obstacles are raised; • institutional managers set research priorities within the HEI; • pressure to raise external research funding has increased; • the availability of research funding is inadequate; • the levels of bureaucracy related to research projects has increased; • not funded research areas tend to be neglected and that has a negative impact on the careers of those working in less popular fields; • career progression is influenced by the publications and citations; • increasing pressure to publish in high profile journals.
Intramural activities	<ul style="list-style-type: none"> • academics feel not sufficiently influential at faculty level and institutional level; • predominance of a top down approach in HEIs; • inadequate communication processes in HEIs; • lack of collegiality and participation in decision-making process, including decisions in relation to the selection of key administrators, budget targets, promotion and tenure.

Table 10. Key issues that impact academic activities during the implementation of Bologna process.

Many of the issues listed present an imminent threat to academic freedom. Some of them can be clearly identified as limitations of academic freedom. For example, setting research priorities and neglecting certain research areas can be regarded as limitations of the freedom of research. Academics are also of the view that the quality of research is threatened because of the pressure to increase research productivity and to produce useful and directly applicable results.⁶⁶⁷ The lack of a positive approach towards participation and the expression of one's opinion in decision-making processes endanger the freedom of intramural speech. It is apparent that the factual trend in teaching activities does not correspond the main mission of the EHEA of enhancing the quality and relevance of learning and teaching.

The Yerevan Communiqué encourages HEIs and academic staff to promote pedagogical innovation in learning environments and fully exploit the potential benefits of digital technologies for teaching.⁶⁶⁸ However, this goal can hardly be achieved if HEIs do not create a conducive environment and fail to provide incentives and opportunities for academics to

⁶⁶⁷ *Ibid.*

⁶⁶⁸ *Yerevan Communiqué, supra* note 657.

develop necessary teaching competences in order to perform effective teaching. It is argued that academics were “positively disposed to the Bologna Process”⁶⁶⁹ and accordingly it is extremely important to reaffirm traditional higher education values in the performance of academic activities.

The lack of a discussion on the issue of the academic working environment was obvious throughout the first ten years of the Bologna Process. Then, in 2009, the Leuven/Louvain-la-Neuve Communiqué took a vast step forward in this respect by stating that “attractive working conditions and career paths as well as open international recruitment are necessary to attract highly qualified teachers and researchers to higher education institutions”.⁶⁷⁰ The Budapest-Vienna Ministerial Declaration recognized the need for “a more supportive environment for the staff to fulfill their tasks”⁶⁷¹. Then, the Bucharest Communiqué outlined the necessity to establish conditions that foster “a supportive and inspiring working and learning environment, while continuing to involve <...> staff in governance structures at all levels”.⁶⁷²

As HEIs operate in the public sphere, having an obligation of public accountability, it is argued that participation of academics and researchers in all key decision-making bodies is the main element of academic freedom which should be founded on the principle of collegiality and should include guarantees to the freedom to determine teaching style, research priorities and the right to intellectual property.⁶⁷³ And then finally, the drafters of the Yerevan Communiqué found it crucial to “recognize and support quality teaching, and to provide opportunities for enhancing academics’ teaching competences”.⁶⁷⁴ Accordingly, it is apparent that for the success of the Bologna Process it is necessary to settle proper teaching and research conditions and attractive career paths for academics.

In conclusion, the Bologna documents did not provide any guidance as to what composes academic freedom. As Karran argues, it is not clear how academic freedom “may be protected or nurtured, and whether, therefore, the presence (or absence) of academic freedom is supporting (or hindering) the implementation of the Bologna Process.”⁶⁷⁵ It is apparent, that while member countries are engaged in a process of convergence and coordinated reform of their higher education systems and concentrate their capacities towards the achievement of a common goal, insufficient amount of attention is paid towards the preservation of the fundamental values of higher education. One of the most obvious examples after the evaluation

⁶⁶⁹ Marie Clarke, *supra* note 666.

⁶⁷⁰ *Leuven/Louvain-la-Neuve Communiqué*, *supra* note 650.

⁶⁷¹ *Budapest-Vienna Declaration*, *supra* note 234.

⁶⁷² *Bucharest Communiqué*, *supra* note 656.

⁶⁷³ Education International, “6th World Congress Report: Building the Future through Quality Education,” *supra* note 659.

⁶⁷⁴ *Yerevan Communiqué*, *supra* note 657.

⁶⁷⁵ Terence Karran, *supra* note 13, 290.

of the Bologna documents is the lack of due regard towards the guarantee of academic freedom which can be directly traced back to insufficiency of attention towards the working conditions of academics. This is an explicit example of the consequences resulting from inadequate recognition of academic right as a right and as a responsibility. In the context of the Bologna Process, the challenges it created and the reforms it has influenced, academics need a working environment which enables them to respond to diverse demands. That can be achieved if the state and HEIs recognize the importance of their role towards the protection of academic freedom. The Yerevan Communiqué expresses the support towards HEIs in enhancing their efforts to promote “intercultural understanding, critical thinking, political and religious tolerance, gender equality, and democratic and civic values”.⁶⁷⁶ The traditional notion of academic freedom suggests that these values, and in particular critical thinking, cannot be achieved unless academics perform their professional responsibilities while enjoying academic freedom. That shows the need to recognize the additional burdens which have been placed upon academics and also to introduce certain requirements and obligations towards the state and the HEIs in order to ensure that academics are able to perform their professional responsibilities while enjoying academic freedom.

3.4. ACADEMIC FREEDOM UNDER THE EU HIGHER EDUCATION FRAMEWORK

3.4.1. The legal basis for European higher education policy

Europe's higher education landscape consists of more than four thousand HEIs, all of which are operating within their national or regional legal and administrative frameworks, thus contributing to the existence of a diversity of this landscape.⁶⁷⁷ Education is deeply rooted in the national culture of every European country. This is one of the most sensitive spheres of the EU policy making. The Member States have long protected and preserved their national responsibilities and competences for education policy. The EU has become active in the field of higher education only in the 1990's. Before the TEU, there was no legal basis for a European education strategy. Nonetheless, the European Commission was always taking part in Bologna deliberations and its role in the Bologna Process in developing a common higher education area across Europe has been increasing. Although formally outside the decision making area, the

⁶⁷⁶ *Yerevan Communiqué*, *supra* note 657.

⁶⁷⁷ European Commission Working Document on recent developments in European high education systems Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Supporting growth and jobs – an agenda for the modernisation of Europe's higher education systems (SEC/2011/1063 final), paragraph 1.

European Commission, accelerated most of the initial groundwork during the initial stages of the Bologna Process and has been formally included in the follow-up work.⁶⁷⁸

The TEU has formally recognized higher education as an area of EU policy noting the necessity for the Community to contribute to the development of quality education and encouraging cooperation between Member States, while fully respecting their responsibility for the content of teaching and the organization of education systems and their cultural and linguistic diversity.⁶⁷⁹ TEU and its commitment to the single European market reinforced the view that higher education has an important economic role to play in the context of increasing global economic competitiveness.⁶⁸⁰ Thus, although previously Member States tried to maintain national sovereignty in the area of education, they are now willingly engaging in “Europeanization”⁶⁸¹ of higher education.

The following aims were defined to be of particular relevance to higher education: developing the European dimension in education, particularly through teaching; encouraging mobility of students and teachers; promoting cooperation, exchange of information and experience between educational establishments; encouraging the development of distance learning.⁶⁸² The TEU has also included the promotion of research and technological development, stressing the necessity to strengthen the scientific and technological bases of the Union’s industry and to encourage it to become more competitive at international level.⁶⁸³ In order to achieve this objective, certain activities should be carried out by the Union.⁶⁸⁴ That demonstrates a high interest of the Union in research performance and recognition of its potential value to the wellbeing of the EU and the Member States.

The exact stipulation of Article 126(1) TEU was later incorporated in the Treaty of Nice, which entered into force 1 January 2003⁶⁸⁵ and also appears in the Lisbon Treaty, which serves

⁶⁷⁸ Roger King, *Governing Universities Globally. Organizations, Regulations and Rankings*, (UK: Edward Elgar Publishing Limited, 2009), 108.

⁶⁷⁹ *Treaty on European Union (Treaty on Maastricht)*, OJ C 191, 29.7.1992, Title VIII, art. 126(1) (now art. 165 TFEU/ art. 149 TEC).

⁶⁸⁰ Roger King, *supra* note 678, 104.

⁶⁸¹ According to Olsen, Europeanization is commonly understood as: 1) expansion of territorial boundaries; 2) development of the European level institutionalization; 3) export of European institutions, organizations and governance beyond the European territory; 4) adjustment of national and sub-national systems of governance to a European norms; 5) endeavor to have unified and politically stronger Europe. Johan P. Olsen, “The Many Faces of Europeanization,” *Journal of Common Market Studies Vol. 40, Issue 5* (2002): 923-924.

⁶⁸² *Treaty on European Union (Treaty on Maastricht)*, *supra* note 679, Title VIII, art. 126(2) (now art. 165 TFEU/ art. 149 TEC).

⁶⁸³ *Ibid.*, Title XV, art. 130f(1) (now art. 179 TFEU/ art. 163 TEC).

⁶⁸⁴ The activities listed are: “a) implementation of research, technological development and demonstration programmes, by promoting cooperation with and between undertakings, research centres and universities; b) promotion of cooperation in the field of Community research, technological development and demonstration with third countries and international organizations; c) dissemination and optimization of the results of activities in Community research, technological development and demonstration; d) stimulation of the training and mobility of researchers in the Community.” *Ibid.*, Title XV, art. 130g (now art. 180 TFEU/ art. 164 TEC).

⁶⁸⁵ Consolidated Version of the Treaty Establishing the European Community, OJ C 325, 24.12.2002, art. 149(1).

as the constitutional basis of the EU since 1 January 2009.⁶⁸⁶ The latter has broadened the role of the EU in higher education but has not introduced any significant changes. The importance of higher education as a concern of European policy is confirmed in the EU Charter, which entered into force with the Treaty of Lisbon in 2009 and which brings together in a single document the fundamental rights protected in the EU.

It should be noted that separate EU higher education systems are no longer functioning exclusively in a national context and have become interdependent and influenced not only by the Bologna Process but also by the EU. The latter became a major actor in the European higher education system fostering the Europeanization of higher education systems. Although the Member States retain substantial competence with regards to the organization of their higher education systems, their competence must be exercised in conformity with EU law. In this context, it must be acknowledged that the EU educational policies, just as the Bologna process, carry the so-called “distinct economic flavor”⁶⁸⁷, which, it can be argued, may encompass possible threats to academic freedom. The EU objectives aimed at this “education from an economic perspective” approach which were established in the Lisbon Strategy are discussed further in this chapter.

3.4.2. *Aiming for the most competitive knowledge-based economy*

The increasing attention and interest towards higher education corresponded to the EU’s strategic goal agreed in Lisbon in 2000 (hereinafter Lisbon Strategy) “to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion”.⁶⁸⁸ The Lisbon Strategy noted that Europe’s education and training systems need to adapt to the demands of the knowledge society and to the need for an improved level and quality of employment.⁶⁸⁹ It is a broad collective strategy designed to meet the challenges of the 21st century, and more specifically, the development towards a knowledge-based economy.⁶⁹⁰ The initial objective was to become a knowledge economy centered on an ambitious research and innovation agenda, however the evaluation of the 2000-2010 period has shown that the EU’s overall performance

⁶⁸⁶ Consolidated Version of the Treaty on the Functioning of the European Union, *supra* note 240, art. 165(1) (ex art. 149 TEC).

⁶⁸⁷ Sacha Garben, *supra* note 90, 21.

⁶⁸⁸ Lisbon European Council 23-24 March 2000 Presidency Conclusions // http://www.europarl.europa.eu/summits/lis1_en.htm (accessed June 10, 2016).

⁶⁸⁹ *Ibid.*

⁶⁹⁰ Marc Pilkington, *supra* note 662, 119.

has improved only marginally because of disappointing performances of some Member States.⁶⁹¹

The Council was charged with the task to adopt a multi-annual framework programme which would establish the scientific and technological objectives, fix the relevant priorities, define the rules for participation and its implementation.⁶⁹² The Lisbon Treaty has introduced some modifications regarding these provisions, stating that “[t]he Union shall have the objective of strengthening its scientific and technological bases by achieving a European research area in which researchers, scientific knowledge and technology circulate freely, and encouraging it to become more competitive, including in its industry [...]”.⁶⁹³ It was agreed to take measures to encourage undertakings, research centers and universities in their research and technological development activities of high quality. In addition, cooperation with the aim to permit researchers to cooperate freely across borders and to enable undertakings to exploit the potential of the internal market to the fullest was encouraged.⁶⁹⁴

Just as the Lisbon Strategy, the Europe 2020 strategy (hereinafter Europe 2020) features universities as key players regarding the emerging knowledge society, innovation and technology development. It focuses on smart, sustainable and inclusive growth that is aimed to be achieved through more effective investment in education, research and innovation.⁶⁹⁵ It acknowledges that in order to strengthen knowledge and innovation it is necessary to improve the quality of education, to strengthen research performance, to promote innovation and knowledge transfer throughout the Union, combining it with entrepreneurship, finance, and a focus on users’ needs and market opportunities.⁶⁹⁶

Recognition of the special role of universities has brought the intentions of governments of many major economies to regulate and motivate universities in order to make them instruments of social and economic public policy and to obtain desirable outcomes.⁶⁹⁷ However, this raises the issue of the balance between such public policy and a wider function and the true role of universities. It is even argued that “the current approach to universities is undermining

⁶⁹¹ European Commission, “Commission Staff Working Document. Lisbon Strategy Evaluation Document,” (2010) // http://ec.europa.eu/europe2020/pdf/lisbon_strategy_evaluation_en.pdf // (accessed June 10, 2016).

⁶⁹² *Treaty on European Union (Treaty on Maastricht)*, *supra* note 679, Title XV, art. 130i(1)(3) (now art. 182 TFEU/ art. 166 TEC).

⁶⁹³ *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, OJ C 306, 17.12.2007, art.163(1) (now art.179 TFEU).

⁶⁹⁴ Consolidated Version of the Treaty on the Functioning of the European Union, *supra* note 240, art. 179(2) (ex art. 163 TEC).

⁶⁹⁵ European Commission, “Europe 2020. A Strategy for Smart, Sustainable and Inclusive Growth,” *supra* note 241.

⁶⁹⁶ *Ibid.*

⁶⁹⁷ Geoffrey Boulton and Colin Lucas, “What are universities for?,” (September 2008) // [http://www.leru.org/files/general/What%20are%20universities%20for%20\(September%202008\).pdf](http://www.leru.org/files/general/What%20are%20universities%20for%20(September%202008).pdf) (accessed June 10, 2016).

the very processes that are the source of those benefits so cherished by government.”⁶⁹⁸ Special attention should be brought to the fact that the Lisbon Strategy did not fully satisfy the aspired ambitions.

The reports of the Lisbon Strategy were demonstrating that Europe’s knowledge society is not “as strong as needed”⁶⁹⁹ or that in numbers of scientific researchers, in universities’ standing in international rankings or in references in scientific papers, “Europe trails the US”⁷⁰⁰. The main focus then was placed on the necessity to have “world-class researchers”.⁷⁰¹ Although it has a positive effect on increasing attractiveness of research environment, it also stimulates the interaction between universities and researchers on the one hand, and industry and commerce on the other. Then the urge to boost R&D making it “a top priority” and “a prerequisite for Europe to become more competitive”⁷⁰² looks like the political aim which seems to supersede most other strategic goals and which must, therefore, be accepted as a mantra and a mission by the universities. As the European Commission strives for the combination of “research, education, training and innovation”⁷⁰³ in order to fulfill the “economic, social and environmental ambitions of the EU”,⁷⁰⁴ the question can be raised whether the existence of academic freedom in such environment is a reality or only an imaginary aspiration? The engagement of universities in the current and germane concerns of the societies is absolutely understandable and necessary. However, with the imposed public policies that strive to achieve the EU’s and national ambitions, universities lose a clear sense of their own mission and purpose. It is argued that by simply accepting the European Commission’s objectives, HEIs must provide their own answers to the questions: “What sort of education? What sort of research? And how do universities contribute to innovation, previously believed to be the exclusive domain of private industry?”⁷⁰⁵

Despite the established goals in the Lisbon strategy, Europe lost its position in the global race for knowledge and talent, while emerging economies steadily increase their investment in higher education. Existing rankings have shown that there were too few world-class European HEIs, as they just were trying to compete in too many areas while having comparatively low

⁶⁹⁸ *Ibid.*

⁶⁹⁹ Report from the High Level Group chaired by Wim Kok, “Facing the challenge. The Lisbon strategy for growth and employment,” (November 2004) // https://ec.europa.eu/research/evaluations/pdf/archive/fp6-evidence-base/evaluation_studies_and_reports/evaluation_studies_and_reports_2004/the_lisbon_strategy_for_growth_and_employment_report_from_the_high_level_group.pdf (accessed June 10, 2016).

⁷⁰⁰ *Ibid.*

⁷⁰¹ *Ibid.*

⁷⁰² *Ibid.*

⁷⁰³ European Commission, “The European Research Area: new perspectives,” (2007) // https://ec.europa.eu/research/era/pdf/era_gp_final_en.pdf (accessed June 10, 2016).

⁷⁰⁴ *Ibid.*

⁷⁰⁵ Geoffrey Boulton and Colin Lucas, *supra* note 697.

capacities.⁷⁰⁶ That even encouraged the European Commission to shift its attention from the idea of “a single excellence model”⁷⁰⁷ in higher education towards “a wide diversity of higher education institutions”⁷⁰⁸ where each must seek excellence in accordance with its mission and strategic priorities.

In the context of the Lisbon Strategy, the European Council established the Education and Training 2010 work programme as a solid framework for European cooperation in the education field, which was a predecessor for the Education and Training 2020 strategic framework (hereinafter ET 2020). The latter emphasizes that the EU objective of becoming a world-leading knowledge economy can be achieved through the provision of excellent and attractive education, training and research opportunities.⁷⁰⁹ ET 2020, among other objectives, addresses promoting mobility and improving the quality and efficiency of education and training. The latter element further underline the need for high quality teaching, adequate initial teacher education and continuous professional development.⁷¹⁰

It is noticeable that through the Lisbon Strategy and the Bologna Process the European Commission has initiated a powerful European policy on higher education. Concerns can be raised in regard to constructing higher education as “purposeful” or “leading somewhere”. Although the European Commission’s documents outline research and studying as productive activity which should be directed towards the benefit of society, the Commission also forges arguments which reflect its own preference for ‘applied’ research and continually supports the idea that higher education produces ‘useful results’ for the individual and society.⁷¹¹

Summarizing the European Commission’s policy on the modernization of Europe’s higher education system and its major focus towards the improvement of the conditions for industry to invest in research and innovation, three concluding arguments can be raised. First, the aspiration to increase a number of doctoral candidates, to equip the existing workforce with research skills and graduates with the knowledge and core transferable competences, carries the potential risk of limiting the freedom of teaching and research. The idea of effective links between education, research and business, also known as the “knowledge triangle”⁷¹² shows the attentiveness to

⁷⁰⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Supporting growth and jobs – an agenda for the modernisation of Europe's higher education systems (COM/2011/0567 final).

⁷⁰⁷ *Ibid.*

⁷⁰⁸ *Ibid.*

⁷⁰⁹ Council conclusions of 12 May 2009 on a strategic framework for European cooperation in education and training (ET 2020), OJ C 119/2, 28.5.2009.

⁷¹⁰ *Ibid.*

⁷¹¹ Ruth Keeling, “The Bologna Process and the Lisbon Research Agenda: the European Commission’s expanding role in higher education discourse,” *European Journal of Education* Vol. 41, No. 2 (2006): 209.

⁷¹² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Supporting growth and jobs – an agenda for the modernisation of Europe's higher education systems (COM/2011/0567 final), *supra* note 706.

exploit the potential for marketable products and services. However, not all research can become a marketable product or service. And although such research is necessary for the HEIs to exercise their fundamental and traditional role to further knowledge and the sciences, institutions pursuing less directly applicable research can lose their attractiveness for academics. These researchers might then be incentivized to choose more lucrative and professionally attractive areas for their research activities. It can be argued that this phenomenon can be recognized as an indirect limitation of academic freedom.

Second, the Commission's concern that "the curricula are often slow to respond to changing needs in the wider economy"⁷¹³ and that they should be adjusted to "current and emerging labor market needs and foster employability and entrepreneurship"⁷¹⁴ suggests a full adherence to the EU's preferences. Subsequently, it raises doubts in regard to what extent HEIs still possess institutional autonomy and to what extent academics are granted academic freedom when deciding on academic issues, in particular on the modalities and the substance of academic instruction.

Third, notwithstanding the fact that the significant role of teachers and researchers is recognized in the reform of European higher education, indications that "academic staff has often not kept pace with increasing student numbers which puts pressure on already strained capacities"⁷¹⁵ express the concern as to whether the states and HEIs are properly implementing their responsibilities and obligations towards the academic profession. In order to fulfill their research and teaching functions, academics need adequate working conditions, continuing professional development, and recognition of and reward for teaching and research excellence. The governments and HEIs should maintain the balance between their obligations and requirements towards academics. Accordingly, it could be argued that if national laws or institutional documents require academics to adhere to such policies, then there must be adequate conditions provided for them to fulfill their professional obligations. Otherwise it could result in a violation of academic freedom.

The trends and priorities in the EU higher education and endeavors to make HEIs as instruments of social and economic public policy show the lack of understanding of the broader function of the HEIs. These trends also change the modalities and the conditions under which teaching, research and publications are delivered. Policy documents for higher education in Europe should address the issue of academic freedom. It is necessary to keep the balance between the interests and needs of the EU, the Member States, HEIs and students. It is argued

⁷¹³ *Ibid.*

⁷¹⁴ *Ibid.*

⁷¹⁵ *Ibid.*

that if the market demand is an absolute factor, then “academic freedom and development in higher education is deprived.”⁷¹⁶ Accordingly, as changes in higher education influence the concept and practices of academic freedom, it is very important to realize its significance and to devote sufficient attention to its establishment as a right and as a responsibility in European and national higher education legislation.

3.4.3. General principles and their requirements for research activities

The European Commission’s intention to establish the European Research Area and the Community’s objective to become the most competitive and dynamic knowledge economy in the world has increased awareness of the issues related to the profession, labor market and career of researchers and to the responsibility of funders or employers of researchers. In 2005, the Commission issued the Recommendation on the European Charter for Researchers and on a Code of Conduct for the Recruitment of Researchers.⁷¹⁷ The Member States were encouraged to establish their strategies for developing sustainable careers for researchers according to the general principles and requirements settled in The European Charter for Researchers (hereinafter the Charter for Researchers) and the Code of Conduct for the Recruitment. Although the documents do not constitute a legal commitment, quite a number of research organizations and universities in different European countries have adopted the recommendations.⁷¹⁸

One of the general principles established in the Charter for Researchers is freedom of research which requires researchers to “focus their research for the good of mankind and for expanding the frontiers of scientific knowledge, while enjoying the freedom of thought and expression, and the freedom to identify methods by which problems are solved, according to recognized ethical principles and practices”.⁷¹⁹ It can be noted that the freedom of research is understood as the freedom of thought and expression and, in addition, as the freedom to identify methods. Additional requirements established in the Charter raise concerns: the document states that “researchers should recognize the limitations to this freedom that could arise as a result of

⁷¹⁶ Tanel Kerikmäe, “Prerequisites for European higher education in the context of Globalized Market,”: 28; in: Fausto de Quadros and Pedro Barbas Homem, eds., *Higher Education in the Framework of the 2020 European Union's Strategy* (Lisbon: Jean Monnet Center of Excellence of the University of Lisbon, 2012).

⁷¹⁷ Commission Recommendation of 11 March 2005 on the European Charter for Researchers and on a Code of Conduct for the Recruitment of Researchers, *supra* note 242.

⁷¹⁸ European Charter for Researchers and Code of Conduct for the Recruitment of Researchers: a UK HE Sector GAP Analysis // <http://www.rcuk.ac.uk/documents/skills/gapanalysis-pdf/> (accessed June 10, 2016).

⁷¹⁹ Commission Recommendation of 11 March 2005 on the European Charter for Researchers and on a Code of Conduct for the Recruitment of Researchers, *supra* note 242.

particular research circumstances (including supervision/guidance/management) or operational constraints, e.g. for budgetary or infrastructural reasons or, especially in the industrial sector, for reasons of intellectual property protection. Such limitations should not, however, contravene recognized ethical principles and practices, to which researchers have to adhere.”⁷²⁰ This requirement demonstrates that researchers are entitled to that amount of freedom that is given by the HEIs and research funders. That implies the necessity to set certain requirements and standards for them as well, so they do not establish limitations that are threatening the freedom of research and publication. The issue of the necessity to establish the conditions under which the state could not limit these rights and freedoms was already addressed.⁷²¹ But then the question remains what are the limits? It must be stressed that the part of the document including general principles and requirements applicable to employers and funders is mute about the freedom of research. There are no requirements or limitations suggested for employers and funders in regard to respect of freedom of research.

However, the document establishes certain requirements for researchers. They are required to be accountable towards employers, funders, public or private bodies and the society at large. They are also required to ensure open access to “methods of collection and analysis, the outputs and, where applicable, details of the data <...> to internal and external scrutiny”⁷²² and to ensure that “research is fruitful and that results are either exploited commercially or made accessible to the public (or both) whenever the opportunity arises.”⁷²³ Another provision requires the dissemination and exploitation of research results in compliance with the contractual arrangements. It is not entirely clear what is the balance between the two if the contract establishes certain limitations on publication and dissemination of results. The problem is that the document does not provide any guidelines for employers and funders in this regard, which would be necessary in order not to violate the freedom of research and publication. From the given provisions it is also unclear how “fruitful” and “whenever opportunity arises” should be defined. Emphasis on exploitation and commercialization of research results also raises further concerns. While such use of the results may be applicable for science, technology, engineering and mathematical research, it may not always be for other disciplines.

Some provisions established in the Charter for Researchers demonstrate the increasing awareness of the need to create appropriate research environments and working conditions. Employers and funders are required to ensure the possibility to combine family and work, children and career, to ensure attractive funding and/or salaries conditions, adequate social

⁷²⁰ *Ibid.*

⁷²¹ CEPES Papers on Higher Education, *supra* note 209.

⁷²² *Ibid.*

⁷²³ *Ibid.*

security provisions, recognition of the value of mobility, professional development, and appropriate protection of intellectual property rights, including copyright. As a valuable experience in the researcher's career path the Charter for Researchers identifies teaching, however specifies that teaching responsibilities should not be excessive and prevent researchers from carrying out their research activities, especially at the early stage of their career.⁷²⁴ One of the essential duties of senior staff members should be training of early stage researchers, which should be considered as part of their own teaching commitment.

Although the recognition by the European Commission given to research activities, researchers' working conditions and to freedom of research is very important, in the context of its ambitious aims, the attention given to academic freedom is not sufficient. The Charter for Researchers is the only document that elaborates on the subject in a more detailed manner. Even so, its provision entitling researchers to the freedom of research includes mainly requirements that researchers should meet leaving the concept of "research freedom" rather unclear. Considering the lack of any requirements for the employers and funders, it seems that contractual arrangements can justify any limitations of the freedom of research and publication. A mere declaratory recognition of the freedom of research without specifying and substantiating the concept leaves much space for interpretation and does not contribute much to the aim of providing researchers the same rights and obligations throughout the EU. The protection of freedom of research from special industry interests is clearly of an aspirational nature. This indicates the need to establish more specific guidelines for employers and funders that set certain limits to their contractual freedom in order to ensure the protection of freedom of research and publication and the fulfillment of a wider mission of the universities.

3.5. ACADEMIC FREEDOM UNDER THE LEGAL FRAMEWORK OF THE COUNCIL OF EUROPE

3.5.1. The role of the Council of Europe in the development of a European higher education system

Alongside the EU, the Council of Europe is the most prominent European institution with legislative and judicial functions in the field of human rights. The CoE is a political organization which focuses on promoting the fundamental values of European citizens and developing common and democratic principles based on the ECHR. The aim of the CoE is laid down in Article 1(c) of its Statute: "to achieve grater unity between its members for the purpose of

⁷²⁴ *Ibid.*

safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress”.⁷²⁵ Among these aims, higher education is one of the most crucial to democratic societies. In its documents, the CoE underlines the diverse roles of higher education in society. It recognizes its importance in developing and preserving a democratic character and underlines the public responsibility of European higher education. Among numerous initiatives dealing with a range of issues connected to education, the CoE also deals with academic freedom and institutional autonomy. Scholars have noted that many of the ideas of academic freedom, and the role of the university in promoting cultural integration, were kept alive by the CoE.⁷²⁶

Through different Recommendations the CoE deals with different matters of higher education. Higher education is recognized as being vital for the future economic and social development in the “promotion of human rights and fundamental freedoms and the strengthening of pluralistic democracy and tolerance”.⁷²⁷ The CoE strives to build a European knowledge and communication society⁷²⁸ and to establish a more complete and far-reaching Europe in the spirit of the Bologna declaration.⁷²⁹ Higher education is perceived as fulfilling a complex of different purposes: preparation for the labor market, preparation for life in democratic societies, the development of personality, the development of an advanced, comprehensive and diverse knowledge base through teaching, learning and research.⁷³⁰

The main trends of the CoE’s vision for the development of a higher education system which would highly contribute to the achievement of the abovementioned goals could be identified as following: widening opportunities of participation in higher education⁷³¹; the promotion of equal opportunities, including the absence of discrimination⁷³²; lifelong learning;

⁷²⁵ Statute of the Council of Europe (ETS No.001, 1949), art. 1(c).

⁷²⁶ Anne Corbett, “Principles, Problems, Politics ... What Does the Historical Record of EU Cooperation in Higher Education Tell the EHEA Generation?”: 46; in: Adrian Curaj, Peter Scott, Lazăr Vlasceanu, Lesley Wilson, eds., *European Higher Education at the Crossroads Between the Bologna Process and National Reforms Part 1* (Science+Business Media Dordrecht: Springer, 2012).

⁷²⁷ *Recommendation R(98)3 of the Committee of Ministers to Member States on Access to Higher Education*, Council of Europe (Adopted by the Committee of Ministers on 17 March 1998 at the 623rd meeting of the Ministers’ Deputies), Preamble.

⁷²⁸ *Recommendation Rec(2002)6 of the Committee of Ministers to member states on higher education policies in lifelong learning*, Council of Europe (Adopted by the Committee of Ministers on 15 May 2002 at the 795th meeting of the Ministers’ Deputies), Preamble.

⁷²⁹ *Recommendation Rec(2000)24 of the Committee of Ministers to member states on the Development of European Studies for Democratic Citizenship*, Council of Europe (Adopted by the Committee of Ministers on 20 December 2000 at the 735th meeting of the Ministers’ Deputies), Preamble.

⁷³⁰ *Recommendation CM/Rec(2007)6 of the Committee of Ministers to member states on the public responsibility for higher education and research*, Council of Europe (Adopted by the Committee of Ministers on 16 May 2007 at the 995th meeting of the Ministers’ Deputies), Preamble.

⁷³¹ *Recommendation No. R(98)3 of the Committee of Ministers to Member States on Access to Higher Education*, *supra* note 727, Preamble.

⁷³² *Ibid.*, 1.3.

supply of higher education of good quality; enhancing mobility and employability⁷³³; the development of European Studies.⁷³⁴

While moving towards a desirable direction, higher education systems in the region, alongside with HEIs, were and are still facing a number of challenges determined by the current trends. In order to fulfill the increasing demand for high quality higher education, it is necessary to ensure excellence in teaching and research. The expansion in students numbers requires additional efforts in maintaining and raising the quality of higher education. From the beginning, the introduction of lifelong learning in the EU strategy towards higher education was perceived not only as having a pivotal role for the European knowledge society, for the prevention of social exclusion and for the promotion of equity and active citizenship, but also constituting a new challenge for higher education.⁷³⁵ Lifelong learning means educational opportunity “into and through higher education across an individual’s lifetime”.⁷³⁶ In order to meet those needs, HEIs must ensure they are sufficiently equipped and flexible in the way they provide higher education.

The extensive use of the information and communication technologies also requires new learning and teaching approaches. HEIs are required to meet the changing needs of European citizens and labor markets. HEIs are encouraged to rethink their traditional mission which rests on teaching and research. An endeavor to extend their mission by offering and integrating lifelong learning opportunities and the promotion of learner-centered education constituted further challenges. The realization of this enriched mission requires high-quality staff that is involved in the mission of the HEI and which is capable of meeting the diverse demands of learners at different stages of their lifelong education.⁷³⁷

The analysis of the Recommendations demonstrates the general aim of the CoE in the field of higher education, which corresponds the basic trends reflected in the Bologna Process and in the EU higher education policies. These documents adopted by the Committee of Ministers express general concerns in regard to the challenges created by the process of globalization, such as “the political upheavals and scientific and technological

⁷³³ Recommendation Rec(2002)6 of the Committee of Ministers to member states on higher education policies in lifelong learning, *supra* note 728, Preamble.

⁷³⁴ Recommendation Rec(2000)24 of the Committee of Ministers to member states on the Development of European Studies for Democratic Citizenship, *supra* note 729, Preamble.

⁷³⁵ Recommendation Rec(2002)6 of the Committee of Ministers to member states on higher education policies in lifelong learning, *supra* note 728, Preamble.

⁷³⁶ Jan De Groof, “Reflections on Challenges, Opportunities and Dilemmas Confronting the European Union in establishing a European Higher Education Area”: 32; in: Spyridon Flogaitis, Athanassios Kyriazis, eds., *European Higher Education Institutions in the 21st Century: What Prospects?* (London: Esperia Publications Ltd, 2007).

⁷³⁷ Recommendation Rec(2002)6 of the Committee of Ministers to member states on higher education policies in lifelong learning, *supra* note 728, Paragraph 1.

breakthroughs”.⁷³⁸ They also highlight the strategic role of higher education in establishing a Europe of knowledge and provide recommendations for further steps and implementation of various measures. These recommendations do not address the matter of academic freedom, however its particular elements and academic freedom itself were covered in other, more specific documents of the CoE which will be further analyzed in more detail in this chapter.

3.5.2. *Special concern of the Council of Europe for the scientific freedom*

The CoE has issued a number of recommendations in relation to academic freedom, and in particular in regard to freedom of research. Certain research areas raise a complex legal, ethical and political questions. For example, biosecurity-relevant research⁷³⁹ is even considered as a potential threat to public security.⁷⁴⁰ A number of different issues can be identified in regard to such research: whether it should be permissible to conduct research which is designed to make a pathogen more dangerous, whether it is permissible to publish the results of such research and whether any limitation to such research are appropriate.⁷⁴¹

The recommendations of the CoE cover some of these fears and reflect the following aspects in the field:

- a) new possibilities arising from the radical development in scientific and medical techniques;
- b) public concern about the use of these techniques due to uncertainty in the field of experimental research and legal, social and ethical issues in regard to a person's inheritable genetic pattern;
- c) concerns in regard to the right to life and to human dignity.

⁷³⁸ *Recommendation Rec(2002)6 of the Committee of Ministers to member states on higher education policies in lifelong learning*, *supra* note 728, Preamble.

⁷³⁹ As this is a specific area of research which deserves a separate and comprehensive study, it is not discussed more in detail here. This research covers just its basic aspects in order to demonstrate the wide scope of freedom of research and its appearance in the documents of the CoE. More on the subject see: German Ethics Council, “Biosecurity - Freedom and Responsibility of Research,” (2014) // <http://www.ethikrat.org/files/opinion-biosecurity.pdf> (accessed June 10, 2016); Milton Leitenberg, *Assessing the Threat of Biological Weapons and Bioterrorism*, (Strategic Studies Institute, U.S. Army War College, 2005); Michael J Selgelid, “Governance of dual-use research: an ethical dilemma,” *Bulletin of the World Health Organization* 87 (2009): 720 // doi: 10.2471/BLT.08.051383.

⁷⁴⁰ It is argued that the advances in biotechnology have the potential to create a much more dangerous warfare threat and that effects of some of engineered biological agents can be worse than any disease ever known. Central Intelligence Agency, “The Darker Bioweapons Future,” (2003) // <http://fas.org/irp/cia/product/bw1103.pdf> (accessed June 10, 2016).

⁷⁴¹ German Ethics Council, “Biosecurity - Freedom and Responsibility of Research,” (2014) // <http://www.ethikrat.org/files/opinion-biosecurity.pdf> (accessed June 10, 2016).

The Recommendation on Genetic engineering, while including all these issues, indicates that “freedom of scientific enquiry - a basic value of our societies and a condition of their adaptability to the changing world environment- carries with it duties and responsibilities, notably in regard to the health and safety of the general public and of fellow scientific workers and to the non-contamination of the environment”.⁷⁴² Irrespective of the public concern regarding experimental research in genetic engineering, the freedom of research was acknowledged as a fundamental value. However, this sensitive sphere requires certain limitations. This implicates the need to maintain a balance between the rights of individuals, research workers and experimentalists and the development of genetic engineering. Research which leads to the discovery and proves to be very beneficial also can have the capacity to cause severe harm to humans, animals or the environment. For this reason scholars often refer to the dilemma of “dual-use research”.⁷⁴³ Accordingly, all expectations of using research to expand knowledge must be balanced against the possible risks.⁷⁴⁴ The state has a fundamental duty to safeguard the legal interests of those that are affected. It is argued that the balancing of interests is intensified when the state’s intervention to protect life runs counter to the scientific freedom to undertake research aimed to secure public health.⁷⁴⁵

The Recommendation on the Use of human embryos and foetuses for diagnostic, therapeutic, scientific, industrial and commercial purposes forbids “any creation of human embryos by fertilisation in vitro for the purposes of research during their life or after death”⁷⁴⁶ and “anything that could be considered as undesirable use or deviations of these techniques”.⁷⁴⁷ The Recommendation states that the freedom of research cannot be restricted arbitrarily, but only on the basis of, inter alia, “professional, legal, ethical, cultural and social principles for the protection of human rights and the dignity of man as an individual and social being”.⁷⁴⁸

The acknowledgement of the experimentation on human beings as a necessity for the advancement of medical science and practice, and of the need to protect persons undergoing medical research, has led to the adoption of the Recommendation concerning medical research

⁷⁴² *Recommendation 934(1982) of the Genetic engineering*, Parliamentary Assembly Council of Europe (26 January 1982), Paragraph 3.3.

⁷⁴³ Dual-use research is understood as the one which may both beneficial and harmful. See more: Michael J Selgelid, “Governance of dual-use research: an ethical dilemma,” *Bulletin of the World Health Organization* 87 (2009): 720 // doi: 10.2471/BLT.08.051383; German Ethics Council, “Biosecurity - Freedom and Responsibility of Research”, *supra* note 741.

⁷⁴⁴ German Ethics Council, “Biosecurity - Freedom and Responsibility of Research”, *supra* note 741.

⁷⁴⁵ *Ibid.*

⁷⁴⁶ *Recommendation 1046(1986) of the Use of human embryos and foetuses for diagnostic, therapeutic, scientific, industrial and commercial purposes*, Parliamentary Assembly Council of Europe (24 September 1986), Paragraph 14.1.3.

⁷⁴⁷ *Ibid.*, Paragraph 14.1.4.

⁷⁴⁸ *Recommendation 1100(1989) of the Use of human embryos and foetuses in scientific research*, Parliamentary Assembly Council of Europe (2 February 1989), Paragraph 1.

on human beings. It stresses the primacy of the interests and well-being of the person who is the object of medical research over the interests of science and society.⁷⁴⁹ The Recommendation establishes principles concerning medical research on human beings, however freedom of research is not included among these principles.

The Recommendation on research on biological materials of human origin also advocates for the human being whose biological materials are used in research over the sole interest of society or science.⁷⁵⁰ However a slightly different approach can be derived when the proposed use of identifiable biological materials in a research project is not within the scope of prior consent given by the person concerned. Although it might require reasonable efforts to contact such person to obtain his consent, the use of biological materials is possible under the established conditions if it was not possible to contact the person concerned. The provision requires the evaluation of the fulfillment of the following conditions: a) the research pursues an important scientific interest; b) the aims of the research could not be achieved using biological materials within the scope of prior consent and c) there is no evidence that the person expressly opposed such research use.⁷⁵¹ In such case the scientific interest prevails.

There is no doubt that academic freedom is crucial for scientific progress as its benefits serve to improve human welfare. However, it raises a complex of issues, such as the risk potential, the likelihood of damage and possible benefits and accordingly requires careful balancing between individual and collective interests and an assessment of rights and responsibilities. The protection of freedom of research in this field is of high significance and it must cover not only safeguards against state interventions but also obligations of the state to ensure a supporting legal framework to secure freedom of research, as well as the protection of individual life and physical integrity.

The Oviedo Convention is the first legally binding international text intended to preserve human dignity, rights and freedoms, through a series of principles and prohibitions against the misuse of biological and medical advances.⁷⁵² The Convention's starting point is that the interests of human beings must come before the interests of science or society.⁷⁵³ It lays down a

⁷⁴⁹ Recommendation No. R(90)3 of the Committee of Ministers to Member States Concerning Medical Research on Human Beings, Council of Europe (6 February 1999), Principle 2, Paragraph 1.

⁷⁵⁰ Recommendation Rec(2006)4 of the Committee of Ministers to member states on research on biological materials of human origin, Council of Europe (Adopted by the Committee of Ministers on 15 March 2006 at the 958th meeting of the Ministers' Deputies), Preamble.

⁷⁵¹ Recommendation Rec(2006)4 of the Committee of Ministers to member states on research on biological materials of human origin, *supra* note 750, art. 22.

⁷⁵² Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (the Oviedo Convention), Council of Europe (ETS No. 164, 4.4.1997).

⁷⁵³ The Oviedo Convention was drafted to guarantee that the "beneficial side prevails". Debbie Sayers, *supra* note 413, 387.

series of principles and prohibitions concerning bioethics, medical research, consent, rights to private life and information, organ transplantation, public debate and others.

The Convention includes general principles preventing violations of human rights and fundamental freedoms, it also recognizes the importance of ensuring the dignity of the human being. It insists on the freedom of scientific research subject to the provisions of the Convention and the other legal provisions safeguarding the protection of the human being.⁷⁵⁴ Although, when drafting the text of the Convention, some experts raised doubts in regard to the usefulness of such article or suggested at least to delete the word “freely”, the majority upheld the view that it was important for the Convention to recognize freedom of research while laying down some limitations.⁷⁵⁵ This approach serves to constitute a balance between individual rights and the rights of the researchers. It was also observed that in the field of biology and medicine the freedom of scientific research is justified not only by society’s right to knowledge, but also by the significant progress its results brings. Nevertheless, such freedom is not absolute.⁷⁵⁶

The Protocols to the Convention establish different limitations to the freedom of research which are considered necessary in order to protect human dignity and identity in the times of scientific development and progress. For example, any intervention seeking to create a human being that is genetically identical to another is prohibited.⁷⁵⁷ The Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Biomedical Research (Protocol concerning Biomedical Research) deals in particular with issues concerning biomedical research. It stresses the paramount concern in regard to the protection of the human being participating in research and the human being who may be vulnerable in the process of research. It presents another angle on academic freedom and even the collision of corresponding rights and freedoms. On the one hand, progress in medical and biological sciences advances especially through biomedical research and thereby contributes to saving lives. On the other hand, the advancement relies on knowledge and discovery which necessitates research on human beings. Accordingly, too extensive freedom of research may result in infringing human dignity, identity and integrity and other human rights and freedoms. The Protocol concerning Biomedical Research establishes a general rule which states that research shall be carried out freely, however, in addition, it limits it to the provisions of the Protocol and other legal provisions

⁷⁵⁴ The Oviedo Convention, *supra* note 752, art. 15.

⁷⁵⁵ Convention on the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (ETS No. 164). Preparatory Work on the Convention. Secretariat of the Steering Committee on Bioethics (CDBI) (28 June 2000), 71.

⁷⁵⁶ *Ibid.*, 69.

⁷⁵⁷ *Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings*, Council of Europe (ETS No. 168, 12.1.1998), art. 1.

ensuring the protection of the human being.⁷⁵⁸ The prevailing rule is that interests of the human being trump the sole interest of society or science. The Protocol states that research on human beings can be undertaken only in such cases when there is no alternative of comparable effectiveness⁷⁵⁹ and it may not involve risks and burdens disproportionate to its potential benefits.⁷⁶⁰ Research can only be performed if the relevant competent body approved, and it meets generally accepted criteria of scientific quality, if it is undertaken in accordance with professional obligations and standards, and under the supervision of a clinical professional. After the conclusion of a research researchers have an obligation to take appropriate measures to make research results public in a reasonable time.⁷⁶¹ However, it remains unclear how such provision should be combined with the requirements and interests of the sponsors of the research. Some surveys show that institutions often allow the corporate sponsors (usually a drug company) to “own” all the data arising out of the research, to make changes to the design of a study after signing an agreement and to include secrecy clauses.⁷⁶²

Two crucial questions in regard to scientific freedom were considered as fundamental in the preparatory documents while drafting the Oviedo Convention. The debate concentrated on the question whether the draft provides sufficient scientific freedom to ensure scientific and medical progress for the welfare of present and future generations;⁷⁶³ and whether the draft guarantees basic standards for the protection of human dignity and identity.⁷⁶⁴ Concerns often are raised in regard of massive involvement of industry in biomedical research which, as it is argued, can negatively influence scientific integrity.⁷⁶⁵ Another concern in this respect is that researchers are willing to select, change, or fabricate data to get a grant or publish a paper.⁷⁶⁶

The analysis of the freedom of research in the context of biology and medicine indicates that it is an essential right of researchers for scientific advancement and for the improvement of human life and health. However it is a very delicate sphere which requires certain limitations in order to give priority to ethical principles and to respect human dignity, societal values and human rights. Accordingly, the state’s duty to protect academic freedom necessitates the use of

⁷⁵⁸ *Ibid.*, art. 4.

⁷⁵⁹ *Ibid.*, art. 5.

⁷⁶⁰ *Ibid.*, art. 6.

⁷⁶¹ *Ibid.*, art. 28.

⁷⁶² Michelle M. Mello, Brian R. Clarridge and David M. Studdert, “Academic Medical Centers’ Standards for Clinical-Trial Agreements with Industry,” *The New England Journal of Medicine* Vol. 352 (2005): 2204 // DOI: 10.1056/NEJMsa044115.

⁷⁶³ Convention on the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (ETS No. 164). Preparatory Work on the Convention, *supra* note 755, 25.

⁷⁶⁴ *Ibid.*

⁷⁶⁵ Thomas Bodenheimer, “Uneasy Alliance - Clinical 21. Investigators and the Pharmaceutical Industry,” *The New England Journal of Medicine* Vol. 342, No. 20 (2000): 1544.

⁷⁶⁶ Evans S., “Research Misconduct: How Common Is It?” Royal college of physicians of Edinburgh. Joint Consensus Conference on Misconduct in Biomedical Research Suppl. 7 Vol 30(1) (2000): 9-12.

specific means of intervention, for example instruments such as codes of conduct with an appeal to professional standards, legislation and policies which limit the rights of research funders or which restricts research and publication.

3.5.3. *Academic freedom and public responsibility*

The Parliamentary Assembly of the CoE in its Recommendation 1762(2006) outlined a number of important issues concerning academic freedom.⁷⁶⁷ The document is not “a revolution in terms of its content”,⁷⁶⁸ as it is mainly based on the Magna Charta Universitatum. Nevertheless, it deserves adequate consideration. First of all, indicating contemporary changing reality and new developments in modern societies it suggests the need to readjust academic freedom in light of these developments. This is certainly a noteworthy statement, unfortunately it is not entirely clear what changes could be introduced in order to adjust it to the contemporary demands, and to which extent they alter the concept of academic freedom. Second, it stresses the necessity to reaffirm and guarantee academic freedom by law, preferably in the constitution. Third, although it acknowledges the widespread aspiration of the “university meeting the requirements and needs of the modern world and societies” and the need for universities to contribute to solving immediate societal problems, more importantly, it highlighted that the mission of universities is more than “mere responsiveness to immediate demands of societies and the needs of the market.”⁷⁶⁹ It underlines the importance of the role of universities in a longer-term to react to fundamental issues of society and to protect the right of unrestricted pursuit and free dissemination of knowledge for the benefit of society. Fourth, the Recommendation 1762(2006) urges to find a balance between the different functions of the universities. On one side, it states that universities should comply with ‘certain’ societal and political objectives and ‘certain’ demands of the markets and businesses. Attention should be paid to the fact that today many universities fully comply with such demands. Some scholars argue that the vital notion of “fitness for purpose”⁷⁷⁰ raises the question “whose ‘purpose’ it is

⁷⁶⁷ The Parliamentary Assembly of the Council of Europe, *Recommendation 1762(2006) on Academic Freedom and University Autonomy*, *supra* note 237.

⁷⁶⁸ Education International, “VIth International Higher Education and Research Conference “Protecting and Defending Academic Freedom”. Report on Current Situation,” (2007) // <http://download.ei-ie.org/docs/IRISDocuments/Education/Higher%20Education%20and%20Research/Higher%20Education%20Policy%20Papers/2008-00037-01-E.pdf> (accessed June 10, 2016).

⁷⁶⁹ The Parliamentary Assembly of the Council of Europe, *Recommendation 1762(2006) on Academic Freedom and University Autonomy*, *supra* note 237, Paragraph 8.

⁷⁷⁰ Eddie Blass, “Is Bologna Sustainable in the Future? Future Testing the Bologna Principles”: 1059-1060; in: Adrian Curaj, Peter Scott, Lazăr Vlasceanu, Lesley Wilson, eds., *European Higher Education at the Crossroads Between the Bologna Process and National Reforms Part I* (Science+Business Media Dordrecht: Springer, 2012).

that needs to be fit: the academics, the institutions, or some external stakeholders?”⁷⁷¹ On the other side, it states that universities should make their own decisions which means to choose in the pursuit of their short-term and long-term missions and objectives. Accordingly, the Parliamentary Assembly of the CoE reaffirmed the right to academic freedom, which includes the following principles:

- “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;
- history has proven that violations of academic freedom and university autonomy have always resulted in intellectual relapse, and consequently in social and economic stagnation;
- high costs and losses, however, could also ensue if universities moved towards the isolation of an “ivory tower” and did not react to the changing needs of societies that they should serve and help educate and develop; universities need to be close enough to society to be able to contribute to solving fundamental problems, yet sufficiently detached to maintain a critical distance and to take a longer-term view.”⁷⁷²

The Recommendation 1762(2006) demonstrates a sustainable model for universities with its aim to achieve a balance between autonomy, freedom, and responsiveness to internal and external needs. It encourages each institution to develop “a cross-fertilisation model of its own while being aware of its basic polyvalence”.⁷⁷³ In the context of this document it was argued that when universities abandon their traditional function and restrict the quest for truth, for example, by focusing on economic growth, they are betraying their full and traditional identity.⁷⁷⁴ Although the Recommendation 1762(2006) encourages the member states to highlight its significance and reaffirm academic freedom by law, it does not contribute to more precise clarification of the content of academic freedom. Quite on the contrary, it creates even more confusion. The document suggests 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”.⁷⁷⁵ It is not entirely clear from such wording why freedom in research, which guarantees freedom of

⁷⁷¹ *Ibid.*

⁷⁷² The Parliamentary Assembly of the Council of Europe, *Recommendation 1762(2006) on Academic Freedom and University Autonomy*, *supra* note 237, Paragraph 4.

⁷⁷³ *Report on Academic Freedom and University Autonomy of the Committee on Culture, Science and Education*, Parliamentary Assembly (Doc. 10943, 2 June 2006) // <https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=11479&lang=en> (accessed June 10, 2016).

⁷⁷⁴ *Ibid.*

⁷⁷⁵ The Parliamentary Assembly of the Council of Europe, *Recommendation 1762(2006) on Academic Freedom and University Autonomy*, *supra* note 237, Paragraph 4.

expression and of action, does not cover freedom to conduct research. It is further unclear what is the difference between freedom to disseminate information and freedom to distribute knowledge and truth. Such definition of academic freedom clearly reflects freedom of research and publication and, presumably, freedom of teaching, as mentions freedom in training, and in disseminations of knowledge and truth. The document is mute in regard to freedom of intramural and extramural speech. Furthermore, the guarantee of academic freedom without any restriction sounds too far from being realistic. Especially having in mind the requirement to react to the contemporary changing needs of and new developments in modern societies and to contribute to solving fundamental problems. Although such requirement itself is absolutely understandable and reasonable, there always remains the question who has the competence to decide what needs of the society are considered to be a priority at a certain point in time and whether HEIs must unconditionally adhere those needs. In this context it becomes necessary to also discuss institutional autonomy and its place within the concept of academic freedom.

It is important to note that while various documents stress the necessity to safeguard academic freedom, there was always a lack of specific guidelines that would establish certain limits of the powers or establish certain positive obligations or duties for public authorities, HEIs and other concerned parties in regard to academic freedom. For this reason the idea of academic freedom as a right and as a responsibility was elaborated through the this research in order to identify reasonable arguments to support this claim. Considering that higher education and research is a public responsibility, the Committee of Ministers adopted a Recommendation on the public responsibility for higher education and research (hereinafter Recommendation CM/Rec(2007)6).⁷⁷⁶ The document addresses the public responsibility for higher education and research as an important element of the academic heritage of Europe and as a cornerstone in development of the EHEA. Accordingly, Recommendation CM/Rec(2007)6 recognizes the need for public responsibility (or responsibility of public authorities)⁷⁷⁷ which must be exercised with due regard to academic freedom and institutional autonomy. The document urges for responsibility of higher education and research exercised by HEIs, bodies, students and staff, however it concentrates only on responsibility of public authorities and does not provide any details of what responsibility other mentioned parties should incur. Although the document addresses the responsibility of public authorities, it mainly aims to ensure that HEIs meet

⁷⁷⁶ *Recommendation CM/Rec(2007)6 of the Committee of Ministers to member states on the public responsibility for higher education and research*, *supra* note 730, Paragraph 2.

⁷⁷⁷ “A “public authority” is understood to be any body, organ, entity or other organisation, at any level, empowered to supervise, oversee or make decisions, representing or acting on behalf of the population of the territory concerned, irrespective of its legal status under public or private law.” *Recommendation CM/Rec(2007)6 of the Committee of Ministers to member states on the public responsibility for higher education and research*, *supra* note 721, Paragraph 2.

“society’s multiple expectations and fulfil their various and equally important objectives”.⁷⁷⁸ However, few main categories of responsibility of public authorities for higher education and research are identified in the document:

- appropriate conditions for HEIs to fulfill their function;
- exclusive responsibility for the framework within which higher education and research is conducted;
- ensuring that the basic research remains a public good;
- ensuring effective equal opportunities in higher education;
- substantial responsibility for financing higher education and research.⁷⁷⁹

The responsibility in regard to appropriate conditions is extremely important for the fulfillment of the HEIs’ functions, including, as it has been argued, for and adequate protection of academic freedom. However, the provision in the document is very indefinite and does not provide any further guidance on how and by what means public authorities would ensure this. In regard to responsibility for the legal higher education and research framework it should be noted that the document lacks the requirement for public authorities when establishing to adhere to the standards of academic freedom and institutional autonomy when establishing such framework. The document suggests that in elaborating or amending the legal framework, public authorities should consult with HEIs, students, staff and other relevant stakeholders. However, public authorities which are granted exclusive responsibility for the legal framework should be required not only to comply with the standards of academic freedom and institutional autonomy but also to ensure its protection by positive actions. The lack of such approach is one of the essential shortcomings of the Recommendation CM/Rec(2007)6.

The document reflects quite a different approach towards the responsibility for research in which public authorities are required to ensure that basic research remains a public good. Most importantly, the document suggests certain means to achieve goal, i.e. by providing adequate funding, by encouraging implementation of codes of ethical behavior in research, by seeking to prevent the misuse of research results, and by ensuring wide public access to research results and by ensuring that copyrights are granted and exercised reasonably.⁷⁸⁰ Although such requirements are not precise and leave room for different interpretations when applied in national higher education legislation and policies, the endeavor to establish certain

⁷⁷⁸ Recommendation CM/Rec(2007)6 of the Committee of Ministers to member states on the public responsibility for higher education and research, *supra* note 730, Paragraph 5.

⁷⁷⁹ *Ibid*, Paragraph 7.

⁷⁸⁰ *Ibid*, Paragraph 15.

responsibilities for research is very much needed and highly important for the protection of freedom of research.

The requirement that public authorities, when establishing the legal framework, adhere to the standards of academic freedom was later taken into account in the Recommendation CM/Rec(2012)7. The Recommendation considers that it is primarily “the responsibility of public authorities to establish and maintain the required environment and framework to guarantee institutional autonomy and academic freedom.”⁷⁸¹ This constitutes a very important step towards recognition of academic freedom as a right and as a responsibility as the documents recommends to the member states to take into account the principles of academic freedom and institutional autonomy when establishing education policies. Additionally, states are suggested to bring these principles to the attention of and to promote their implementation by the competent local authorities and HEIs.

In the context of Recommendation CM/Rec(2012)7 academic freedom is perceived as freedom of teaching, freedom of research and freedom of studying without undue outside interference by public authorities or others, without the fear of disciplinary action, dismissal or any other form retribution.⁷⁸² Recognizing that institutional autonomy can be both, a prerequisite and a tool to limit academic freedom, the document underlines that institutional autonomy should not impinge on academic freedom.

The document deserves special consideration in regard to the requirements set to public authorities:

- to actively promote academic freedom, to contribute to its establishment and maintenance;
- to set the framework for academic freedom and continuously monitor its implementation;
- to frame policies that call for positive measures (for example, in such areas as qualifications framework, external quality assurance);
- to refrain from intervening and from imposing detailed guidance in certain areas (for example, curricula and teaching programmes, internal quality development of HEIs);
- to establish and maintain the necessary conditions for guaranteeing the right to a supportive working environment.⁷⁸³

⁷⁸¹ 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, Council of Europe (Adopted by the Committee of Ministers on 20 June 2012 at the 1146th meeting of the Ministers' Deputies), Preamble.

⁷⁸² *Ibid.*, Paragraph 5.

⁷⁸³ *Ibid.*

In line with these requirements for public authorities, the document also includes certain safeguards of academic freedom from the interference of private funders. The document demands, within the regulatory mechanisms for higher education funding, transparency and clear provisions for preempting any possible threats to academic freedom whether the sources are public or private.⁷⁸⁴ In this regard, public authorities are required to monitor the sources of funding of HEIs in order to ensure the protection of academic freedom from possible intrusions.

In conclusion, the analysis of international documents and normative instruments demonstrated that they recognize the main guiding dimensions of academic freedom, however each of them also adds additional components of academic freedom and a list of obligations and responsibilities academics must adhere. It often demonstrates too broad understanding of the concept of academic freedom and imbalance amongst the rights and responsibilities. The inconsistency in understanding the concept of academic freedom makes it even more vague. The Bologna documents, as well as the EU policy on Europe's higher education system, on the opposite, lack even the basic recognition of academic freedom. That should be considered as a huge gap especially having in mind that member countries are engaged in a process of convergence, reform of their higher education systems and competitiveness of HEIs. And finally, the CoE's recognition of the need to set more precise requirements to public authorities with relation to academic freedom reveals a more comprehensive approach on the matter. Relying on above analyzed recommendations the member states should encourage the implementation of policies which require respect for academic freedom and ensure its protection against undue outside interference by public authorities or others. The latter document is, finally, a good example of more precise recommendations towards a so desperately needed protection of academic freedom. Accordingly, having these recommendations in mind, chapter four will be dedicated to an in-depth analysis to evaluate whether Lithuanian higher education legislation and policies are devised in accordance to any of these recommendations.

⁷⁸⁴ *Ibid*, Paragraph 13.

CHAPTER 4. ACADEMIC FREEDOM UNDER THE NATIONAL HIGHER EDUCATION FRAMEWORK: CASE OF LITHUANIA

4.1. INTRODUCTION

While still under Soviet occupation, Lithuania has started reforming its education system in the late 1980s. After the restoration of sovereign statehood, Lithuania ceased the opportunity to join the democratic community of Western and central Europe, and to release within and across its borders individual creative powers which were so inhibited during the period of occupation. In this way, Lithuania strove to create an open, modern and harmonious society of free citizens. These changes were marked by a rapid intellectual growth of society, an increased dynamism of economic and social relations, and a growing importance of information technologies, science production, and the advancement of individual initiative and autonomy.⁷⁸⁵ This national development required changes of the mentality of the Lithuanian society that stressed the necessity of an awareness of fundamental democratic values, of a new political and economic literacy, and moral and cultural maturity. These fundamental changes were possible only with a radical reform of the Lithuanian education system.

By 1989 most Lithuanian HEIs had drafted new Statutes and after declaring Lithuania's independence in 1990, they were adopted by the Lithuanian Parliament (Seimas). In 1991, the Seimas adopted the Law on Science and Studies which granted HEIs with the right to academic freedom.⁷⁸⁶ The first years of independence were marked by an obvious aspiration towards the establishment and application of academic freedom, which, it is argued, to a large extent determined the extensive nature of development in the higher education sector.⁷⁸⁷

⁷⁸⁵ More on the reform of higher education in Lithuania see: Rimantas Želvys and Rima Žilinskaitė, "Lietuvos aukštojo mokslo reforma: laimėjimai ir problemos," *Acta Pedagogica Vilnensia* 19 (2007). Rimantas Želvys, "Reform of Higher Education in Lithuania: Moving towards Decentralization or State Control?," *Socialiniai mokslai* No. 5(42) (2003). Eglė Bilevičiūtė and Inga Žalienė, "Higher Education Reform in Lithuania with Emphasis on Lithuanian Educational Strategy," *European Scientific Journal* Vol. 9, No. 19 (2013). Palmira Jucevičienė, "Universitetų reforma: save ugdančios organizacijos koncepcija ir jos realizavimo reikšmė," *Acta Pedagogica Vilnensia* 3 (1996). Almantas Samalavičius, *Universiteto idėja ir akademinė industrija*, (Vilnius: VPU, 2010). Liudvika Leisyte, "The Lithuanian Case of Higher Education Reforms in Europe," *International Higher Education* (2008). Liudvika Leisyte, Rimantas Želvys, and Lina Zenkiene, "Re-contextualization of the Bologna process in Lithuania," *European journal of higher education* 5 (1) (2015). Liudvika Leisyte, "Changes in Lithuanian Higher Education and Research: Being at the Crossroads"; in: *International Futura Scientia Workshop Soviet Past and European Future: Endless Transition in Higher Education and Research* (Vilnius: International School of Management, 2013). Antanas Musteikis, "Užpustyta akademinė laisvė," *Mėnesinis kultūros žurnalas Aidai* (1970) // http://www.aidai.eu/index.php?view=article&catid=195%3A197006&id=2586%3Afi&option=com_content&Itemid=225 (accessed November 19, 2016).

⁷⁸⁶ *Republic of Lithuania Law on Science and Studies*, Official Gazette (1991, no. 35-0) (not valid from May 12, 2009), Preamble.

⁷⁸⁷ Rimantas Želvys, "Reform of Higher Education in Lithuania: Moving towards Decentralization or State Control?," *Socialiniai mokslai* No. 5(42) (2003): 18.

The Constitution of the Republic of Lithuania (hereinafter the Lithuanian Constitution), which was adopted in 1992, has established the autonomy of HEIs (Article 40(3)) and a right to free of charge at state schools of higher education for those who are good at their studies (Article 41(3)). HEIs initiated a number of actions to reform the scientific and education sectors in the country. Until 1995, HEIs were restructuring their study programs, updated the curriculum, introduced mandatory modules of human and social sciences, and developed the three-tiered university system (undergraduate, graduate, post-graduate). In 2000, with the adoption of the Law on Higher Education, a binary education system of higher education consisting of university sector and non-university (college) was established.⁷⁸⁸ During the institutional reform, which started in 2000, HEIs councils were established, the voting rights of students' representatives in the administration and self-government of HEIs were defined; this eliminated the monopoly of self-governed universities in the higher education sector.

In 1990, Lithuanian higher education policy defined highly ambitious national educational aims that reflected democratic values and eventually has clearly displayed signs for an orientation towards the international cooperation. This new orientation was also marked by a stronger involvement in international higher education networks and a significant influence of supranational educational powers on Lithuanian higher education policy.⁷⁸⁹ In 1999, Lithuania became a full member of the Bologna Process and the EHEA which has given rise to further higher education reforms in the country. International and regional higher education framework documents and instruments demanded application of the relevant regulatory measures within the national and institutional higher education policies. Especially after the accession to the EU in 2004, the Lisbon objectives aimed at the creation of a European Research Area and an increase of the competitiveness of the European higher education system have become more visible in the domestic policy discourse. National HEIs were bound to implement regulatory measures contained in the international documents: the Convention on the Recognition of Qualifications concerning Higher Education in the European Region, developed by the CoE and UNESCO and its implementation documents,⁷⁹⁰ the Lisbon Strategy adopted in 2000 by the EU heads of state and government⁷⁹¹ and the National Lisbon Strategy Implementation Programme.⁷⁹² These

⁷⁸⁸ *Republic of Lithuania Law on Higher Education*, Official Gazette (2000, no. 27-715) (not valid from May 12, 2009).

⁷⁸⁹ Eglė Bilevičiūtė and Inga Žalienė, "Higher Education Reform in Lithuania with Emphasis on Lithuanian Educational Strategy," *European Scientific Journal* Vol. 9, No. 19 (2013): 123-124.

⁷⁹⁰ *Law on Ratification of the Council of Europe/UNESCO Convention on the Recognition of Qualifications Concerning Higher Education in the European Region of the Republic of Lithuania*, Official Gazette (1998, no. 110-3022); *Resolution no. 60 of the Government of the Republic of Lithuania of 21 January 2005 'On Approval of Regulations for Assessment and Academic Recognition of Foreign Qualifications Giving Access to Higher Education and Higher Education Qualifications'*, Official Gazette (2005, no. 12-369).

⁷⁹¹ *Resolution no. 670 of the Government of the Republic of Lithuania on the Lisbon Strategy Implementation and Coordination In Lithuania*. Official Gazette (2005, no. 78-2823).

documents integrated guidelines for the states to promote investments in human resources, knowledge and innovation and to increase attention towards life-long learning in order to achieve the strategic goal for the EU to become “the most competitive and dynamic knowledge-based economy in the world”.⁷⁹³ For this reason Lithuania has committed itself to increasing the effectiveness of its higher education system, to improving the supply of specialists of the highest qualification conforming to the demands of modern industry and business, and to increasing the effectiveness of R&D activities of science and study systems and their compliance with national economic needs. These key tasks served as a basis for the subsequent reforms in higher education system.

Accordingly, chapter four is dedicated to an in-depth analysis of the national legal framework for higher education with a particular focus on the subject of academic freedom. It is conducted with consideration of all the research previously performed in this dissertation at international and regional level, and having in mind the prevailing conceptual perception of academic freedom in international and regional higher education framework and the relevant case-law of the ECJ and the ECtHR. It will help to evaluate the level of protection of academic freedom as a human right and as a responsibility in the national higher education framework. Despite strong academic consensus that a constitutional right to academic freedom exists, it is argued that the doctrinal, conceptual, and normative issues concerning the subject of academic freedom are quite murky.⁷⁹⁴ For this reason the analysis starts with the constitutional doctrine on academic freedom and will further proceed with the national higher education legislation, policies and strategies and institutional documents on the subject.

4.2. THE CONSTITUTIONAL NOTION OF INSTITUTIONAL AUTONOMY AND ACADEMIC FREEDOM

The fundamental provisions concerning education in Lithuania are stemming from the Lithuanian Constitution which came into force on 2 November 1992. Chapter III which is entitled “Society and the State” contains three articles that are directly related with and set basic principles for education in the country. These few articles contain general provisions concerning primary, main and also higher education. Primary and secondary education are not subjects of this research, therefore, further analysis will focus on those constitutional provisions relevant to

⁷⁹² *Resolution no. 1270 of the Government of the Republic of Lithuania on the National Lisbon Strategy Implementation Programme*. Official Gazette (2005, no. 139-5019).

⁷⁹³ Lisbon European Council 23-24 March 2000 Presidency Conclusions, *supra* note 688.

⁷⁹⁴ Frederick Schauer, “Is There a Right to Academic Freedom?,” *University of Colorado Law Review* Vol. 77 (2006): 908.

higher education. The Lithuanian Constitution contains one provision which is directly related to the topic of this research, although the concept of academic freedom is not explicitly established in the Constitution. However, the protection of academic freedom can be inferred from Article 42 of the Lithuanian Constitution:

“Culture, science and research, and teaching shall be free.

The State shall support culture and science, and shall take care of the protection of Lithuanian historical, artistic and cultural monuments and other culturally valuable objects.

*The law shall protect and defend the spiritual and material interests of an author which are related to scientific, technical, cultural, and artistic work.”*⁷⁹⁵

Even though the Lithuanian Constitution does not directly mention the concept of academic freedom, further analysis will show that the Constitutional Court of the Republic of Lithuania (hereinafter the Lithuanian Constitutional Court) refers to the concept in its jurisprudence. A literal interpretation of the wording of Article 42 allows to define the main dimensions of academic freedom: freedom of science, freedom of research and freedom of teaching. For a more extensive description and definition of the content of the concept of academic freedom and its development in the official constitutional doctrine, the case law of Constitutional Court will be reviewed in this chapter.

It was already mentioned in the first chapter of this research that the principle of academic freedom is often referred to in the context of institutional autonomy. Although both, academic freedom and institutional autonomy, are unique and autonomous concepts, they are also interrelated. As the Lithuanian Constitutional Court held, neither institutional autonomy nor academic freedom are isolated constitutional norms, they are closely related with each other.⁷⁹⁶ As the analysis on institutional autonomy has demonstrated, it is perceived as a prerequisite in order to ensure academic freedom, however institutional autonomy does not necessarily guarantee the protection of academic freedom.

Contrary to academic freedom, the Lithuanian Constitution *expressis verbis* provides the concept of institutional autonomy in Article 40:

“Schools of higher education shall be granted autonomy.

*The State shall supervise the activities of establishments of teaching and education.”*⁷⁹⁷

⁷⁹⁵ *Constitution of the Republic of Lithuania*, *supra* note 443, art 42.

⁷⁹⁶ The Constitutional Court of the Republic of Lithuania Decision on the construction of the provision of time 13 of chapter II of the reasoning part of the ruling of the Constitutional Court of the Republic of Lithuania of 20 March 2008 (2009, no. 28/07 - 29/07).

⁷⁹⁷ *Constitution of the Republic of Lithuania*, *supra* note 443, art. 40.

The provision itself declares that HEIs are not entitled to full and comprehensive institutional autonomy. Although institutional autonomy as such is not a subject of this research, its content and the official constitutional doctrine will be examined further in this chapter to the point where it is necessary to perform an in-depth analysis of the constitutional notion of academic freedom.

One more constitutional guarantee in the field of higher education is contained in Article 41, which states that:

*“Higher education shall be accessible to everyone according to his individual abilities. Citizens who are good at their studies shall be guaranteed education at State schools of higher education free of charge.”*⁷⁹⁸

All three provisions outlined in the Lithuanian Constitution express constitutional rights and freedoms belonging to HEIs, academics and students. They all are intertwined with each other and these constitutional provisions form the basis for the protection of academic freedom as a right and as a responsibility. This is so because all of them not only grant rights and freedoms but also require a certain level of responsibility and implementation of duties. The state has a duty to find a balance between the interests and the needs of each involved party while shaping and implementing the policy of higher education in the country. As academic freedom and institutional autonomy are constitutional rights and freedoms, legal regulation related to defining the content and establishing the guarantees of their implementation can be determined only by means of law. The legislator, when implementing its prerogative to establish basic requirements for the activities of the HEIs, including their organizational and governance structure, must adhere to the constitutional provisions, including the guarantees of institutional autonomy and academic freedom. The Lithuanian Constitutional Court has noted that the provisions of the Constitution are construed in the jurisprudence of the Constitutional Court which create and develop the official constitutional doctrine.⁷⁹⁹ The Court held that state institutions, while adopting a new or amending and supplementing existing laws and other legal acts, are bound by the concept of the provisions of the Constitution and other legal arguments set forth in the reasoning part of the Constitutional Court ruling.⁸⁰⁰ The constitutional concept of

⁷⁹⁸ *Constitution of the Republic of Lithuania*, *supra* note 443, art. 41(3).

⁷⁹⁹ The Constitutional Court of the Republic of Lithuania decision on the 4 August 2005 petition of the Klaipėda Regional Court requesting an investigation into whether item 89 of the instructions for execution of decisions as confirmed by the order (no. 432) “On Confirming the Instructions For Execution of Decisions” of 31 December 2002 issued by the Minister of Justice of the Republic of Lithuania is not in conflict with the Constitution of the Republic of Lithuania (2005).

⁸⁰⁰ The Constitutional Court of the Republic of Lithuania ruling on the compliance of paragraph 2 of Article 4 of the Republic of Lithuania’s Law on the Supplement and Amendment of Articles 86 and 87 of the Law on Elections to Municipal Councils and Its Supplement With Article 881 with the Constitution of the Republic of Lithuania and

institutional autonomy and academic freedom and their development are imparted from the official constitutional doctrine of the Constitutional Court as well. All national courts and any other law-making and law-applying entity must apply the Lithuanian Constitution in accordance with the official constitutional doctrine and in compliance with the prevailing interpretation of constitutional provisions. Otherwise, the supremacy of the Constitution would be disregarded.

In those cases when the Lithuanian Constitution does not require that certain issues concerning human rights and freedoms and their implementation be regulated by law, they may also be regulated by means of sub-statutory legal acts. Higher education regulation is implemented by both, laws and sub-statutory legal acts, therefore the further analysis of the constitutional jurisprudence is relevant in elaborating the notion of the constitutional freedom of science, research and teaching, and institutional autonomy as shaped by the Constitutional Court. The basic framework according to the findings and opinions from the Constitutional Court will work as guidelines in order to further analyze laws and sub-statutory legal acts established in the sphere of higher education and will allow to evaluate their conformity with the constitutional rights and freedoms.

HEIs perform a special role in the system of higher education. As the Lithuanian Constitutional Court has held in its rulings, in certain cases when there is a need to detail or particularize the legal regulation in the sub-statutory legal acts, it may be necessary in the law-making process to rely on the special knowledge and professional competence in the field at issue.⁸⁰¹ The role of HEIs, being an expert on the issues of science, research, studies and having special (professional) competence, is significant and necessary in establishing regulation in the sphere of scientific and academic activity. Another significant role of HEIs is the adoption of their own (local) legal acts to provide more detail and to specify the basic requirements formulated in the state's legal regulation. The analysis of the constitutional jurisprudence, including certain findings and opinions, will serve to perform a survey on the local acts of HEIs and will allow to evaluate their conformity with the constitutional rights and freedoms.

Although it is surely correct that institutional autonomy and academic freedom are robust constitutional rights, the doctrinal, conceptual, and normative issues surrounding both principles are quite ambiguous. The Constitutional Court has been making references to institutional

on the compliance of the Resolution of the Government of the Republic of Lithuania (no. 457) "On the Dismissal of the Chief of the Vilnius County" of 11 April 2003 with the Constitution of the Republic of Lithuania and paragraph 1 of Article 9 of the Republic of Lithuania's Law "On the Procedure of the Publication and Entry Into Force of Laws and Other Legal Acts of the Republic of Lithuania" (2003, no. 21/2003).

⁸⁰¹ The Constitutional Court of the Republic of Lithuania Ruling On the compliance of item 37 the regulations concerning social insurance benefits for accidents at work and occupational diseases which were confirmed by the Resolution of the Government of the Republic of Lithuania (no. 506) "On the Confirmation of the Regulations Concerning Social Insurance Benefits For Accidents at Work and Occupational Diseases" of 8 May 2000 with Paragraph 1 of Article 29 (wording of 23 December 1999 and 5 July 2001) of the Republic of Lithuania's Law on Social Insurance of Occupational Accidents and Occupational Diseases (2005, no. 9/02).

autonomy and occasionally to academic freedom since 1994. There is no great diversity of the constitutional jurisprudence on the issue, however further analysis will present basic constitutional notions on academic freedom, institutional autonomy and interrelation between these principles and other constitutional rights and freedoms.

4.2.1. Balancing different legitimate interests in higher education under the Lithuanian constitutional jurisprudence

As it was aimed to establish and support the hypothesis of academic freedom as being a right and a responsibility throughout this research, this part of the research is devoted to examine how interests (rights, freedoms and responsibilities) of the state, HEIs, academics and society at large are balanced in the case-law of the Constitutional Court. The main focus in this part will be on institutional autonomy, its interrelation with academic freedom, HEIs' role towards achieving social needs and the wider function of higher education.

The first ruling concerning higher education was on institutional autonomy. It dealt with the question whether the institutions of higher education have autonomy "to exercise the right of inviolability of its territory and buildings".⁸⁰² Starting with the historic idea of autonomy, the Constitutional Court emphasized that the autonomy meant a certain independence from the state, from the influence of political power and independence in creating a system of regulation of internal activities. The intention of such dissociation was based on the necessity to safeguard the freedom of science, research and teaching, and protect academics from political influence.

⁸⁰² The first ruling regarding institutional autonomy dealt with the issues not directly related to the education or science but rather the privatization of hostel rooms of the institutions of higher education, inhabited by permanent employees of the schools. The question was also raised whether the HEIs have a right to refuse individual's request to be permitted to privatize the dwelling relying on constitutional provisions and university statute. The procedure of sale and purchase of the state and public housing fund to the tenants leasing dwellings was established in the Law on Privatization of Apartments. The Constitutional Court in the ruling gave its first interpretation of the principle of institutional autonomy. It's worth mentioning that the Constitutional Court in the case at issue was confronted with the two fundamental constitutional values. From one side, with the university's interests ensuring the conformity with the institutional autonomy. From the other side - with one of the basic rights of individual persons - the right of ownership. The case was decided after the restoration of independent state of Lithuania and restitution of the constitutional institute of private ownership right when one of the principal directions of the Lithuania's social policy was privatization of property. It can be understood that under such circumstance the Constitutional Court was more anxious to protect the right of ownership. The emphasis by the Constitutional Court in the given case was placed on the status of persons residing in the premises which belonged to the higher education institutions. It was the main criterion issuing the decision on the infringement. Existing law prohibited the privatization of hostels, allotted for students and post - graduates. The prohibitions were justified under the legislator's obligation not to adopt decisions restricting the freedom of science, research and teaching. On the contrary, the privatization of the premises inhabited by permanent employees of the schools was not considered as a violation of the institutional freedom in the sphere of science, research, teaching and self-governance and was regarded as being in conformity with the constitutional principle of institutional autonomy.

The Constitutional Court of the Republic of Lithuania Ruling On the compliance of the norms of the Republic of Lithuania's Law on Privatisation of Apartments, establishing the privatisation of hostel rooms in the institutions of higher education, with the Constitution of the Republic of Lithuania (1994, no. 2/94).

This referral to certain elements of academic freedom highlighted its interrelation with institutional autonomy. The Constitutional Court also introduced the concept of academic freedom, describing it as endeavor “to protect the researchers’ and teachers’ freedom of scientific thought and its expression from outward influence”.⁸⁰³ It reflects the understanding of academic freedom as an individual right, given for researchers and teachers. The freedom of scientific thought and its expression indicates quite an ample scope of academic freedom, however it is not precisely clear whether “outward influence” means the influence imparting from the state, HEIs or both. The ruling of the Constitutional Court did not bring any additional clarification of the content of academic freedom, nor more detailed interpretation of the concepts of separate elements, however the Court indicated that the content of academic freedom is declared in the legal acts. A further analysis of the legal acts will be given in the next subchapter.

It has become a general understanding that an undisrupted existence and advancement of science and teaching can only be achieved and safeguarded when they are free and independent. The institutional autonomy in the constitutional jurisprudence is conceived as the right to act independently from the state in certain spheres of activities, such as establishment of the organizational and governmental structure, relations with partners, development of the order of research and studies, administration of academic programmes and student enrolment affairs, the use of property and other related questions. The Constitutional Court noted that the spheres where HEIs are entitled to act freely are determined by the legislature who limits its own powers with respect to those spheres. At that time, the principle of institutional autonomy was detailed in the Law on Science and Studies⁸⁰⁴ as well as statutes of HEIs which had to be approved by the Parliament. These legal acts set forth the spheres of activities independent from governmental control. Being a democratic state under the rule of law obliges to refrain from reducing autonomy of those to whom it is granted by the State, established in the Constitution and particularized in the laws. The Constitutional Court held that it is necessary for the State to guarantee the right of independent scientific activity, and ensure due material and financial conditions for said activity.⁸⁰⁵ 1994 ruling established the basic understanding of institutional autonomy under Lithuanian law:

“Traditionally, the autonomy of the institution of higher learning is conceived as the right to independently determine and establish in the regulations or statute the organisational and

⁸⁰³ The Constitutional Court of the Republic of Lithuania Decision (1994, no. 2/94), *supra* note 802.

⁸⁰⁴ *Law on Science and Studies*, Official Gazette (1991, no. 35-0), art.16.

⁸⁰⁵ The Constitutional Court of the Republic of Lithuania Decision (1994, no. 2/94), *supra* note 802.

governmental structure, relations with other partners, the order of research and studies, academic syllabus, the order of student enrolment, to resolve other related questions, to use the property given over by the state as well as newly acquired, to possess the territory and buildings as well as other property, allotted for the needs of research and studies, to have the guarantee of inviolability. For this purpose, the institution of higher learning is guaranteed the institutional autonomy, i.e. certain status, which means that there are certain spheres of activities, independent from the control of the executive power.”⁸⁰⁶

Later on, this statement on the autonomy of HEIs was reaffirmed in almost every Constitutional Court ruling rendered in the sphere of higher education regulation, often without providing a more detailed approach of the concept. Important insights were given on the objectives of higher education system and its correlation with the social needs and interests of the society.⁸⁰⁷ Declaring the system of higher education as the key factor in the development of science, culture, social life and economy, the Constitutional Court emphasized the purpose of higher education, stating that it is to “create, accumulate and disseminate knowledge of science and cultural values, to educate the personality and society”.⁸⁰⁸

Two requirements for the accomplishment of this mission were determined. First, the state must provide due conditions for the HEIs to achieve their mission. Second, certain conditions must be fulfilled by the HEIs as they are required to react and adapt to changes of social needs. Derivatively, certain limits or, more precisely, associated elements of the principle of institutional autonomy were introduced by the Constitutional Court, which states that autonomy goes hand in hand with the principle of responsibility and accountability before society, other constitutional values and the duty to comply with the Constitution and the laws.⁸⁰⁹

The balancing between the legitimate interests of a person, the state and HEIs was analyzed in regard to the regulation on the availability of higher education to everyone

⁸⁰⁶ *Ibid.*

⁸⁰⁷ In 2002 the Constitutional Court adopted a ruling on the compliance of certain articles of the Law on Higher Education with the Constitutional principle of institutional autonomy. The case dealt with the rights of self-government of higher education institutions, the different levels of autonomy of higher education institutions respectively of their type (universities or colleges) or their founders (the state or not the state) etc. The Constitutional Court noted, that taking into consideration the diversity of goals of higher education and accordingly a variety of types of higher education institutions founded by different founders, laws may regulate administration, self-government, the procedure of formation and the functions and powers of higher education institutions in a different manner.

The Constitutional Court of the Republic of Lithuania Ruling On the compliance of paragraph 5 of article 8, paragraph 3 of article 9, paragraph 3, items 10, 11 and 12 of paragraph 5 of article 22, items 1, 2 and 5 of paragraph 1, paragraphs 2 and 7 of article 24, paragraph 4 of article 42, article 60, paragraph 1 of article 61, paragraph 1 of article 62 and paragraphs 1 and 2 of article 65 of the Republic of Lithuania’s Law on Higher Education with the Constitution of the Republic of Lithuania (2002, no. 18/2000).

⁸⁰⁸ *Ibid.*

⁸⁰⁹ *Ibid.*

according to their abilities and higher education free of charge.⁸¹⁰ The Constitutional Court argued that, nevertheless, the state does not only have certain duties in ensuring due conditions in order to access higher education, but also together society at large, has an interest in having specialists with a university education and highly qualified experts to work in different fields. In order to ensure the constitutional human right to seek higher education the state has a duty to ensure preconditions necessary for the implementation of such right. The state has a duty to make sure that any imposed requirements are consistent with the constitutional principle of equality of those who seek higher education. The state institutions also have a duty to ensure that HEIs adhere to such policy.

However, it should be stressed that when seeking to educate specialists and qualified experts, it is also necessary to align the higher education curricula to the current demands of the labor market, claims which are also made intensively in the context of the Bologna Process. Accordingly, there is a general concern in regard to this emerging tendency and its balance with academic freedom. Scholars argue that universities do not only have the function to create experts for the current employment market but rather they must find their own way in a diversifying higher education and they must educate students to challenge conventional wisdoms and to become change agents in economy and society.⁸¹¹ When balancing these interests of the state, society, HEIs, students and academics, there always remains the question what the limits are and who decides whose interests prevail.

When discussing state's interest in higher education, the issue of state funding is often raised. The Constitutional Court noted that the financial possibilities of the state are limited but

⁸¹⁰ The case dealt with the question whether certain provisions of Law on approving the financial indicators of the state budget are in compliance with the constitutional right to an equal opportunities to attain higher education according to the individual abilities and a right to free of charge higher education when citizens demonstrate suitable academic progress. A strong argument when talking about the fulfillment of given constitutional right is who has a duty to pay for it? Although, the duty to assure appropriate funding is coming from the state, the Constitutional Court noted that the financial possibilities of the state are not unlimited. The constitutional right to an equal opportunities to attain higher education according to individual abilities must be in proportion with the needs and possibilities of the society and the state. However, limited possibilities of the state to finance only a certain number of students keening to become educated specialists cannot be a barrier for those who are willing to seek higher education at their own expenses. On the one side it is quite attractive setting for those who seek higher education and are able to study at their own expenses and also for higher education institutions which increasingly have to rely on tuition fees to sustain themselves. But on the other side it brings the risk of a possible decrease in the quality of higher education as higher education institutions striving for additional funding may tolerate growing number of students disregarding their capabilities. This could be a perfect example of how the institutional autonomy can influence academic freedom.

The Constitutional Court of The Republic of Lithuania ruling on the compliance of the Republic of Lithuania's Law on Approving the Financial Indicators of the 2001 State Budgets (wording of 19 December 2000), the Republic of Lithuania's Law on the Approval of the Indicators Determining the Size and Levelling of Revenues of Municipal Budgets for 2001, 2002 and 2003 and Article 16 of the Republic of Lithuania's Law on the State Regulation of Economic Relations in Agriculture with the Constitution of the Republic of Lithuania (2002, no. 25/01).

⁸¹¹ Ulrich Teichler, "Universities Between the Expectations to Generate Professionally Competences and Academic Freedom: Experiences from Europe," *Procedia – Social and Behavioral Science* 77 (2013): 421 // DOI: 10.1016/j.sbspro.2013.03.097.

this could not constitute a barrier for those who are willing to seek higher education at their own expenses. Competing in the battle for additional funding, HEIs through various marketing strategies are now focused on attracting ever larger number of students. In the same way as business enterprises, HEIs make major efforts to save their resources. Often it is accomplished through a model – greater supply with the same resources – which has direct influences on the workload and working conditions of academic staff, quality in teaching and research and, consequently, influence academic freedom. Although, the Constitutional Court has set a certain standard here, stating that while fulfilling the right to access higher education according to individual abilities it is essential for HEIs to evaluate their abilities to provide higher education to a larger number of students,⁸¹² the increasing dissatisfaction of the academic staff with their working environment indicates that such standard is often disregarded.⁸¹³ And it is not necessarily because HEIs are focusing on profitability, but rather because of the declining rate of state funding, they are simply forced to look for alternative funding sources. This leads not only to increasing the numbers of students which may eventually influence the freedom of teaching but also may lead to greater focus on profitability of research results, which, it is argued, alters the purpose of research shifting from contribution to the public good to increasing external revenues for HEIs.⁸¹⁴ And that may result in limitations and consequently violations of freedom of research and publication.

In regard to the quality higher education the Constitutional Court held that the accessibility of higher education to everyone according to his abilities does not mean that higher education is universally compulsory, nor does it mean that it is required to establish any such standards of higher education which would worsen the quality of higher education.⁸¹⁵ The Court

⁸¹² The Constitutional Court of the Republic of Lithuania Decision (2002, no. 25/01), *supra* note 810.

⁸¹³ Academics in Lithuania are often complaining about the lack of balance between an increasing work-load and salary. Mikas Vengris, “Dėstytojų darbas – melžiamas dramblienės tešmuo,” (November, 2016) // <http://www.propatria.lt/2016/11/mikas-vengris-destytoju-darbas.html?m=1> (accessed November 25, 2016). It is also argued that national higher education and research institutions because of unattractive structure of salaries and few career possibilities can hardly attract young talented people and also encourage brain drain.

Lithuanian Innovation Strategy for the Year 2010 – 2020 approved by Resolution No. 163 of the Government of the Republic of Lithuania of 17 February, 2010, Official Gazette (2010, no. 23-1075).

⁸¹⁴ Risa L. Lieberwitz, *supra* note 99, 101.

⁸¹⁵ The Constitutional Court of the Republic of Lithuania Ruling on the Compliance of paragraph 4 (wording of 22 April 2003), paragraph 5 (wording of 30 June 2005) of article 47 (wording of 18 July 2006), article 57 (wording of 18 July 2006), paragraph 3 (wording of 22 April 2003), paragraph 4 (wording of 30 June 2005) of article 58 (wording of 30 June 2005), paragraph 1 (wording of 22 April 2003) of article 60, and paragraph 1 (wording of 22 April 2003) of article 61 of the Republic of Lithuania Law on Higher Education with the Constitution of the Republic of Lithuania, as well as on the dismissing of the part of the case subsequent to the petitioner of the President of the Republic of Lithuania, the petitioner, which has set forth in his Decree No. 1K-1138 “On Applying to the Constitutional Court of the Republic of Lithuania” of 22 October 2007, requesting to investigate whether items 3 and 14 of the methods of establishing the needs of funds from the state budget of the Republic of Lithuania and assigning them to institutions of science and studies approved by Resolution of the Government of the Republic of Lithuania No.1272 “On Approving the Methods of Establishing the Needs of Funds from the State Budget of the Republic of Lithuania and Assigning them to Institutions of Science and Studies” of 11 October 2004

has established the essential conditions for HEIs. First, they must evaluate their ability to provide education to a larger number of students. Second, higher education must be provided in accordance with the requirements set by the state, conforming to the established quality standards. Third, HEIs are obliged not to create preconditions in any cases to worsen the quality of studies, especially not to deteriorate the conditions to those students whose studies are financed by the state.⁸¹⁶

These standards clearly require a certain level of responsibility from the HEIs. Although they are entitled to make their own decisions on their internal affairs, they also must incur responsibility for ensuring compliance with the applicable quality standards. Instead of entirely focusing on attracting the largest possible number of students they should evaluate their potential in providing high quality education. Highly qualified academic staff and the establishment of the most conducive environment to perform their professional functions and implement professional responsibilities while enjoying academic freedom should be one of the primary goals of the HEIs.

Attractive working conditions were highly encouraged by the Leuven/Louvain-la-Neuve Communiqué.⁸¹⁷ The Budapest-Vienna Ministerial Declaration advocated a more supportive environment for the staff to fulfill their tasks.⁸¹⁸ The Bucharest Communiqué outlined the necessity of a supportive and inspiring working and learning environment.⁸¹⁹ It corresponds to the notion of developed by the Constitutional Court that the quality of higher education can be ensured by those HEIs which have highly qualified teachers, necessary training facilities and the necessary infrastructure.⁸²⁰

In regard to responsibility towards the quality of higher education, the Constitutional Court stressed that it is not only the HEI's right and obligation to safeguard quality education, but that it is also an obligation of the state.⁸²¹ According to the Court, the entitlement of the

(wording of 5 October 2006) are not in conflict with paragraph 3 of article 40 and paragraph 3 of article 41 of the Constitution of the Republic of Lithuania (2008, no. 28/07 - 29/07).

⁸¹⁶ *Ibid.*

⁸¹⁷ *Leuven/Louvain-la-Neuve Communiqué*, *supra* note 650.

⁸¹⁸ *Budapest-Vienna Declaration*, *supra* note 234.

⁸¹⁹ *Bucharest Communiqué*, *supra* note 656.

⁸²⁰ The Constitutional Court of the Republic of Lithuania Decision (2008, no. 28/07 - 29/07), *supra* note 815.

⁸²¹ Although internal affairs of the higher education institutions deserve the highest level of autonomy, certain regulation stemming from the state can also be justified, especially in the cases when it relates to the quality of studies and implementation of a constitutional right to choose a job. In this ruling on the qualification requirements for judges the Constitutional Court emphasized that the constitutional right to seek higher education according to individual abilities along with constitutional right to profession implies, *inter alia*, a state duty to assure that diplomas of higher education, confirming completed studies and acquired qualification degree which are issued by legally functioning higher education institutions, be recognized and stand as a confirmation that a person has acquired higher education in a certain field, which is necessary in order to do a certain job or hold a certain position. In the context of the constitutional justice case at issue, because of the role of the legal profession in the state and its legal system the compulsory uniform requirements for legal studies in each higher education institution are crucial

autonomy to the HEI does not merely encompass the right to freely determine organizational and governmental structure, its relations with other partners, the procedure of research and studies, academic syllabi, the procedure of students' enrolment, other related questions, but also obliges the HEI to adhere to certain standards and to accomplish the essential mission – the pursuit of knowledge and contributing to the growth of a knowledge-based society.

The Constitutional Court noted that the official constitutional doctrine that the institutional autonomy includes the right to freely establish study programmes must be construed in the context of the constitutional obligation of the state to supervise the activity of HEIs and the constitutional obligation to ensure a level of higher education, which would comply with certain uniform standards of the quality of higher education. Such standards must be established by the state institutions which, within their competence, are entitled to shape the policy of higher education, coordinate and implement the supervision of activities of HEIs.⁸²²

Another interesting aspect developed by the Constitutional Court was granting students the status of consumers.⁸²³ The Court held that the state in the process of forming and implementing the policy of higher education, must take into account the interests of HEIs (both state and non-state), since higher education, and, science in general, can foster and be advanced only without state's detailed administration of scientific activity and teaching.⁸²⁴ Allowing the HEI to set limits to the number of students that can enroll in university courses, the Constitutional Court ruled that they must act in conformity with the right of a person to seek higher education according to his abilities at his own expense and eventually equated the status of a such person to a consumer of higher education services. The Court also noted that HEIs providing higher education services to consumers (persons studying at their own expense) compete with other state and non-state HEIs. Accordingly, the constitutional provisions "the State shall supervise the activities of establishments of teaching and education" (Article 40(4)), "the law <...> shall protect freedom of fair competition" (Article 46(4)), "the State shall defend the interests of the consumer" (Article 46(5)) create a duty for the state to establish such legal

for maintaining the certain level of higher education, for the preparation of highly qualified lawyers and for determining the strong foundation for coherent functioning of the legal system in the country.

The Constitutional Court of the Republic of Lithuania ruling on the compliance of the qualifications requirements of higher education in law for the persons who wish to hold, under procedure established by laws, the position of a judge approved by Government of the Republic of Lithuania Resolution no. 1568 "On Approving the Qualification Requirements of Higher Education in Law for the Persons Who Wish to Hold, Under Procedure Established By Laws, the Position of a Judge" of 4 October 2002 with paragraph 1 (wording of 24 January 2002, 18 May 2004, 1 June 2006) of article 51 of the Republic of Lithuania Law on Courts and paragraph 1 of article 5 of the Republic of Lithuania Law on the Entry Into Force and Implementation of the Law on Amending the Law on Courts (2008, no. 19/05).

⁸²² *Ibid.*

⁸²³ In ruling on students' number and their financing in state schools of higher education, the Constitutional Court had to decide who employs the right to set the number of students seeking higher education on their own expense.

The Constitutional Court of the Republic of Lithuania Decision (2008, no. 28/07 - 29/07), *supra* note 815.

⁸²⁴ *Ibid.*

regulation in the field of higher education which would not distort fair competition, and also which would combine various measures of protection of consumers of higher education services.⁸²⁵ The conclusion can be drawn that institutional autonomy also brings about the burden for the HEI to participate in the market of higher education services with other providers struggling for a greater number of consumers and, most importantly, to remain accountable for the quality of the provided service not only to the state but also to the consumer.

One of the essential roles of the state in fulfilling the duty to ensure access to high quality higher education is control and supervision of the activities of HEIs. The Constitutional Court held that granting institutional autonomy to the HEIs does not relieve the state from its constitutional duty to secure the efficiency of the system of higher education.⁸²⁶ The constitutional judicial cases stress the control and supervision of the activities of HEIs as a very important feature because state and non-state HEIs, granted with a constitutional right to autonomy, also discharge an important social function - to provide higher education. The Court has ruled that the institutional autonomy must be directly linked with the mission of HEIs to prepare highly educated specialists of various spheres, who meet the requirements of society and the state, and alongside with the considerably important responsibility of ensuring the quality of and in higher education. Thus, the mission of the HEIs to prepare educated specialists, who meet the requirements of society and the state, implies the responsibility of HEIs for providing good quality higher education that meets the needs requirements of society and the state.⁸²⁷

The Constitutional Court held that the institutional autonomy does not mean that the activity of the HEIs cannot be subject to state control, on the contrary, the constitutional provision, stating that the state shall supervise the activities of establishments of teaching and education, requires to ensure regulation, control and supervision of the coherent implementation of human rights and freedoms, as well as to secure effectiveness of the system of higher education and efficiency of the use of state budget funds.⁸²⁸

According to the constitutional doctrine on the constitutional concept of institutional autonomy formulated by the Constitutional Court, some insights regarding the interrelation between the rights, interests and responsibilities of different parties can be summarized. First, the Constitutional Court demonstrated that it is necessary to maintain the balance between the rights, interests and responsibilities of the state, society, HEIs, students and academics in higher education. In this context, it is obvious that academic freedom is not an exclusion and must combine both, rights and responsibilities. Second, institutional autonomy granted to the HEIs

⁸²⁵ *Ibid.*

⁸²⁶ The Constitutional Court of the Republic of Lithuania Decision (2009, no. 28/07 - 29/07), *supra* note 796.

⁸²⁷ *Ibid.*

⁸²⁸ The Constitutional Court of the Republic of Lithuania Decision (2008, no. 19/05), *supra* note 821.

creates preconditions to implement and protect freedom of science, research and teaching. Third, keeping the balance between the interests of society, state, academics and HEIs, implies a duty of a state to adopt the corresponding model of higher education system, including adequate models of financing. HEIs are participating in a competing environment, while trying to attract a larger number of consumers of higher education services and to achieve financial sustainability. At the same time, they have to ensure the quality of the provided services. The decisions on corresponding financial aid from the state influence the ability of the HEIs to meet the standards established by the state. Consequently, teachers, researchers and other academics have to fulfill the requirements established by the HEIs in order to achieve their goals in employing the efficiency of the system, ensuring the quality, achieving financial sustainability and adhering to the standards established by the state. The efforts to find the balance in achieving these goals may sometimes place academic freedom at risk. The state should be responsible for maintaining academic freedom. Fourth, the state possesses the duty to ensure supervision and control of the activities of educational establishments and their ability to ensure consistency of institutional autonomy, responsibility and accountability to society. The state must implement this duty without violating academic freedom. Further the analysis of existing regulation established by the state and also the HEIs will allow to evaluate its conformity to the principle of academic freedom.

4.2.2. Doctrine of academic freedom under the Lithuanian constitutional jurisprudence

4.2.2.1. The constitutional freedom of science and research

With reference to the *Magna Charta Universitatum*, the Lithuanian Constitutional Court ruled that the university is an autonomous institution at the heart of societies which produces culture by research and teaching, which in order to meet the needs of the world around it, must be morally and intellectually independent of all political authority and economic power.⁸²⁹ Governments and universities must ensure respect for the freedom in research and training/teaching as the fundamental principle of university life.⁸³⁰ This subchapter will focus on the analysis of the official constitutional doctrine on this fundamental principle and its content.

The concept of academic freedom was introduced for the first time was introduced in a 1994 ruling, where it was described as an endeavor “to protect the researchers’ and teachers’ freedom of scientific thought and its expression from outward influence”.⁸³¹ The Constitutional

⁸²⁹ The Constitutional Court of the Republic of Lithuania Decision (2011, no. 13/2010 – 140/2010), *supra* note 336.

⁸³⁰ *Ibid.*

⁸³¹ The Constitutional Court of the Republic of Lithuania Decision (1994, no. 2/94), *supra* note 802.

Court in its subsequent rulings emphasized that the constitutional freedom of science and research is perceived as a prerequisite for self-expression, creativity, pluralism of ideas, socializing, for economical, technological and social development, and for prosperity of the whole society.⁸³² This understanding clearly corresponds to the idea that academic freedom should not be understood only as an individual right but as having a broader function. It is crucial that the true role of academic freedom, together with that of universities, in modern societies is recognized “before mechanisms to promote change are put in place.”⁸³³

Quite significant for the interpretation of the freedom of science and research, for recognizing its importance and showing its inseparability from the other rights and freedoms established in the Constitution, was a decision rendered ruling in 2007.⁸³⁴ The description of the constitutional notion of the freedom of science and research serves for a better acknowledgement of the concept of academic freedom, its limits, requirements for the state institutions and HEIs in establishing laws, sub-statutory legal acts and local acts on higher education.

⁸³² The Constitutional Court of the Republic of Lithuania Ruling on the Compliance of the 2.3.1 of Resolution of the Government of the Republic of Lithuania No. 899 “On Approving the Inventory Schedule of the Minimum Qualification Requirement for the Positions of Scientific Workers, Other Researchers and Teachers at State Institutions of Science and Studies, the Inventory Schedule of the Procedure for Organisation of Competitions for Positions of Scientific Workers, Other Researchers and Teachers at State Institutions of Science and Studies and of Certification of Scientific Workers, Other Researchers and Teachers, and the Inventory Schedule of the Procedure for Awarding Pedagogical Degrees in Universities” of 11 July 2001 (Wording of 18 August 2005) and Items 2.2, 2.5, 3.1.2, 3.1.3 and 3.1.4 of the Inventory Schedule of Minimum Qualification Requirements for the Positions of Scientific Workers, Other Researchers and Teachers at State Institutions of Science and Studies, who Work in Humanitarian and Social Sciences (Wording of 18 August 2005) Approved by the Same Resolution, as Well as Item 3.1 of the Habilitation Procedure Approved by Resolution of the Government of the Republic of Lithuania No. 962 “On Approving the Habilitation Procedure” of 18 July 2003 with the Constitution of the Republic of Lithuania (2007, no. 18/06).

⁸³³ Geoffrey Boulton and Colin Lucas, *supra* note 697.

⁸³⁴ In 2007 ruling, when deciding on minimum qualification requirements to scientists, the question was raised whether certain provisions of government resolutions aimed to regulate the issues concerning science and research, announcing the research results, teaching and/or scientific work at the higher education institutions, scientific institutes under state universities, state institutes of science and state educational establishments and the basic requirements for the positions of the scientists or teachers at the state institutions of science and studies are in conformity with Article 14 of the Lithuanian Constitution (Article 14. Lithuanian shall be the State language) and with the constitutional principle of a state under the rule of law. One of the main issues raised in the case was the regarding the fact that in order to apply for a certain scientific position one had to meet the established requirement “<...> not less than two scientific articles must be published in the publications included in the databases of the Institute for Scientific Information”. Another issue was related to the fact that when establishing qualification requirements for positions, institutions must take account of “<...> publishing scientific articles in the publications which are assessed by the Institute for Scientific Information and other recognized international databases, the list whereof is drawn by the Council of Science of Lithuania <...>”. The provisions were deemed as obliging to publish scientific results only in the publications which are assessed in the international databases. Also doubts were raised regarding the establishment of the requirements for the positions of scientists or teachers in the government resolution, stating that defined list of the compulsory (minimum) requirements for the positions of scientists or teachers of state institutions of science and studies should be established by means of a law. The question was also raised regarding the government resolution provision stating that the Council of Science of Lithuania may be commissioned to establish by its legal acts a list of recognized international databases, contesting the Council of Science of Lithuania discretion to regulate the relations related to the constitutional provision - the right of a person to freely choose an occupation.

The Constitutional Court of the Republic of Lithuania Decision (2007, no. 18/06), *supra* note 832.

One of the most important aspects in this case was that while defining the constitutional notion of the freedom of science and research as very ample, the Constitutional Court for the first time explicitly tried to clarify the content of the freedom of science and research, identifying its different aspects as including:

- the right to freely decide by oneself whether to engage in science and research;
- the right to freely choose the sphere of scientific research and methods of investigating particular subjects;
- the right to form one's own scientific world-view;
- that no scientific views may be thrust upon a person;
- that a person may not be forced to choose a certain sphere of scientific research, or may not be prevented from choosing it (save for the exceptions stemming from the Constitution);
- that a person may not be forced to perform certain scientific research or may not be prohibited from performing certain scientific research (save the exceptions stemming from the Constitution);
- that a person may not be forced to publish or not to publish results of the performed scientific research.⁸³⁵

The ruling suggested that the Constitution consolidates such a notion of the freedom of science and research where “science and research may not be made a political or ideological issue”.⁸³⁶ For that reason, any member of the scientific community has to be protected from any pressure to accept certain scientific views and values and from discrimination based on the fact that the field or subject area of scientific research contravenes someone's political or ideological views. Any interpretation of the notion of the constitutional freedom of science and research to the contrary would lead to an understanding that it is allowed to “deviate from the constitutional imperatives of democracy, an open, just and harmonious civil society, and to create conditions for violating various values, inter alia, human rights and freedoms, which are entrenched in and protected and defended by the Constitution.”⁸³⁷

The present ruling of the Constitutional Court serves as a strong fundamental basis for freedom of research and publication, which in many cases allows limitations of this freedom only if established in the Constitution. The importance of freedom of research and publication is underlined by the quite extensive scope of this right: free engagement in scientific research, choosing the sphere and methods of a research, developing a scientific view and sharing the

⁸³⁵ *Ibid.*

⁸³⁶ *Ibid.*

⁸³⁷ *Ibid.*

results of the research.⁸³⁸ However, is a right to freedom to perform or not to perform certain research, or a right to freedom to publish or not to publish indeed realistic today?

Existing higher education policies and the importance of “quantitative research output in academic career paths”⁸³⁹ often incentivize academics to satisfy quantitative publishing requirements, to focus on subjects supported by grants from government, industry or foundations. Following the growth of external commercially funded research the protection of academic freedom has become exceptionally important. Scholars note that “by no means exhaustive of the ways sponsored research might compromise the integrity of the academic enterprise.”⁸⁴⁰ And it makes it even worse if research productivity is an institutional requirement for promotion or salary increase.⁸⁴¹

Researchers may also face excessive limitations of their freedom of research and publication, for example, in cases of increasingly close relationships between HEIs and corporations for the purpose of technology transfer. It is true that both partners benefit from such cooperation, the HEI develops a new revenue stream and the corporation gain access to inventions or discoveries.⁸⁴² However, increasing involvement of industry in academic research may hinder the free exchange of knowledge and guide research towards a full compliance with commercial aims.

The implementation of Bologna Process also spurred a number of issues that impact research and publication (see Table 10). The internationalization requires academics to publish in English and in high-ranked academic journals. Scholars note that institutional managers set research priorities within the HEI and demand to raise external research funding. Those research areas that are not funded tend to be neglected and that has a negative impact on the careers of those working in less popular fields. It is of course understandable that setting a wide scope of constitutional freedom of research does not mean that it is absolute. However, as the Court noted, the constitutional freedom of science and research may be subject to limitations only when: “this is done by means of a law; the limitations are necessary in a democratic society in

⁸³⁸ However, the Constitutional Court also emphasized entirely different approach of academic freedom. The Constitutional Court held that the notion of the constitutional freedom of science and research “implies the professional independency of the scientific community (as well as communities representing certain scientific subject areas), as a community united by a scientific view and professional interests, from state institutions, their independent institutionalization and self-government, free communication with scientific communities of other countries (inter alia, scientific and educational institutions).” In the context of the constitutional case at issue such interpretation presupposes another aspect of academic freedom. Previously described as the freedom entitled to an individual scholar, the Constitutional Court referred to it as an institutional academic freedom which belongs to the higher education institutions rather than to an individual scholar. *Ibid.*

⁸³⁹ OECD, “Higher Education to 2030. Volume 2: Globalisation,” *supra* note 192.

⁸⁴⁰ Rebecca S. Eisenberg, *supra* note 320, 270.

⁸⁴¹ Terence Karran. “Academic Freedom: In Justification of a Universal Idea,” *Studies in Higher Education* Vol. 34, No. 3 (May 2009): 270 // DOI: 10.1080/03075070802597036.

⁸⁴² Peter D. Blumberg, *supra* note 551, 90.

order to protect the rights and freedoms of other persons and values entrenched in the Constitution, as well as constitutionally significant objectives; the limitations do not deny the nature and essence of the rights and freedoms; the constitutional principle of proportionality is followed.”⁸⁴³ Accordingly, it can be concluded that it is highly doubtful whether the existing research environment, including limitations of freedom of research, can be justified as necessary in a democratic society in order to protect the rights and freedoms of other persons, and whether it actually suits the constitutional notion of freedom of research and publication. The assurance of freedom of research is important not only as a defense against state interventions, but also because it creates an obligation for the state to establish a supportive legal framework and implement adequate measures to protect it. That is fundamental for the recognition and protection of academic freedom as a right and as a responsibility.

4.2.2.2. The right to self-governance

Another interpretation of academic freedom by the Constitutional Court, although rather confusing, reflected one more element of academic freedom, i.e. the freedom of intramural speech. In its 2011 ruling, the Constitutional Court held that the autonomy of schools of higher education implies academic and institutional autonomy.⁸⁴⁴ The Court stated that “academic autonomy and institutional autonomy of schools of higher education are inseparably interrelated, i.e. without academic autonomy one may not guarantee institutional autonomy – the self-governance of a school of higher education, while without institutional autonomy one would not ensure academic autonomy, which stems, *inter alia*, from the constitutional freedom of science and research”.⁸⁴⁵ From such wording it can be concluded that by academic autonomy the Constitutional Court actually meant academic freedom. However, it is not entirely clear how academic freedom as a prerequisite ensures institutional autonomy. Most likely, the Court here acknowledged the importance of freedom of intramural speech. The Court considered free opinion of the academic community to be of significant value in order to ensure the self-governance of the HEI. The indispensability to rely on the opinion of the scientific community was also emphasized stating that it is a duty of the HEI “not to ignore an opinion of the scientific community and take proper account of it”.⁸⁴⁶

The professional independence of the scientific community implied from the constitutional notion of freedom of science, research and teaching is interrelated with the self-

⁸⁴³ The Constitutional Court of the Republic of Lithuania Decision (2007, no. 18/06), *supra* note 832.

⁸⁴⁴ The Constitutional Court of the Republic of Lithuania Decision (2011, no. 13/2010 – 140/2010), *supra* note 336.

⁸⁴⁵ *Ibid.*

⁸⁴⁶ The Constitutional Court of the Republic of Lithuania Decision (2007, no. 18/06), *supra* note 832.

governance of HEIs and is perceived as one of the fundamental conditions of implementation of institutional autonomy. The essential requirement for the implementation of self-governance is the need to establish the conditions which would ensure that the academic community has an opportunity to influence the adoption of decisions on administration of the HEIs. For this reason the institutions of administration which implement functions of self-government of the HEIs must be formed by the HEIs themselves. This would allow to guarantee the constitutional implementation of the principle of academic freedom and, alongside, the constitutional imperative of institutional autonomy.⁸⁴⁷

According to the Court, in order to balance the principles of institutional autonomy and institutional responsibility and accountability to society, the legislature may establish that members of certain collective institutions of governance of HEIs do not have to be appointed exclusively from among members of the academic community of that HEI.⁸⁴⁸ It can be noticed that in order to preserve the effective, accountable and responsible governance of an HEI, the Court suggests to include to certain collective bodies the representatives of the academic community not exclusively from that particular HEI. However, in establishing the governance and organizational structure of HEIs, the legislature is obliged to follow the democratic principles of governance and create no preconditions for their violation. The Court also highlighted the necessity for the legislature to respect and adhere to the opinion of the scientific and academic society in the law-making process. Governmental institutions, when adopting decisions in the field of research, science and studies, possess a duty not to ignore but rather to take into proper consideration the opinion of the scientific community because of the need of their special professional knowledge, especially when making decisions on the content of scientific research.⁸⁴⁹

Although the Constitutional Court recognized the value of academic opinion, it seems that the acknowledgement of freedom of intramural speech in the constitutional jurisprudence does not extent much further than the speech concerning the self-governance and adoption of decisions on administration of the HEI. However, such recognition itself is highly important to support a claim of freedom of intramural speech even if the speech or utterance by an academic is beyond the scope of constitutional protection. It is considered that “self-governance over academic matters of research, teaching, and faculty hiring and promotion”⁸⁵⁰ is element of

⁸⁴⁷ The Constitutional Court of the Republic of Lithuania Decision (2009, no. 28/07 - 29/07), *supra* note 796.

⁸⁴⁸ The Constitutional Court of the Republic of Lithuania in the name of Republic of Lithuania ruling on the compliance of the provisions of paragraph 3 (wording of 24 April 2012) of article 20 and paragraph 7 (wording of 19 January 2012) of article 70 of the Republic of Lithuania’s Law on Science and Studies with the Constitution of the Republic of Lithuania (2014, no. 24/2012).

⁸⁴⁹ The Constitutional Court of the Republic of Lithuania Decision (2007, no. 18/06), *supra* note 832.

⁸⁵⁰ Risa L. Lieberwitz, *supra* note 99, 75.

academic freedom with significant importance. It promotes tolerance of divergent views. Academics should have the right and opportunity to participate in the governing bodies and to criticize their own HEI and the whole higher education system. However, they are bound to respect the rights of other members of the academic community. The right to self-governance is deemed to be necessary to protect freedom of teaching and research.

4.2.2.3. *The right to conducive working environment*

Another important aspect of academic freedom was recognized in regard to the appreciation of the engagement of highly qualified experts in academia. The Constitutional Court emphasized that highly qualified teachers, researchers and other academics are the most significant and valuable assets of HEIs, leading them in fulfillment of the constitutional obligation to provide high quality higher education which meets established standards. This is a prerequisite for high quality higher education which is inseparable from the constitutional freedom of science, research and teaching.⁸⁵¹

It corresponds to the concerns raised by the Leuven/Louvain-la-Neuve Communiqué, The Budapest-Vienna Ministerial Declaration and the Bucharest Communiqué which stressed the need to attract highly qualified teachers and researchers to HEIs and accordingly advocated for attractive working conditions,⁸⁵² and more supportive and inspiring working and learning environment.⁸⁵³ Studies indicate that a significant part of the problem why universities are less able to attract the best minds is of a financial nature, as academic salaries did not keep up with remuneration for highly trained professionals in other sectors.⁸⁵⁴ Adequate remuneration for higher education teaching staff is considered as such remuneration which allows “to devote themselves satisfactorily to their duties and allocate the necessary amount of time for their continuing training”.⁸⁵⁵ It can be argued that as remuneration is considered to be an important factor for fulfillment of professional responsibilities, it is also related to safeguarding academic freedom as a right and as a responsibility. Studies also suggest that the salary of academics should reflect their importance to society as well as different responsibilities that they incur from the entry into the profession.⁸⁵⁶ Fair and supportive working environment and conditions allow academics to effectively perform their duties and responsibilities to their students, as well

⁸⁵¹ The Constitutional Court of the Republic of Lithuania Decision (2009, no. 28/07 - 29/07), *supra* note 796.

⁸⁵² *Leuven/Louvain-la-Neuve Communiqué*, *supra* note 650.

⁸⁵³ *Budapest-Vienna Declaration*, *supra* note 234; *Bucharest Communiqué*, *supra* note 656.

⁸⁵⁴ Philip G. Altbach, Liz Reisberg, and Laura E. Rumbley, *supra* note 56.

⁸⁵⁵ UNESCO, “Resolution 31 adopted by the General Conference at its 29th session,” (1997) // <http://unesdoc.unesco.org/images/0011/001102/110220e.pdf> (accessed June 10, 2016).

⁸⁵⁶ *Ibid.*

as in regard to scholarship, research and administration. That creates favorable conditions for the protection of academic freedom.

It is also argued that the basic philosophy for regulating academic employment and working conditions have changed and it is mainly related to “performance and quality, competition and flexibility, efficiency and accountability.”⁸⁵⁷ It seems that academics were forced to adapt to the new circumstances higher education systems have been facing without adequate support from the state and HEIs. The Constitutional Court also underlined that in order to gain the overall advantage of the academic expertise, disciplinary knowledge and of education of high quality, a variety of certain conditions must be established and met.

The Court held that the quality of higher education is influenced by a variety of conditions. Quality is interrelated with the existing infrastructure of HEI and state’s allocated funding into this infrastructure. Another important facet is the structure of HEIs which allows the progress of scientific and pedagogical activity and mobility of academics. The Constitutional Court also stressed the importance of adequate and agreeable social guarantees to teachers, *inter alia* the provision of remuneration, which should be consistent with the constitutionally protected social function of this profession, secure a dignified life, and enable the academic to devote all his working time to pedagogical and scientific activity and to the improvement of his or her professional qualification.⁸⁵⁸ The Court recognized the fact that in order for the HEIs to enjoy the benefits of disciplinary knowledge, a corresponding environment must be created for academics to be remunerated, to enjoy their working conditions and devote their time fully to academic work.

Another important factor in ensuring a conducive working environment for academics is the workload which must be fair and permit academics to carry out their duties and responsibilities effectively. In order to ensure a certain level of protection for academic profession, the Constitutional Court described teaching and scientific activity as a special activity which requires creativity and which is not similar to other types of professional activities. The Court noted that the work of academics is not limited only to the work in the classroom. Teaching in the classroom is only a part of the whole process which includes preparation for classes, guiding the students in their independent studies, performing scientific activities engaging in the research and professional communication with other scientists and researchers. These activities are often conducted outside the premises of HEIs, and, in some cases, even cannot be conducted in these premises, as in Lithuania HEIs usually do not have or

⁸⁵⁷ Jürgen Enders, “Academic Staff in Europe: Changing Employment and Working Conditions,” *Academic Work and Life* Vol. 1 (2000): 13.

⁸⁵⁸ The Constitutional Court of the Republic of Lithuania Decision (2009, no. 28/07 - 29/07), *supra* note 796.

have not enough dedicated premises for academic work. These specificities imply that the account of academic work-load cannot be based upon the mere formal criterion as the time spent in a lecture room or in the premises of a HEI in general.

The Court's approach on the working conditions corresponds the basic understanding of academic freedom. It can be concluded that in order for academic freedom to be protected as a right and as a responsibility, the state and the HEIs have the responsibility to ensure that national legislation and institutional policies create preconditions and support a fair working environment, including equitable work-load, adequate remuneration and sufficient institutional infrastructure. Accordingly, academics should be responsible while enjoying academic freedom and a conducive working environment to ensure effective and high quality performance of their professional functions.

4.2.2.4. *Publish or perish*⁸⁵⁹

With regard to the conducive working environment and conditions for academics and also in light of the quite wide concept of the constitutional freedom of research and publication, it is worth mentioning some additional aspects that relate to the requirements to publish the research results in journals which are assessed in international databases. It is a widespread tendency to encourage researchers to publish scientific publications in such scientific journals which are highly ranked, considered authoritative by the academic community and are reviewed in various international databases. Increasing pressure to publish in high profile journals has been considered as one of the key issues that impacts academic activities during the implementation of Bologna process (see Table 10). Studies demonstrate that academics are required to publish their articles in highly-ranked journals and to obtain funding, and, it is argued, that it has increasingly become a war between universities regarding quality and excellence (as being the prerequisites for their survival).⁸⁶⁰ Data on the subject shows that research university professors

⁸⁵⁹ "Publish or perish and perform better or disappear" taken from Jan Masschelein and Maarten Simons, "The University as a Matter of Public Concern. Thinking About and of a World-University": 92; in: *Rethinking the University After Bologna: New Concepts and Practices beyond Tradition and the Market* (Antwerpen: UCSIA, 2009).

"Publish or Perish is a free software program that retrieves and analyzes academic citations. It uses Google Scholar to obtain raw citations, then analyzes these and calculates a series of citation metrics." Soledad Moya, Diego Prior and Gonzalo Rodríguez-Pérez, "Performance - based Incentives and the Behavior of Accounting Academics: Responding to Changes," *Accounting Education: An International Journal* (2014): 23 // DOI: 10.1080/09639284.2014.947092.

⁸⁶⁰ Jan Masschelein and Maarten Simons, "The University as a Matter of Public Concern. Thinking About and of a World-University": 92; in: *Rethinking the University After Bologna: New Concepts and Practices beyond Tradition and the Market* (Antwerpen: UCSIA, 2009).

contribute the largest share of scholarly and scientific research articles and books.⁸⁶¹ About 90 percent of the articles in the high-ranked journals are likely to be written by professors from research-intensive universities.⁸⁶² It must also be stressed that they perform their teaching and research responsibilities at the highest levels but they are also given such employment conditions that permit them to perform their best work.⁸⁶³

“Publish or perish” has emerged as one of the most important career advancement factors in higher education systems. It prompted a debate among scholars and their universities around quality teaching versus quantity of research publications.⁸⁶⁴ Scientists and researchers in Lithuania face various difficulties trying to implement such publication requirements. In many cases they are forced to publish their research results not in Lithuanian but in a foreign language. Most influential academic journals are published in English and universities in different countries encourage and sometimes demand to publish in English.⁸⁶⁵

The “publish or perish” mentality has been emerging and scholars in different countries acknowledge that publishing in high-ranked journals is challenging.⁸⁶⁶ If the field or object of a research is related mainly to a specific issue of national concern which is not or only hardly relevant in foreign countries, it becomes complicated to find a journal which would be eager to accept the publication.⁸⁶⁷ The question could be even raised whether the requirement to publish in journals which are assessed in the international databases could be justified when the results of the research are mainly significant to the local market and national academic community. There is no doubt that publications in the authoritative journals can undeniably be considered as of high quality and value. But does the mere fact of publishing the research results in Lithuanian language and in a local journal makes scientific work less significant?

The Constitutional Court recognized internationalization as a fundamental condition for the successful development of science. The Court stressed that the state’s duty to support culture and science and to take care of the protection of Lithuanian historical, artistic and cultural

⁸⁶¹ Philip G. Altbach, *supra* note 174, 19.

⁸⁶² *Ibid.*

⁸⁶³ *Ibid.*

⁸⁶⁴ Kelly A. Way, Robert J. Harrington and Michael C. Ottenbacher, “Hospitality Author and University Productivity in the 21st Century,” *Journal of Culinary Science and Technology* 10 (2012): 255 // DOI: 10.1080/15428052.2012.706143.

⁸⁶⁵ Philip G. Altbach, *supra* note 174, 18.

⁸⁶⁶ Li Wang, “Quality assurance in higher education in China: Control, accountability and freedom,” *Policy and Society* 33 (2014): 258 // DOI: org/10.1016/j.polsoc.2014.07.003.

⁸⁶⁷ Scholars argue that if an argument that Lithuanian science is very specific and it is not reasonable to publish in foreign journals, can be partly justified in case of social sciences and humanities, accordingly it can not be justified in case of natural and exact sciences. Darius Čeburnis, “Lietuvos mokslo sistamai reikia chirurgo peilio,” (2014) // <http://www.bernardinai.lt/straipsnis/2014-07-02-darius-ceburnis-lietuvos-mokslo-sistamai-reikia-chirurgo-peilio/119390> (accessed November 19, 2016).

monuments and other culturally valuable objects⁸⁶⁸ entails the “support in every possible way the imparting of Lithuanian science around the world, and representing it beyond Lithuanian borders”.⁸⁶⁹ The Court agreed that announcing scientific research results and exchanging scientific information, especially in the global arena is defined as a prerequisite for productive scientific activity, preservation of global standards and tendencies and prosperity of the whole scientific and academic community. The internationalization approach was confirmed in the Court’s statement, finding that “a low level of science and research could create preconditions for violation or even denial of other constitutional values”.⁸⁷⁰

The Constitutional Court noted that the state has certain duties ensuring the possibility of publishing the research results in Lithuania as well. For example, research which cannot raise much interest within the international scientific community, which is however significant to Lithuanian cultural, political, and academic communities; or established conditions for publication of results can hardly be fulfilled due to the reasons which cannot be eliminated even by the state. It was also noted that a possibility of an international dissemination of scientific results may vary according to the specifics of spheres and subject areas of science. A more extensive imparting of results is more common to the physical, biomedical and technological sciences, meanwhile, it is more complicated for the humanitarians and social sciences. This implies the necessity to introduce differentiated requirements according to the specifics of spheres and subject areas of sciences.⁸⁷¹ It was an important insight on the necessity to differentiate established standards and requirements for the publication of the research results. Stressing that it can also be relevant to publish research results in the local journals which are not assessed in the international databases, creates more favorable conditions for those whose research is focused more on the national issues.

The requirements for acquiring a certain position at institutions of science and studies which demand to have a certain number of publications in the journals reviewed in the international databases, and which allows to presume that such publications are significant,

⁸⁶⁸ *Constitution of the Republic of Lithuania*, *supra* note 443, art. 42(2).

⁸⁶⁹ The Constitutional Court of the Republic of Lithuania Decision (2007, no. 18/06), *supra* note 832.

⁸⁷⁰ *Ibid.*

⁸⁷¹ The Constitutional Court also paid attention to the fact that the established requirements prescribed that articles should be published in the journals which are included in the databases of the Institute for Scientific Information (ISI). ISI is a private establishment which provides paid services and administers one of the international databases which is widely recognized, however the database administered by ISI is only one of the international databases which is recognized on the international level. At the moment of consideration of this constitutional justice case, ISI has included only 10 Lithuanian scientific magazines. Many areas of Lithuanian science were not covered by them. That means that some scientists had better possibilities of publishing their results, and some according to their research sphere and subject area had more complicated and limited. The Constitutional Court held that such requirement by itself is not a violation but when the requirements are established in the law it cannot be done mechanically. It is necessary to evaluate the specifics of the corresponding spheres and subject areas of science. The Constitutional Court of the Republic of Lithuania Decision (2007, no. 18/06), *supra* note 832.

according to the Constitutional Court, may not be considered as absolute. The mere fact that a publication was not published in the journal reviewed in the international databases does not mean that it is not significant. The significance of publication must be evaluated by the novelty, original ideas, fundamentality, impact upon formation of new spheres and/or subject areas of scientific research, etc. The Court stressed that really significant scientific works are often published in authoritative journals that are not reviewed in international databases or in other ways. In the process of evaluating the significance and quality of scientific publications, not only formal assessment requirements must be met but also qualified and impartial expertise assessments must be included. The Constitutional Court observed that the requirement to publish in certain journals may be established, however, in addition, there must be an alternative on the form of other requirements related to an assessment of the significance of the scientific publication. The Constitutional Court also held that when shaping and implementing state's scientific policy it is necessary to find a balance between promotion of internationalization of Lithuania's science and research, and of such scientific research which is significant to Lithuania even if it does not raise international interest.⁸⁷²

Setting general minimum requirements for the scientists forms a part of the procedure of implementation of the constitutional right to freely choose an occupation. Lithuanian Constitution does not require that such requirements for the scientists should be explicitly regulated by law. One of the reasons of such regulation is the necessity in law-making procedure to rely on special professional knowledge and competence. Accordingly, the Court noted that the requirements for the scientists can be regulated by sub-statutory legal acts, for example, government resolutions.⁸⁷³

The Constitutional Court also noted that the discretion of the Government in setting the requirements for scientists is limited by the constitutional norms and principles, *inter alia*, the constitutional principle of a state under the rule of law and accordingly, the principle of proportionality which requires that applicable measures established by legal acts are in proportion to the objective sought, and that they do not limit the rights of a person more than needed in order to achieve the legitimate and universally significant, constitutionally reasoned aim. In the context of the case at issue, the objective sought by establishing certain requirements for the scientists should be to promote the quality of Lithuanian science and its international dissemination.⁸⁷⁴ Accordingly, having in mind these requirements, this chapter also includes an

⁸⁷² *Ibid.*

⁸⁷³ *Ibid.*

⁸⁷⁴ *Ibid.*

analysis of legal acts setting general minimum requirements for scientists in order to evaluate their compliance with the constitutional doctrine of academic freedom.

As a requirement of participation in the global research and science arena always raises the question of funding, the Constitutional Court stressed the duty of the state to form and implement a certain scientific policy and to support the science with sufficient means. The latter is an imperative *expressis verbis* established in the Constitution. As the rights and freedoms have certain limitations, they are applied to the duties as well. The implementation of a certain policy depends not only upon the established objectives and goals of the state but also on the financial and economical capacities of the state. The support is allocated to such research that is perspective, productive, corresponds the objectives and tasks close to the interests of the society and the state.⁸⁷⁵ Such approach reaffirms the notions of the Constitutional Court regarding the quality of science and research. It establishes that those whose research is corresponding to certain set standards can be granted financial support from the state.

In conclusion it should be noted that the quality of a research and its results cannot be evaluated by the mere fact that the research results were published in a national scientific journal which is not reviewed in the international databases. First, research and its results might be considered as more relevant to the national academic community or national market and consequently it would not be reasonable to publish it in other languages than Lithuanian and international journals rather than national ones. Second, even if the performed research is not related exclusively to national issues but, on the contrary, could be highly relevant to the international academic community, however was published in a national journal, it does not mean that it is not significant. The assessment of the significance of the scientific publication cannot be limited to the criterion which is related to the requirement to publish in certain scientific journals. It is necessary to establish assessment mechanism which would entail alternative criteria which should be publicly available to all scholars. However, it should be noted that the requirement itself to publish in peer-reviewed journals in international databases is not considered as incompatible or as violating freedom of publication as long as there are alternatives. This requirement is supported by the idea that global dissemination of research results is extremely important for productive scientific activity and prosperity of the whole scientific and academic community.

In conclusion, the constitutional conception of academic freedom demonstrates the significance of freedom of research and publication, the right to self-governance, conducive working environment and conditions for academics and fair procedure for research productivity evaluation. Although these elements reflected in the constitutional doctrine of academic freedom

⁸⁷⁵ *Ibid.*

do not cover all aspects of academic freedom, they will serve as guidelines for the analysis of national higher education legislation.

4.3. NATIONAL HIGHER EDUCATION REGULATION

4.3.1. *National higher education policy*

The analysis of the Constitutional Court doctrine of academic freedom showed that it is a state's commitment to establish a supporting legal framework in order to ensure that scientific endeavors can be pursued independently. It is argued that because modern science takes place in a complex of related activities between the state, HEIs and society, its regulation is equally complex.⁸⁷⁶ The Lithuanian Constitutional Court further recognized a complex of the changing needs and interests of the state, society, HEIs, students and academic community and demonstrated concerns in regard to keeping a balance between them. The state must fulfill a double function: it is charged with setting boundaries in regard to academic freedom as a responsibility and with promoting the respect and protection of the right to academic freedom. Therefore, this part concentrates on national higher education policy in order to examine whether it reflects any restrictions of academic freedom or its separate elements and whether it promotes and supports protection of academic freedom.

In 1992, after the reform of higher education was initiated Lithuanian Council for Education and Culture and the Ministry of Culture and Science of the Republic of Lithuania approved the General Concept of Education in Lithuania.⁸⁷⁷ The Concept defined general educational values, principles and objectives in the country which are relevant until today. It was favorably recognized by the experts of the OECD as the most prominent Eastern and Central European education reform.⁸⁷⁸ The General Concept of Education in Lithuania stated that the legal basis for HEIs is the Law on Science and Studies of the Republic of Lithuania which provides the basic principles for the activities of HEIs and their relations with the state.

The General Concept claimed freedom for creative and educational work and research of HEIs from the political, ideological and economic power. HEIs were required to act in conformity with the state's regulation and under the state's supervision, however they were granted full autonomy in the process of adoption of decisions in their internal activities, such as

⁸⁷⁶ German Ethics Council, *supra* note 741.

⁸⁷⁷ The Ministry of Culture and Science of the Republic of Lithuania, "General Concept of Education in Lithuania," (1992) // https://www.smm.lt/uploads/documents/General_concept_of_education_in_Lithuania_1992.pdf (accessed June 10, 2016).

⁸⁷⁸ *The Programme for the Implementation of the Provisions of the National Education Strategy 2003-2012 approved by Resolution no. 82 of the Government of the Republic of Lithuania of 24 January 2005*, Official Gazette (2005, no. 12-391).

self-government, organization of studies, research and artistic activities, financial management and other issues. It was established that HEIs regulate their internal activities according to their statutes which are considered as laws and are binding on the institutions.⁸⁷⁹ The General Concept seemed to recognize institutional autonomy as an important element of higher education and also as a prerequisite for the guarantee of the rights and freedoms of academics. Institutional autonomy was perceived as a valuable tool for the HEIs to contribute to the advancement of academic community, to ensure rights and freedoms of individual members of the academic community and to meet the needs of the society.

Later higher education policies and strategies which have been approved by the state reflected strategic goals and priorities of the Bologna Process and the Lisbon Strategy. The Long-Term Development Strategy of the State,⁸⁸⁰ which was approved in 2002, intended to develop the country, as a future EU member state, by distinguishing three priority areas: knowledge society, secure society and competitive economy. Education was given an exceptional role in this development. The Strategy aimed for higher education massification,⁸⁸¹ international co-operation and exchange in education, development and implementation of the system for promotion of scientific activities and their results. The Strategy stressed the need to develop the system of monitoring, audit and strategic planning and ensure external evaluation of HEIs. It also advocated for a stable, rational and transparent system of education funding.

The Long-Term Development Strategy recognized the need for highly qualified specialists and the need to ensure the scientific and technological potential of the country. It was stressed that it is important to determine priority trends in the development of science, to support and strengthen the scientific potential, while increasing investment in the infrastructure of education and science institutions to enable them to train specialists who can compete in the changing academic and professional labor market. The main priorities established in the document were the following:

⁸⁷⁹ Essential public higher education regulatory keys are partial funding of the state higher education institutions, accreditation and licensing of higher education institutions. Funding to higher education institutions is allocated according to the need for specialists and priority matters of the state's science and culture policy. The main objective of accreditation is to evaluate the ability of higher education institutions to provide qualifications and scientific degrees in the context of international equivalence and recognition. External evaluation is organized by the Ministry of Education and Science authorized institution. The purpose of the external evaluation is to create conditions for high education institutions to improve and promote the culture of quality, to evaluate basic funding needs according to the efficiency of the activities of higher education institution, to inform the founder, the academic community and society about the quality of activity of higher education institution, according to results of performance evaluation to make recommendations on higher education institution activities.

⁸⁸⁰ *The Long-Term Strategy of the State approved by Resolution no. IX-1187 of Seimas of the Republic of Lithuania of 12 November 2002*, Official Gazette (2002, no. 113-5029).

⁸⁸¹ It stated that while developing an effective, coherent, universally accessible and continuous education system it is necessary to ensure that the system of higher education should embrace everyone seeking higher education according to the abilities.

- to perform research relevant to the country's sustainable development and to the demands of the national economy;
- to promote interaction between science and business and ensure the progress of the country;
- to expand applied research and research aimed at creating and introducing new flexible technologies;
- to apply competitive research funding, financing priority research programmes, while financing of other programmes should be based on the preservation of the country's scientific competence.

It demonstrates ambitious targets that are established to support the development of the country's economy. It is obvious that the government has adopted the widespread view that "high quality, internationally competitive research and higher education <...> are prerequisites for long-term success in globalized knowledge economies".⁸⁸² HEIs were recognized as important tools for shaping social and economic public policy and obtaining desirable outcomes. Such approach clearly raises concerns in regard to the wider function and the true role of HEIs and higher education, including the role of academic freedom and institutional autonomy, which did not receive any attention in the document.

As a supplementary document to the Long-Term Strategy, the National Education Strategy 2003 - 2012, aimed to increase the efficiency and consistency of the national educational system, based on responsible management, targeted funding and rational use of resources, to improve accessibility to education, to ensure quality of education which meets the needs of the individual person and the universal need of society of the modern world.⁸⁸³ To implement these aims, the Strategy established a set of measures.⁸⁸⁴ One of them was the improvement of the content of studies.⁸⁸⁵ It was suggested to increase the adjustment of the content of studies and curricula to the needs of the labor market in the knowledge society, strengthening general education of social, informational, communicational and other basic skills, and adapting studying workload accordingly to individual needs and capacities. Implementation of all these measures was to be based on such values as quality, social justice,

⁸⁸² Geoffrey Boulton and Colin Lucas, *supra* note 697.

⁸⁸³ *The National Education Strategy 2003-2012 approved by Resolution No. IX-1700 of the Parliament of Lithuania of 4 July 2003*, Official Gazette (2003, no. 71-3216).

⁸⁸⁴ Implementation of the responsible management system; introduction of changes in education funding and use of resources area; modernization of education research and assessment; transfer of some of the education supervision and inspection functions to the discretion of the educational institutions and their internal and external auditing systems. *Ibid.*

⁸⁸⁵ *The Programme for the Implementation of the Provisions of the National Education Strategy 2003-2012 approved by Resolution no. 82 of the Government of the Republic of Lithuania of 24 January 2005*, *supra* note 878.

lifelong learning, access to education, open civil society, transparency and efficiency. However, institutional autonomy and academic freedom did not appear in any of those documents.

It should be noted that although it is necessary to respond to the needs of the labor market and enhance graduate employability, these goals must be balanced with the idea of the university as an institution “dedicated to the disinterested pursuit of ‘higher learning’ as an end in itself”.⁸⁸⁶ It is argued that the patterns of responding the economic and political objectives of the state and training students according to the needs of employers are particular evident in those countries where due to decreasing state funding, HEIs had to seek alternative income sources.⁸⁸⁷ As it was already mentioned such tendency not only may distort the true function of the university but also may place academic freedom at risk.

Despite all established aims in national higher education policy documents, the evaluation of Lithuanian higher education system has demonstrated that the HEIs are reluctant to consider the needs of the knowledge society and ensure compliance of the curricula with the labor market.⁸⁸⁸ The review of the higher education system pointed out that due to relatively low salaries and poor academic environment university teachers, scientists and researchers choose to work in other fields or leave to other countries.⁸⁸⁹

Attention was also brought to the fact that the principle of institutional autonomy in Lithuanian HEIs was interpreted differently in deviation from its fundamental meaning. According to the Magna Charta Universitatum, while implementing their mission, universities must be autonomous and have close links to the society. However, as it was argued, Lithuanian universities perceive institutional autonomy as self-government which is performed only by the members of the university and society cannot influence the decisions of the senate and rector of the university.⁸⁹⁰ It should be noted that the Budapest-Vienna Communiqué, which highlighted the value of academic freedom, institutional autonomy and accountability in the EHEA, recognized the necessity of an even broader role of academics. It called for a more supportive

⁸⁸⁶ Cris Shore and Mira Taitz, *supra* note 53, 205.

⁸⁸⁷ *Ibid*, 206.

⁸⁸⁸ Because of weak relations with the social partners the results of science, technology and experimental development have been insufficiently used in business. Accordingly, the private investment in science, technology and experimental development was poor.

The Development Programme for the Lithuanian Education System 2006-2010 approved by Resolution no. 335 of the Government of the Republic of Lithuania of 5 April 2006, Official Gazette (2006, no. 39-1394).

Measures for the First Stage 2006-2007 Implementation of The Development Programme for the Lithuanian Education System 2006-2010 approved by Resolution no. 1133 of the Government of the Republic of Lithuania of 17 November 2006, Official Gazette (2006, no. 126-4789).

⁸⁸⁹ *The Development Programme for the Lithuanian Education System 2006-2010 approved by Resolution no. 335 of the Government of the Republic of Lithuania of 5 April 2006*, Official Gazette (2006, no. 39-1394).

⁸⁹⁰ The Programme suggested that according to the good practice examples of the other European countries, Lithuanian higher education institutions should establish two bodies: the council which would be formed not only from the members of the university, students and graduates but also from the other members of the organizations which have interests towards higher education development and quality; and senate which would be formed from the university teachers, scientists and student representatives. *Ibid*.

environment for academic staff to participate in decision-making structures not only at institutional, but also at European and national levels.⁸⁹¹

Although the country aimed to promote the internationalization of higher education and to ensure the successful integration of Lithuanian higher education into European area of higher education, the development was insufficient.⁸⁹² It was due to a number of reasons, for example, because of the poor number of subjects taught in a foreign language and relatively small number of teachers who could teach in foreign language. Lithuanian HEIs also reflected the lack of administrative staff help, inflexible schedules, insufficient access to computers and other office equipment, poor quality of infrastructure and insufficient study programs. As significant barriers for development of internationalization, students and teachers considered an insufficiency of financial resources, a lack of foreign language skills, and inflexible employment conditions. Accordingly, the Programme stressed the necessity to create conditions for teachers in HEIs to improve their competences, qualifications and foreign language skills.

This approach corresponds to the constitutional conception of academic freedom. It shows that in order to fulfill the constitutional obligation to provide high quality higher education, the state and HEIs have an obligation to ensure a fair and equitable working environment and conditions so that academics can perform their professional functions and responsibilities.

Internationalization in order to increase the quality of higher education and competitiveness of HEIs remained the main goal in subsequent higher education programmes.⁸⁹³ A slightly different approach can be seen in Lithuania's progress strategy "Lithuania 2030" (hereinafter Lithuania 2030) which calls for integration of industries, business, education, science and culture to create favorable conditions for the development of creative and cultural industries and their international competitiveness.⁸⁹⁴ In addition, it advocates for the necessity to ensure in all Lithuanian HEIs studies a basic humanistic education which would encompass training of generic cultural competencies for the development of a creative individual.⁸⁹⁵ Lithuania 2030 acknowledges the importance of the development of individual abilities and argues that the current national education system underestimates the importance of critical

⁸⁹¹ *Budapest-Vienna Declaration*, *supra* note 234.

⁸⁹² *A Programme for the Promotion of the International Dimension in Higher Education for 2008-2010 approved by Resolution no. 732 of the Government of the Republic of Lithuania of 9 July 2008*, Official Gazette (2008, no. 85-3384).

⁸⁹³ *A Programme for the Promotion of the International Dimension in Higher Education for 2011-2012 approved by the the Order no. V-178 of the Minister of Education and Science of the Republic of Lithuania of 2 February 2011*, Official Gazette (2011, no. 16-785).

The Action Plan for the Promotion of the International Dimension in Higher Education for 2013-2016 approved by the Order no. V-878 of the Minister of Education and Science of the Republic of Lithuania of 20 September 2013, Official Gazette (2013, no. 102-5051).

⁸⁹⁴ *Lithuania's Progress Strategy "Lithuania 2030" approved by Resolution No XI-2015 of the Seimas of the Republic of Lithuania of 15 May 2012*, Official Gazette (2012, no. 61-3050).

⁸⁹⁵ *Ibid.*

thinking. Additionally, different from other programmes on the subject, Lithuania 2030 does not encourage full concentration towards the needs of businesses, instead it suggests to foster the creation of an environment favorable for science and research and for opening up the research infrastructure for business-science interaction. Although academic freedom does not appear in the document, it seems like it is in favor of promoting the wider function of higher education.

The main idea, principles and values established in Lithuania 2030 served as a basis and were re-established in the National Education Strategy 2013-2022,⁸⁹⁶ however, among them academic freedom is not mentioned as well. In regard to institutional autonomy, the National strategy notes that HEIs had just started learning to exploit autonomy with accountability to society and also stresses the necessity to reinforce it. In response to increasing quality demands for higher education system, HEIs and increasing qualification and competence requirements for academics, the document highly encourages the quality of higher education. The Council of the EU has been identifying the weaknesses in quality, in the ability to foster innovations and in the labor-market relevance as the main problematic aspects in Lithuanian higher education.⁸⁹⁷ Therefore, the National Strategy encourages the state to increase public funding⁸⁹⁸ so that HEIs can ensure adequate conditions for academics to improve their competences and skills. Professional competence of academics is one of the main priorities of the National Education Strategy 2013-2022.

However, more specific current national policies on the subject still highly concentrate on a tendentious preservation of the system of higher education and studies for the development of creativity, entrepreneurship, innovativeness and practical skills and qualifications corresponding

⁸⁹⁶ *The National Education Strategy 2013-2022 approved by Resolution No. XII-745 of the Parliament of Lithuania of 23 December 2013*, Official Gazette (2013, no. 140-7095).

⁸⁹⁷ *Council Recommendation of 12 July 2016 on the 2016 National Reform Programme of Lithuania and delivering a Council opinion on the 2016 Stability Programme of Lithuania*, OJ C 299, 18.8.2016, 2016/C 299/17, 69–72. *Council Recommendation of 14 July 2015 on the 2015 National Reform Programme of Lithuania and delivering a Council opinion on the 2015 Stability Programme of Lithuania*, OJ C 272, 18.8.2015, 2015/C 272/18, 70–72. *Council Recommendation of 8 July 2014 on the National Reform Programme 2014 of Lithuania and delivering a Council opinion on the Convergence Programme of Lithuania*, OJ C 247, 29.7.2014, 2014/C 247/13, 67–71. *Council Recommendation of 9 July 2013 on the National Reform Programme and delivering a Council opinion on the Convergence Programme of Lithuania, 2012-2016*, OJ C 217, 29.5.2013, 2013/C 217/13, 51-54.

⁸⁹⁸ The Strategy urges to restore the level of public funding as during the last few years it was decreased. It also encourages to adhere to the requirements of UNESCO and OECD to increase public funding on education institutions at least up to 6 percent of country's GDP, and also to keep in mind European Commission recommendations in regard to 2013 National Reform Programme, where it stresses the need to increase public funding for education and scientific research.

The World Education Forum, "The Dakar Framework for action. Education for All: Meeting our Collective Commitments," UNESCO (2000) // <http://unesdoc.unesco.org/images/0012/001211/121147e.pdf> (accessed June 10, 2016). OECD, "Education at a Glance 2012: Highlights," OECD Publishing (2012) // <http://www.oecd.org/edu/highlights.pdf> (accessed June 10, 2016). *Council Recommendation of 9 July 2013 on the National Reform Programme and delivering a Council opinion on the Convergence Programme of Lithuania, 2012-2016*, OJ C 217, 29.5.2013, 2013/C 217/13, 51-54.

to the market needs.⁸⁹⁹ This strategic goal was predetermined by the priorities and targets established in Europe 2020.⁹⁰⁰ The European higher education system is perceived as an attractive platform to be used for the development and training of entrepreneurship and improving the culture of innovations.⁹⁰¹ The Lithuanian Innovation Development Programme urges to focus scientific research, and applied research in particular, more on business needs.⁹⁰² One of its main targets is to create a regulatory environment which promotes innovation and to improve the institutional framework for the formation and implementation of the innovation policy.⁹⁰³

Accordingly, it can be argued that such regulation must include certain limitations in regard to maintain the balance between promoting business needs-oriented research and preserving adequate implementation of a wider function of higher education. The legal framework should include both, requirements to respect and preserve academic freedom and institutional autonomy and also more concrete conditions under which the state and the HEIs could not limit academic freedom.

Attention has also been increasingly devoted towards introducing innovative educational solutions, interactive teaching-learning methods (e-learning tools, simulation programs, educational e-games) in higher education. It is argued that the potential of social sciences, humanities and arts are not sufficiently exploited in order to contribute to the development of innovation.⁹⁰⁴ However, it is directly related to the freedom of teaching and the free choice of teaching methods. For this reason it is necessary to keep that in mind when requiring academics to apply innovative educational methods in their teaching.

In conclusion it should be noted that the national higher education programmes demonstrate an increasing engagement in a process of convergence and concentration on internationalization and competitiveness in order to achieve the common goal of European higher education. At the same time they display an insufficient amount of attention on safeguarding the fundamental values of higher education. Academic freedom was not mentioned

⁸⁹⁹ *The Lithuanian Innovation Development Programme 2014-2020 approved by the Resolution No. 1281 of the Government of the Republic of Lithuania*, Official Gazette (2013, no. 29-1406).

⁹⁰⁰ European Commission, "Europe 2020. A Strategy for Smart, Sustainable and Inclusive Growth," *supra* note 241.

⁹⁰¹ *The Lithuanian Innovation Development Programme 2014*, *supra* note 899.

⁹⁰² *Ibid.*

⁹⁰³ *Ibid.*

⁹⁰⁴ *Action Plan of the Priority "Modern Educational Technologies and Processes" of the Priority Area of Research and Experimental (Socio-Cultural) Development and Innovation (Smart Specialization) "Inclusive and Creative Society approved by Order No. V-290/4-175 of the Minister of Education and Science and the Minister of Economy of the Republic of Lithuania of 31 March 2015 (TAR No. 4985, 2015).*

Implementation Programme of the Trends and Their Priorities of the Priority Area of Research and Experimental (Socio-Cultural) Development and Innovation (Smart Specialization) "Inclusive and Creative Society approved by Resolution No. 411 of the Government of the Republic of Lithuania of 30 April 2014 (TAR No. 5331, 2014).

in any of the analyzed documents. Institutional autonomy received only marginal attention, as one of the analyzed documents stated that in order to implement the mission of HEIs and to ensure it is accountable to society it is important to “aim at combining the autonomy of State institutions of higher education and their accountability to society and to other parties concerned”.⁹⁰⁵

Just as this has been the case for the Bologna documents, the lack of due regard to the protection of academic freedom in national higher education programmes contributes to insufficient attention towards the working conditions of academics. This is an explicit example of the consequences resulting from inadequate recognition of academic right as a right and as a responsibility. Therefore, it can be argued that national higher education programmes must address the question of responsibility of the state, the HEIs and academics in regard to the protection of academic freedom in the process of higher education development.

4.3.2. National laws on higher education

4.3.2.1. The Law on Higher Education and Research

The Lithuanian Constitutional Court in one of its rulings has explicitly recognized the concept of academic freedom and has indicated that the content of academic freedom is declared in the legal acts.⁹⁰⁶ It is clear that when it comes to the human rights and freedoms, which include academic freedom or explicitly the constitutional freedom of science and research, the legal regulation related to defining the content and establishing the guarantees of their implementation can be determined only by means of law. In those cases when the Lithuanian Constitution does not require that certain questions concerning human rights and freedoms and their implementation must be regulated by law, they may also be regulated by means of sub statutory legal acts. It is argued that if constitutional provisions on the right to academic freedom legitimately may be rather brief, then essential aspects of that right need to be concretized by way of parliamentary legislation and further detailed in subordinate legislation.⁹⁰⁷

The Lithuanian Constitutional Court noted that the constitutional freedom of science and research may be subject to limitations only when: “this is done by means of a law; the limitations are necessary in a democratic society in order to protect the rights and freedoms of other persons and values entrenched in the Constitution, as well as constitutionally significant

⁹⁰⁵ *The National Programme for the Development of Studies, Scientific Research and Experimental (Social and Cultural) Development for 2013 – 2020 approved by the Resolution No. 1494 of the Government of the Republic of Lithuania of 05 December, 2012, Official Gazette (2012, no. 145-7455).*

⁹⁰⁶ The Constitutional Court of the Republic of Lithuania Decision (1994, no. 2/94), *supra* note 802.

⁹⁰⁷ Klaus D. Beiter, Terence Karran, Kwadwo Appiagyei-Atua, *supra* note 16, 639.

objectives; the limitations do not deny the nature and essence of the rights and freedoms; the constitutional principle of proportionality is followed”.⁹⁰⁸ Accordingly, this part of the research is devoted to the analysis of national laws on higher education in order to examine whether they disclose the content of academic freedom and contain any limitations.

The basic principles and provisions of the previously discussed General Concept of Education in Lithuania were implemented in the Law on Education of the Republic of Lithuania which mainly regulates primary, basic and secondary education.⁹⁰⁹ In regard to higher education studies it establishes its purpose by stating that it “shall be to assist an individual in the acquisition of a higher education qualification corresponding to a modern level of knowledge and technologies and to meet the demands of economy as well as in the preparation for an active professional, social and cultural life.”⁹¹⁰ The main legal basis for HEIs is the Law on Higher Education and Research of the Republic of Lithuania which provides the basic principles of the activities of HEIs and their relations with the state.

The Law on Higher Education and Research establishes the mission of higher education stating that it is “to help ensure the country’s public, cultural and economic prosperity, provide support and impetus for a full life of every citizen <...>, and satisfy the natural thirst for knowledge.”⁹¹¹ It also notes that the system of higher education and research satisfies the demands of society and the economy. The Law lists a number of principles on which higher education and research shall be based. The research shall be based on, *inter alia*, freedom of creation and research, academic ethics, publicity of research results, ensuring of intellectual property rights. Two of the main principles of higher education are academic freedom and autonomy.

The Law reflects interrelation between institutional autonomy and academic freedom. According to the Law on Higher Education and Research, HEIs shall enjoy autonomy in academic, administrative, economic and financial management activities and it is based on the principles of self-government and academic freedom.⁹¹² To ensure academic freedom of members of the academic community is one of the main obligations of HEI established in the Law.⁹¹³

As the Law distinguishes higher education and research institutions, it provides slightly different objectives, rights and obligations for each category. For example, the Law grants institutional autonomy to HEIs but not research institutions. It requires research institutions to

⁹⁰⁸ The Constitutional Court of the Republic of Lithuania Decision (2007, no. 18/06), *supra* note 832.

⁹⁰⁹ *Law on Education of the Republic of Lithuania*, Official Gazette (1991, 23-593).

⁹¹⁰ *Ibid.*, art. 13(1).

⁹¹¹ *Law on Higher Education and Research of the Republic of Lithuania*, *supra* note 6, Preamble.

⁹¹² *Ibid.*, art. 7(1).

⁹¹³ *Ibid.*, art. 7(3).

conduct long-term research and experimental (social, cultural) development, important to the state, the public or economic entities, for the continuity and development of the national economy, culture, healthcare and society.⁹¹⁴ Research institutions have a right under a contract with natural or legal persons to carry out expert examinations, to provide scientific consultations and other services.⁹¹⁵ Such cooperation, including with representatives of business, government and the public, is highly encouraged and is established as one of their main objectives. Although research institutions have a right to publish scientific research results and to choose the ways to disseminate them, the Law establishes the communication of scientific results to the public as one of the main objectives of the research institutes.

Such regulation and the fact that one of the duties of the research institutions is to ensure academic freedom of members of the academic community shows the necessity of a certain balance of interests, rights and obligations of different parties. The discussed regulation clearly shows the need to consider the rights and responsibilities of the representatives of the businesses and the state in order not to place excessive limitations and restrictions on freedom of research and publicity of research results. The requirement to ensure academic freedom cannot be placed only upon research institutions. It must be a responsibility of the state and business representatives as well. Accordingly, the regulation should be extended to include provisions requiring the state and business entities to respect academic freedom and also establishing circumstances under which they could not limit freedom of research and publication. However, the Law on Higher Education and Research does not mention any of such rights and obligations, nor directs to any other legal act which would determine them.

Because ensuring academic freedom is an obligation established by law, it obviously requires a certain degree of clarity on what academic freedom means. The Law on Higher Education and Research does not contribute to clarifying the concept significantly. It states that academic freedom encompasses:

- *“the freedom of thought, the freedom of expression;*
- *the freedom to choose methods of and access to research (artistic) and pedagogical activities, which is in conformity with the accepted principles of ethics;*
- *protection against restrictions and sanctions for making public the results of the research of his or her research, and for the manifestation of his or her beliefs, with the exception of the cases when the declared information is a State or official secret and/or is in violation of laws of the Republic of Lithuania.”*⁹¹⁶

⁹¹⁴ *Ibid.*, art. 10(2),(3).

⁹¹⁵ *Ibid.*, art. 11(1)(6).

⁹¹⁶ *Ibid.*, art. 53(2).

It seems like the Law recognizes an ample scope of academic freedom. It covers all previously discussed elements: freedom of research and publication, freedom of teaching and freedom of intramural and extramural expression. The only limitations of academic freedom established in the Law is the requirement to comply with accepted principles of ethics and if any of these activities is related to information which is declared a state or official secret⁹¹⁷ and/or contradicts national laws. State secrets may consist of detailed information about new technologies, research, testing and results with a potential significance to the state interests.⁹¹⁸ For example, restrictions of the freedom of research and publication could be justified on such criterion as dangerous knowledge or a dangerous way of gaining knowledge and performance of classified research in support of the military or other projects which are pivotal to national security.

Given distinction of separate elements of academic freedom does not contribute much to a better understanding of what academic freedom actually stands for. It can be argued that Law on Higher Education and Research should establish the main elements of academic freedom: freedom of research and publication, freedom of teaching and freedom of intramural expression. Ideally, each of these elements should be defined. Freedom of extramural expression should be discussed in institutional legislation. However, the Law on Higher Education and Research gives hope for a more precise content of academic freedom stating that the academic community shall make use of academic freedom in compliance with the Code of Academic Ethics, approved by HEIs in accordance with the recommendations of the supervisor of academic ethics and procedures.⁹¹⁹

4.3.2.2. *The Institute of the Ombudsman for Academic Ethics and Procedures*

The Office of the Ombudsman for academic ethics and procedures was established in 2011⁹²⁰ with the aim to integrate academic ethics within the higher education and research

⁹¹⁷ “State Secret means political, economic, military, law enforcement, scientific and technical information, loss or illegal disclosure whereof could violate the sovereignty of the Republic of Lithuania, defence or economic power, pose harm to the constitutional system and political interests of the Republic of Lithuania, pose danger to the life, health and constitutional rights of individuals. This Law shall determine the list of categories of State secrets.”

“Official Secret means political, economic, military, law enforcement, scientific and technical information, dissemination whereof shall be limited owing to the interests of the State or the institutions thereof as well as, striving to protect the constitutional rights of individuals. This Law shall determine the list of categories of official secrets.”

Law on State Secrets and Official Secrets, Official Gazette (1999, 105-3019), art. 2.

⁹¹⁸ *Ibid*, art. 7.

⁹¹⁹ *Law on Higher Education and Research of the Republic of Lithuania*, *supra* note 6, art. 53(4).

⁹²⁰ *On establishment of the Office of Ombudsman for Academic Ethics and Procedures and approval of the Statutes of the Office of Ombudsman for Academic Ethics and Procedures approved by Resolution No. XI-1583 of the Seimas of the Republic of Lithuania of 15 September 2011*, Official Gazette (2011, no. 115-5389).

institutions.⁹²¹ Following two failed attempts, the ombudsmen was appointed in 2014. One of the established tasks of the Ombudsman is to consider complaints and to carry out the investigations on the actions of the members of the academic community and HEIs which violate or are suspected to violate the academic ethics and procedures, among them, the principles of academic integrity, academic freedom, and impartiality in assessing research.⁹²²

In 2015 the Recommendations for the Codes of Academic Ethics (hereinafter 2015 Recommendations) were approved by the Ombudsman for academic ethics and procedures.⁹²³ With only minor changes the document re-established the text of the provision on academic freedom embedded in previously enforced Recommendations for the Codes of Academic Ethics which were approved by the Minister of Education and Science of the Republic of Lithuania in 2005 and were in effect until 2009.⁹²⁴ According to the 2015 Recommendations, academic ethics is understood as a set of academic values which ensure, *inter alia*, academic integrity, academic freedom and the protection of intellectual property rights. Academic freedom is perceived as one of the norms of academic ethics and is defined as the right of the members of the academic community to freely express their opinion about the organization and administration of studies and research, freely express their critical views and freely engage in scientific activity while independently choosing the methods for their research. In addition, HEIs incur a responsibility to protect the members of academic community from any restraints.⁹²⁵ The members of academic community are required to enjoy academic freedom in a responsible manner, i.e. to respect the same freedom of others. As violations of academic freedom are recognized: intolerance towards another opinions and reasoned criticism of members of the academic community, disregard or limitation of the right of the members of academic community to express their opinion in regard to the HEI and its academic community,

⁹²¹ The Office of Ombudsman aims to promote the compliance with academic ethics and procedures in higher education and research institutions, is considering complaints, initiating investigations for violations of academic ethics and procedures and supervising the compliance with academic ethics provisions and procedures.

Statutes of the Office of Ombudsman for Academic Ethics and Procedures approved by Resolution No. XI-1583 of the Seimas of the Republic of Lithuania of 15 September 2011, Official Gazette (2011, no. 115-5389).

⁹²² *Ibid.*

⁹²³ *The Recommendations for the Codes of Academic Ethics of the Higher Education and Research Institutions approved by Order No. V-16 of the Ombudsmen for academic ethics and procedures of 31 March, 2015.*

⁹²⁴ The Recommendations for the Codes of Academic Ethics encouraged HEIs to develop codes of academic ethics for students and academics and provided recommendations on what provisions should be included in their codes of academic ethics.

The Recommendations for the Codes of Academic Ethics approved by Order No. ISAK-2485 of the Minister of Education and Science of the Republic of Lithuania of 05 December, 2005, Official Gazette (2005, no. 145-5299) (Not valid from 24 June, 2009).

⁹²⁵ *The Recommendations for the Codes of Academic Ethics of the Higher Education and Research Institutions*, *supra* note 923, art. 8.

disregard or limitation of the right to respond to criticism or accusation and participation in research and experiments related to the damage to a human, nature, society or culture.⁹²⁶

Such perception of academic freedom as one of the norms of academic ethics shows a misunderstanding of the essence of the concept of academic freedom. The definition of academic freedom reflects its wide scope granting academics unrestricted freedom of teaching, research, publication, intramural and extramural expression. The only limitations require to respect academic freedom of others and not to conduct research which harms a human, nature, society or culture. However, it is not clear whether such a scope of academic freedom was given intentionally or whether it is the result of misconception of the substance of academic freedom. It is obvious that the 2015 Recommendations fails to demonstrate a substantial connection between academic freedom and teaching and research activities. The document mainly concentrates on ethical issues, however it does not elaborate on such issues as discussing controversial and offending topics in the classroom or within research, limitations of the freedom of research and publication sought by private funders, and professional responsibilities when discussing issues outside the HEI.

During the three years of its operation, the office of the Ombudsman for academic ethics and procedures investigated a number of complaints. An analysis of the decisions shows that in some cases the complaint is brought under the violation of academic ethics and procedures, however, it could be qualified as a violation of academic freedom. This raises concerns in regard to misunderstanding the essence of academic freedom and in confusing it with academic ethics. It also exposes an urgent need to prepare and approve necessary legislation which would clarify the concept of academic freedom and would define its main elements. Such clarity is necessary in order to raise the awareness of the rights, freedoms and responsibilities that academic freedom brings.

The analysis of the decisions of the Ombudsman for academic ethics and procedures demonstrated that academics and the Ombudsman do not perceive a number of academic activities as elements falling under the scope of academic freedom or as closely related with academic freedom. For example, the legitimacy of the assessment procedure for pedagogical title of professor⁹²⁷ and legitimacy of the evaluation criteria and procedures of the research works of researchers when HEI is making a decision about allocation of the work to scientific

⁹²⁶ *The Recommendations for the Codes of Academic Ethics of the Higher Education and Research Institutions*, *supra* note 923, art. 9.

⁹²⁷ Decision No. SP-6 Regarding Complaint of Arkadijus Kiseliovas Against Siauliai University by the Ombudsmen for Academic Ethics and Procedures of the Republic of Lithuania of 20 June, 2014.

production and its recognition level⁹²⁸ or legitimacy of the assessment and the execution of public competitions⁹²⁹ were considered merely as violations of academic ethics and procedures. However, according to the jurisprudence of the Lithuanian Constitutional Court, setting the requirements for the scientists and the evaluation of their scientific work and results must be in compliance with the constitutional rights and freedoms, including freedom of research and freedom to choose an occupation. Academic freedom in such complaints could have been addressed not only in regards to the fair evaluation criteria and assessment procedures which are closely related to and may impact academic freedom, but also by underlining the significance of a right to self-governance and a right to criticize such procedures, i.e. throughout the exercise of the freedom of intramural speech.

In a complaint regarding research data in a published book, the applicant was complaining that the book presented misleading research data and also criticized the methodology the author of the book had been using. It could be argued that the complaint covered some aspects of academic freedom, however, it was not addressed in the decision of the Ombudsman.⁹³⁰ In the case of the person's right to receive information from the university the matter of academic freedom was also not recognized.⁹³¹ Just as in the case of a complaint by a lecturer whose candidacy for the post of professor was not considered because a colleague brought an application to take into account possible plagiarism allegations, violations of the Code of Ethics and research competences of a lecturer.⁹³²

Although the violations in the analyzed decisions of the Ombudsman did not explicitly include the issue of academic freedom, many of academic activities in question could be considered as highly related to academic freedom. The main concern can be raised in regard to whether in case of academic freedom violations under its existing conceptual framework provided in the Law on Higher Education and Research and the 2015 Recommendations academic freedom would be adequately protected. It can be argued that academic freedom is addressed in the latter only as an aspect of academic ethics, and therefore lacks conceptual precision and a stronger basis in order to effectively ensure its protection. It is necessary not only to recognize separate elements of academic freedom but also to define their concrete

⁹²⁸ Decision No. SP-4 Regarding Complaint of Irena Ramaneckienė Against Siauliai University by the Ombudsmen for Academic Ethics and Procedures of the Republic of Lithuania of 26 May, 2014.

⁹²⁹ Decision No. SP-23 Regarding the Execution of Assessment and Public Competition at Kaunas University of Technology by the Ombudsmen for Academic Ethics and Procedures of the Republic of Lithuania of 23 October, 2015.

⁹³⁰ Decision No. SP-15 Regarding Complaint of Viktoras Deveikis by the Ombudsmen for Academic Ethics and Procedures of the Republic of Lithuania of 5 June, 2015.

⁹³¹ Decision No. SP-17 Regarding Complaint of Jonas Mockevičius by the Ombudsmen for Academic Ethics and Procedures of the Republic of Lithuania of 26 June, 2015.

⁹³² Decision No. SP-8 Regarding Complaint of Rasa Pocevičienė by the Ombudsmen for Academic Ethics and Procedures of the Republic of Lithuania of 29 August, 2014.

content in more detail. In regard to teaching it should be determined whether academics are free to define the course content and choose teaching methods, what limitations of this freedom are applicable and what responsibilities they have in order to maintain high quality teaching. In regard to research and publication it should be made clear whether researchers can focus on any subject areas, are free to choose which research methods to adopt, and which ways to choose for dissemination, exploitation and commercialization of research results. In regard to intramural and extramural expression it should be made clear whether academic staff are free to express their opinions, views, criticize their institution, higher education system, discuss public and controversial matters both inside and outside the HEI and participate in decision making.

4.3.2.3. Institutional laws concerning academic freedom

HEIs regulate their internal activities according to their statutes which are considered as laws and are binding on the institutions. Another important institutional document are the Study Regulations which regulate the universities' first-cycle, second-cycle, integrated and non-degree studies.⁹³³ HEIs and the academic community also act in compliance with the Code of Academic Ethics, which is prepared and approved by institutions in accordance with the Recommendations of the Ombudsman for academic ethics and procedures. Traditionally, the Codes provide principles and norms of academic ethics, give a list of violations of academic ethics and specify sanctions for such violations. Accordingly, these main institutional documents are analyzed in this part in order to examine whether and how they reflect academic freedom.

At the moment there are 41 HEIs (19 universities and 22 colleges) in Lithuania.⁹³⁴ The statutes and the codes of academic ethics of HEIs show that most of the institutions chose to implement some or all of the provisions on academic freedom as they are established in the Law on Higher Education and Research and the 2015 Recommendations without providing more details on the content of the principle. An analysis of the documents showed that the majority of the statutes of HEIs mention academic freedom only as one of the principles on which institutional autonomy is based⁹³⁵ or/and re-establish the provision on academic freedom from

⁹³³ The Study Regulations has not been analyzed in this research because it focuses more on students' rights and freedoms and the freedom of studying, although being an element of academic freedom, is not a subject of this research.

⁹³⁴ The number of higher education institutions in Lithuania. One of the universities is a non-state Lithuanian higher education institution. One of the universities is the branch of the University of Białystok.
<http://www.lamabpo.lt/turinys/aukstosios-mokyklos/universitetai#top> (accessed November 19, 2016).

⁹³⁵ For example, "[t]he University shall enjoy autonomy encompassing its academic, administrative, economic and financial management activities based on the principles of self-governance, academic freedom and respect for human rights enshrined in the Constitution of the Republic of Lithuania, the Law on Higher Education and

the Law on Higher Education and Research (Article 53(2)).⁹³⁶ However, some of the statutes of universities which pay slightly more attention to academic freedom and institutional autonomy are worth a discussion.

The statute of Kaunas University of Technology (hereinafter KTU) contains a separate chapter on academic freedom and rights of the academic society. According to the statute, academic freedom, in addition to those elements listed in 2015 Recommendation, also comprises equal “rights to participate in competitions for the performance of duties of lecturers

Research of the Republic of Lithuania.” *The Statute of Mykolas Romeris University approved by Resolution of the Seimas of the Republic of Lithuania*, Official Gazette (2012, no. 115-5820), art. 6.

⁹³⁶ *The Statute of Kaunas Forestry and Environmental Engineering College approved by Resolution No. 999 of the Government of the Republic of Lithuania of 24 August, 2011*, Official Gazette (2011, no. 107-5069), art. 7.

The Statute of Kaunas University of Applied Engineering Sciences approved by Resolution No. 1297 of the Government of the Republic of Lithuania of 27 October, 2011, Official Gazette (2011, no. 135-6416), art. 10, 86, 87, 88.

The Statute of Kaunas University of Applied Sciences approved by Resolution No. 953 of the Government of the Republic of Lithuania of 18 July, 2012, Official Gazette (2012, no. 93-4793), art. 6.

The Statute of the Kolping University approved by Decision No. 10/01 of 30 March, 2010, art. 2.

The Statute of Lithuania Business University of Applied Sciences of 22 August, 2012, art. 10.

The Statute of Marijampole College approved by Resolution No. 998 of the Government of the Republic of Lithuania of 24 August, 2011, Official Gazette (2011, no. 107-5068), art. 7.

The Statute of University of Applied Social Sciences of 15 November, 2013, art. 1.5., 10.2., 10.3.

The Statute of Šiauliai State College approved by Resolution No. 858 of the Government of the Republic of Lithuania of 11 July, 2012, Official Gazette (2012, no. 83-4381), art. 5, 93, 95.

The Statute of Utena University of Applied Sciences approved by Resolution No. 948 of the Government of the Republic of Lithuania of 18 July, 2012, Official Gazette (2012, no. 92-4781), art. 6, 9, 117, 118.

The Statute of Vilnius College of Design, art. 3, 10, 103.

The Statute of Vilnius University of Applied Sciences approved by Resolution No. 947 of the Government of the Republic of Lithuania of 18 July, 2012, Official Gazette (2012, no. 92-4780), art. 7, 100, 102.

The Statute of Vilnius Cooperative College approved by Resolution No. 78 of the Board of the Lithuanian Cooperatives of 30 December, 2013, art. 4, 68, 70.

The Statute of the General Jonas Žemaitis Military Academy of Lithuania approved by Resolution No. 215 of the Government of the Republic of Lithuania of 25 February, 2015, TAR (2015, no. 3065), art. 14, 48.

The Statute of Aleksandras Stulginskis University approved by Resolution No. XI-2148 of Seimas of the Republic of Lithuania of 18 June, 2012, Official Gazette (2011, no. 80-3899), art. 8, 11, 14, 111.

The Statute of Mykolas Romeris University approved by Resolution of the Seimas of the Republic of Lithuania, Official Gazette (2012, no. 115-5820), art. 6.

Public Institution European Humanities University Statutes of 3 February, 2016, art. 1.8.

The Statute of Kazimieras Simonavičius University of 2012, art. 2.1., 2.3.

The Statute of Klaipėda University of 1 June, 2012, art. 6, 120.

The Statute of LCC International University of 13 April, 2016, art. 1.4.

The Statute of Lithuanian University of Educational Sciences approved by Resolution No. XI-1398 of Seimas of the Republic of Lithuania of 19 May, 2011, Official Gazette (2011, no. 66-3102), art. 5, 8, 144, 146.

The Statute of Lithuanian Academy of Music and Theatre approved by Resolution No. XI-2152 of Seimas of the Republic of Lithuania of 28 June, 2012, Official Gazette (2012, no. 81-4232), art. 5, 9, 10, 12, 13, 91.

The Statute of Lithuanian Sports University approved by Resolution No. XI-2309 of Seimas of the Republic of Lithuania of 17 October, 2012, Official Gazette (2012, no. 127-6399), art. 5, 14, 109.

The Statute of Šiauliai University approved by Resolution No. XI-1241 of Seimas of the Republic of Lithuania of 21 December, 2010, Official Gazette (2010, no. 157-7982), art. 3, 10, 65.

The Statute of Vilnius Academy of Arts approved by Resolution No. XI-1536 of Seimas of the Republic of Lithuania of 23 June, 2011, Official Gazette (2011, no. 80-3898), art. 10, 110.

The Statute of Vilnius Gediminas Technical University approved by Resolution No. XI-1277 of Seimas of the Republic of Lithuania of 15 March, 2011, Official Gazette (2011, no. 36-1700), art. 5, 95.

The Statute of University of Management and Economics of 8 April, 2010, art. 2.1., 2.3.

The Statute of Vilnius University approved by Resolution No. I-281 of Seimas of the Republic of Lithuania of 12 June, 1990, Official Gazette (1990, no. 18-468), art. 3, 6.

and science workers, the right to participate in study competitions, disregarding their sex, race, political and religious beliefs, nationality, and citizenship”.⁹³⁷

The same chapter also includes other rights of the members of the academic community: amongst them the right to participate in self-governance of the university and in preparing and accepting documents that regulate the activity of the university (intramural expression), the right to participate in the activities of public political organizations and associations (extramural expression), and the right to freely announce the results of one’s intellectual (scientific) activity (publication) are recognized.⁹³⁸ Such distinction creates some conceptual uncertainty as it shows that these academic activities are not identified as elements which should otherwise fall under the scope of academic freedom. This part also lacks a list of responsibilities or duties of academic staff which would be associated with the enjoyment of academic freedom. The statute includes only a general provision stating that academics must comply with the academic ethics and perform their duties determined in the statute and in employment contracts.

The statute of the Lithuanian University of Health Science (hereinafter LSMU) includes a chapter on institutional autonomy, rights, responsibility and academic freedoms. It considers academic freedom as the main value of the activities of the university. According to the document, academic freedom guarantees equal rights to participate in competitions for the position of lecturers and science workers, the right to freedom of outlook and belief, the right to protection against restraints and sanctions for any beliefs and for dissemination of scientific research results, the right to freedom from ideological and political beliefs and the right to self-governance.⁹³⁹ Almost the same provision appears in the statute of Vytautas Magnus University (hereinafter VMU). In addition, this statute mentions the freedom of choice of science, art, and education activity methods and access agreeable to the accepted principles of ethics and the right to creative or intellectual authorship.⁹⁴⁰ However, none of the statutes include any provisions on the responsibilities of academics or the institution in regard to enjoying and protecting academic freedom. It should be also noted that only a small number of the statutes of Lithuanian HEIs set an obligation to respect and guarantee academic freedom to the members of academic community.⁹⁴¹

⁹³⁷ *The Statute of Kaunas University of Technology approved by Resolution No. XI-1194 of Seimas of the Republic of Lithuania of 30 November, 2010*, Official Gazette (2010, no. 144-7364), art. 20(3).

⁹³⁸ *Ibid.*, 21.

⁹³⁹ *The Statute of Lithuanian University of Health Sciences approved by Resolution No. XI-973 of Seimas of the Republic of Lithuania of 30 June, 2010*, Official Gazette (2010, no. 81-4231), art. 18.

⁹⁴⁰ *The Statute of Vytautas Magnus University approved by Resolution No. XI-2151 of Seimas of the Republic of Lithuania of 28 June, 2012*, Official Gazette (2012, no. 81-4231), art. 12.

⁹⁴¹ *The Statute of Vytautas Magnus University*, *supra* note 931, art. 11(1).

The Statute of Kaunas University of Technology, *supra* note 928, art. 18(1).

The Statute of Lithuanian University of Health Sciences, *supra* note 928, art. 19(1).

The Statute of Aleksandras Stulginskis University *supra* note 927, art. 14(1).

The codes of academic ethics reflect a similar approach of HEIs to academic freedom as the statutes. The majority of the codes of academic ethics of colleges⁹⁴² and almost half of universities⁹⁴³ re-establish the provision on academic freedom as it is suggested in the 2015 Recommendations, including the list of violations of academic freedom. Some of the codes merely mention academic freedom as one of the principles of academic ethics without further elaborating on the concept in more detail.⁹⁴⁴ Such reference to academic freedom cannot be

The Statute of Klaipėda University, supra note 927, art. 12(7).

The Statute of Vilnius University supra note 927, art.32.

⁹⁴² *The Code of Academic Ethics of Alytus College approved by Minutes No. V3-34 by Alytus College Academic Board of August 28, 2015.*

The Code of Academic Ethics of Kaunas Forestry and Environmental Engineering College of higher non-university education approved by Minutes No. 18 by Kaunas Forestry and Environmental Engineering College of higher non-university education Academic Board of May 22, 2015.

The Code of Academic Ethics of Kaunas University of Applied Engineering Sciences approved by Order No. VI-33 by Director of Kaunas University of Applied Engineering Sciences of April 5, 2013.

The Code of Academic Ethics of Kolping University of Applied Sciences approved by Minutes No. 1 by Kolping University of Applied Sciences Academic Board of June 29, 2010.

The Code of Academic Ethics of Marijampole College approved by Minutes No. AR-15-30 by Marijampole College Academic Board of June 8, 2015, art. 6, 7.

The Code of Academic Ethics of Panevėžys university of applied sciences approved by Minutes No. V4-6 by Panevėžys university of applied sciences Academic Board of May 27, 2015, art. 2.2., 2.4., 6, 7.

The Code of Academic Ethics of Šiauliai State College approved by Minutes No. ATN-12 by Šiauliai State College Academic Board of May 22, 2015, art. 4, 7, 8.

The Code of Academic Ethics of Northern Lithuania College, art. 1, 4.

The Code of Academic Ethics of St. Ignatius Loyola College approved by Order No. V-41 by Director of St. Ignatius Loyola College of May 29, 2015, art. 3(1), 5.

The Code of Academic Ethics of International School of Law and Business approved by Order No. 3 by International School of Law and Business Academic board of May 26, 2015, art. 2.1.

The Code of Academic Ethics of Utena University of Applied Sciences approved by Decision No. AT-10 by Utena University of Applied Sciences Academic board of April 6, 2016, art. 6.

The Code of Academic Ethics of Vilnius College of Design approved by Order No. VI/12-42 by Director of Vilnius College of Design of May 28, 2013, art. 15.

The Code of Academic Ethics of Vilnius University of Applied Sciences approved by Decision No. ATN-10 by Vilnius University of Applied Sciences Academic Board of December 2, 2015, art. 5, 6.

The Code of Academic Ethics of Vilnius Cooperative College approved by Decision No. 3-1 by Vilnius Cooperative College Academic Board of March 3, 2016, art. 4, 5.

⁹⁴³ *The Code of Academic Ethics of the General Jonas Žemaitis Military Academy of Lithuania approved by Minutes No. VJ-58(4) by the Senate of the General Jonas Žemaitis Military Academy of Lithuania June 28, 2011, art. 5.*

The Code of Academic Ethics of Klaipėda University approved by Resolution No. 11-34 by the Senate of Klaipėda University of December 15, 2006, art. 5.

The Code of Academic Ethics of Lithuanian Sports University approved by the Minutes No. 5 by the Senate of Lithuanian Sports University of March 1, 2012, art. 2.

The Code of Academic Ethics of Lithuanian University of Health Sciences approved by Resolution No. 47-17 by the Senate of Lithuanian University of Health Sciences of June 20, 2014, art. 8.

The Code of Academic Ethics of Vilnius Academy of Arts approved by Resolution No. C-2015-4/13 by the Senate of Vilnius Academy of Arts of November 22, 2015, art. 4.

The Code of Academic Ethics of Vilnius Gediminas Technical University approved by Resolution No. 81-2.5 by the Senate of Vilnius Gediminas Technical University of May 5, 2015, art. 8, 9.

The Code of Academic Ethics of Lithuanian Academy of Music and Theater approved by Resolution No. 4-SE by the Senate of Lithuanian Academy of Music and Theater of May 4, 2016, art. 6.

⁹⁴⁴ *The Code of Academic Ethics of Kaunas University of Applied Sciences approved by Order No. I-204 by Director of Kaunas University of Applied Sciences of July 2, 2013.*

The Code of Academic Ethics of Šiauliai University approved by Resolution No. 4 by the Senate Šiauliai University of December 16, 2015, art. 1.

The Code of Academic Ethics of University of Applied Social Sciences, art. 1(1), 2(1).

considered as providing sufficient or adequate protection. Despite the fact that the main values and ethical principles are explicitly expressed in the codes, it is argued that values and ethical principles in Lithuanian HEIs are not yet at the forefront, and also conflict with the governance of HEIs.⁹⁴⁵

A few codes of academic ethics do not mention academic freedom at all. However, throughout the entire text of the respective documents they include certain provisions which are closely related to academic freedom. For example, one of the codes of ethics sets a requirement not to use the name of the university in an academics' political and religious activities and not to compromise the reputation of university by socially unacceptable behavior.⁹⁴⁶ This provision suggests certain limitations to the freedom of extramural expression. Another norm in the code of academic ethics demands not to discuss personal qualities, private life, achievements, skills and working methods of another academic, except when this is done by a specially created commission of the university.⁹⁴⁷ It can be argued that such requirement in regard to professional skills and working methods might be considered as too excessive of a limitation to the freedom of intramural speech. Academics must be free to exercise their right to speak on issues that are important for the HEI. In addition, no similar guarantee exists to encourage or protect failure to perform professional duties. It is argued that the freedom of intramural speech cannot be limited only because an HEI does not approve of the views expressed by a particular staff member.⁹⁴⁸ It is suggested that such limitation could be justified by an important institutional interest, such as the use of abusive language that falls outside the boundary of acceptable professional behavior.⁹⁴⁹

After this general overview of the content and structure of the codes of academic ethics it is worth distinguishing and discussing two of the codes in more detail.

The code of academic ethics of KTU recognizes the importance of the historically inherited mission of the members of academic community, which implies the adherence to the principle of ethics.⁹⁵⁰ According to the code, one of them is the principle of academic freedom and responsibility which, as defined in the code, rather entails obligations than rights and

The Code of Academic Ethics of University of Management and Economics approved by Order No. 01-07-56 by the Rector of University of Management and Economics of October 17, 2011, art. 2.

⁹⁴⁵ Loreta Tauginienė, "Embedding Academic Integrity in Public Universities," *Journal of Academic Ethics* (2016): 14 // DOI: 10.1007/s10805-016-9268-4.

⁹⁴⁶ *The Code of Academic Ethics of Aleksandras Stulginskis University approved by Minutes No. 515 by Senate of Aleksandras Stulginskis University of March 28, 2012, art. 5.5.*

⁹⁴⁷ *Ibid.*, 7.4.

⁹⁴⁸ AAUP, "Academic Freedom and Electronic Communications," (November 2004) //

<https://www.aaup.org/report/academic-freedom-and-electronic-communications-2014> (accessed June 10, 2016).

⁹⁴⁹ *Ibid.*

⁹⁵⁰ *The Code of Academic Ethics of Kaunas University of Technology approved by Minutes No. V3-S-1 by Senate of Kaunas University of Technology of January 25, 2012, art. 3.*

freedoms. It entitles the academic community to freedom to “express their opinions and critical attitudes, exchange ideas without restraint, set up research groups, select themes and techniques for research and creative work as well as higher education goals and methods”.⁹⁵¹ While enjoying their freedom, the members of the academic community are required to respect the university’s general interests, to remain impartial in decision-making, to make sure that academic activity, research and their results comply with the common interests of the university, to refrain from using the name of the university for political, religious or private commercial activities, and not to restrict academic freedom through the abuse of official positions.⁹⁵²

In addition, various provisions that could be associated with academic freedom occur in different parts of the code of KTU. Related to freedom of intramural speech is a provision, although listed as a principle of loyalty, which states that disclosure of information about the unlawful or negligent acts of institutional staff with the aim of criticizing them will not be deemed as a breach of the principle of loyalty.⁹⁵³ A provision related to freedom of research can be found among the standards of ethics for researchers which requires respectability in presenting research results without concealing critical evaluations with regard to possible research findings. This shows that not only the university has a duty to ensure that the freedom to voice critical opinions is protected but also that a researcher has a responsibility not to conceal it. A researcher must preserve impartiality and independence from ideological, political, economic or financial interests. However, this should be a responsibility of the university as well. The latter should ensure that a researcher is entitled to freedom to conduct research without such constraints.

A variety of different rights and freedoms and responsibilities can be identified throughout the range of the codes of ethics. For example, academics are required to ensure that the results of research are beneficial to the university,⁹⁵⁴ or are required to make research results publicly available and are obliged to search for truth and knowledge.⁹⁵⁵ It is understandable that HEIs consider participation in research, which if associated with the institution can severely damage its reputation, as unacceptable. But a researcher does not know in advance and cannot ensure that research results will be beneficial for the university.

⁹⁵¹ *Ibid.*, 3.1.

⁹⁵² *Ibid.*, 3.2.

⁹⁵³ *Ibid.*, 3.13.

⁹⁵⁴ *The Code of Academic Ethics of Lithuanian University of Educational Sciences approved by Resolution No. 96 by the Senate of Lithuanian University of Educational Sciences of April 17, 2012*, art. 7.13.

⁹⁵⁵ *The Code of Academic Ethics of Mykolas Romeris University approved by Resolution No. 1SN-39 by the Senate of Mykolas Romeris University of June 2, 2015*, art. 7.3, 8.2.

A number of the codes set a priority to address critique towards the activities of the university and to solve arising problems inside the university⁹⁵⁶ or even forbid to address problems publicly of or in the university before exhausting all internal institutional remedies.⁹⁵⁷ However, in justification of the freedom of extramural activities, it is argued that extramural statements should only be grounds for discipline if they demonstrate unfitness to perform professional duties or interfere with the HEI's regular operation.⁹⁵⁸ As HEIs should be perceived as having a wider mission, i.e. to contribute to a nation's public, cultural and economic prosperity, it is necessary to weigh not only the interests of the HEI but also the public's and the government's interest in being informed.

The code of ethics of VMU defines academic freedom as comprising three standards. One of these standards states that to safeguard the freedom of beliefs and expression, as a tradition of critical thinking, an atmosphere of open discussion of negotiable questions which is based on goodwill and responsibility for one's actions must be maintained.⁹⁵⁹ This corresponds to the basic idea of academic freedom that knowledge cannot be advanced unless existing claims can be criticized and analyzed.⁹⁶⁰ The two other standards of academic freedom focus on achieving high qualification and the truth in research and on priority of problem solving within the university community. Although these aspects can be indirectly linked to academic freedom, the main elements, such as freedom of teaching, freedom of research and publication or freedom of intramural speech are not addressed in the code.

Summarizing the content analysis of the statutes and the codes of academic ethics of HEIs it can be concluded that they reflect a consistent approach on academic freedom only in those parts where they implement the provision on academic freedom taken from the Law on Higher Education and Research and from the 2015 Recommendations. The efforts of HEIs to provide more guidance on the content of academic freedom in the codes of academic ethics demonstrate that HEIs recognize its significance and value for their respective institutions. Unfortunately, only a small number of HEIs took the initiative to elaborate the content of academic freedom. The analysis also indicates that the codes of academic ethics often include a number of provisions that are closely related to academic freedom, however are not expressly associated with academic freedom or its separate elements and their limitations. This shows the lack of

⁹⁵⁶ *The Code of Academic Ethics of Aleksandras Stulginskis University*, *supra* note 946, 6.1.; *The Code of Academic Ethics of Vilnius University approved by the Minutes No. S-2006-05 by the Senate of Vilnius University of June 13, 2006*, art. 2.4.1.; *The Code of Ethics of Vytautas Magnus University approved by Order No. 3-7 by the Senate of Vytautas Magnus University of April 9, 2011*, art. 2.

⁹⁵⁷ *The Code of Academic Ethics of Lithuanian University of Educational Sciences*, *supra* note 954, 7.6.; *The Code of Academic Ethics of Lithuanian Sports University*, *supra* note 943, 2.3.7.

⁹⁵⁸ American Association of University Professors, *supra* note 365.

⁹⁵⁹ *The Code of Ethics of Vytautas Magnus University approved by Order No. 3-7 by the Senate of Vytautas Magnus University of April 9, 2011*, art. 2.

⁹⁶⁰ Robert C. Post, *supra* note 30, 64.

HEIs' awareness of the concept and content of academic freedom. This corresponds to argument that the content of the codes of ethics show that HEIs concentrate more on the behavior of students rather than on the behavior of their academic staff.⁹⁶¹ The codes of academic ethics should explicitly incorporate the separate elements of academic freedom and their possible limitations. They should also include the responsibilities and duties of academic staff and the institution in regard to the protection of academic freedom.

Having in mind the fact that academic freedom is a fundamental right and a constitutional value, it is evident that the attention that is given by the state and HEIs to ensure its protection is insufficient. Undoubtedly, changes are necessary in creating a stronger legal basis for a better understanding and protection of academic freedom. It would be instrumental and should be an obligation to establish more precise and accurate regulation of academic freedom in the Law on Higher Education and Research and 2015 Recommendations. Accordingly, every HEI should be required to implement a more detailed approach to academic freedom in their institutional documents, either by re-establishing the same norm from the Law on Higher Education and Research and 2015 Recommendations or by their own interpretation but within the basic guidelines required by law. It would help to make academic freedom a significant value and a standard of Lithuanian HEIs' academic infrastructure.

⁹⁶¹ Loreta Tauginienė, *supra* note 945.

CONCLUSIONS AND SUGGESTIONS

The research on a number of scholarly literature, legislation and case-law confirmed a significant role of academic freedom in higher education and the importance and the necessity of its protection. However, the multitude of literature, legislation, various international, regional and national documents and case-law demonstrate the ambiguous character of academic freedom which allows to draw a conclusion that there is no consistency in defining academic freedom and, therefore, the concept is vague and misleading. Although there is no prevailing agreement whether the precise definition of academic freedom is at all needed, the research has shown that for an adequate legal application and protection of academic freedom as a human right and as a responsibility its conceptual clarity is crucial.

The conceptual confusion of academic freedom arises out of its multifaceted character. The most commonly as the main elements falling under the scope of academic freedom are recognized: freedom of teaching, freedom of research and publication, freedom of intramural expression, freedom of extramural expression and freedom of studying. However, the research of scholarly literature, legislation and case-law has shown the variety of interpretations of the content of academic freedom. This is the major obstacle in trying to achieve an adequate application and protection of academic freedom. The least problematic and disputed elements of academic freedom are freedom of teaching and freedom of research and publication. However, both elements, together with the rest, lack more detailed perception of their content and limits.

Academic freedom has a lengthy history and traditionally has been perceived as freedom to pursue the truth regardless of where it led, to explore different fields of knowledge, to adopt scholarly methods and conduct research without any constraints. Today HEIs are recognized as the key contributors to social well-being and economic development, they are involved in complex globalized economies and competitive environment and are required to adjust in order to meet arising challenges and adhere the social needs. HEIs are facing trends and demands arising from globalization, internationalization, commercialization and massification. The list of arising challenges is considered to influence academic freedom of individual scholars and make it extremely vulnerable. However, it is very important to acknowledge academic freedom as a fundamental prerequisite for the fulfillment of university's mission in serving the common good by producing knowledge which requires freedom of inquiry.

Noteworthy contribution to the development of academic freedom was performed by UNESCO. Issues of academic freedom have been discussed in a number of international conferences and also recognized in a number of documents drafted by UNESCO. They reflect the complexity of matters related to the functions of academics and also challenges brought by

the recognition of the significant interrelations between economic progress and higher educational, a growing financial dependence of HEIs, and the necessity to adhere to the needs and interests of modern societies. However, UNESCO documents could not significantly contribute to establishing a comprehensive notion of academic freedom. They reflect the attempt to develop principles, norms and practices to safeguard academic freedom in higher education at the institutional, national and international levels, however the documents appear to be lacking a consistent and systematic conceptual approach. The analysis showed that the scope of academic freedom varies covering different aspects, and even the main elements of academic freedom are not perceived in the same manner.

During the UNESCO conferences the question of an international agreement on academic freedom has been raised and, accordingly, it was urged to prepare an international instrument for the protection and promotion of academic freedom. After the assessment of the feasibility, desirability and possible content of an International Charter on Academic Freedom and University Autonomy, the conclusion was proposed that the development of such instrument was both feasible and desirable, however the idea has been never realized.

The Bologna Process and the EU's Lisbon Strategy with its objective of becoming the most competitive knowledge-based economy in the world significantly influenced European and nation higher education policies. HEIs in order to adhere and fulfill European and national demands and enhance competitiveness focus on academic performance and productivity, commercialization of research results, labor-market oriented studies and digress from their fundamental role and mission. Although the reforms initiated by the Bologna Process and Lisbon Strategy have been highly appreciated and considered as a vital contribution to the versatile development of the region, the oftentimes excessive concentration on commercialization and competition in higher education without due regard to academic freedom raises various concerns. The analysis demonstrated that insufficient amount of attention is paid towards the preservation of the fundamental values of higher education, including academic freedom.

The analysis of the Bologna documents, the EU and Lithuanian higher education framework raised a concern that the lack of due regard towards the guarantee of academic freedom can be directly traced back to insufficiency of attention towards the working conditions of academics. This was recognized as an explicit example of the consequences resulting from inadequate recognition of academic right as a right and as a responsibility. That supports one of the hypothesis raised in this research that the arising challenges and the additional burdens which have been placed upon academics signify the necessity to recognize academic freedom both as a right and as a responsibility in order to ensure that academics are able to perform their

professional responsibilities while enjoying academic freedom. Legal regulation in higher education should include not only declarative provisions highlighting the significance of academic freedom but should also list the rights and freedoms it covers and accordingly define responsibilities and obligations of the state, HEIs, academics and other related parties who have interest and can have impact on academic freedom.

The EU documents reflect the goal of constructing European higher education as purposeful and directed towards the improvement of the conditions for industry to invest in research and innovation. The idea of “knowledge triangle” which shows the attentiveness to exploit the potential for marketable products and services incentivizes researchers to choose more attractive areas for their research activities. Accordingly, it may lead to undermining the fundamental mission of higher education. In addition, the EU documents expressed the concern in regard to academic profession, adequate working conditions and professional development. The necessity was stressed for the states and HEIs to maintain the balance between their obligations and requirements towards academics. It was argued that if national laws or institutional documents require academics to adhere to different policies, then there must be adequate conditions provided for them to fulfill their professional obligations. Otherwise it could result in a violation of academic freedom.

The trends and priorities in the EU higher education and endeavors to make HEIs as instruments of social and economic public policy clearly demonstrated the lack of understanding of the broader function of the HEIs. As changes in higher education influence the concept and practices of academic freedom, it is very important to realize its significance and to devote sufficient attention to its establishment as a right and as a responsibility in European and national higher education legislation.

The need to devote sufficient attention to and to have adequate regulation for academic freedom also arises from its recognition as a human right. Academic freedom was addressed within the context of Article 13 ICESCR, is recognized by the EU Charter and was discussed within the case-law of the ECtHR. The General Comment of Article 13 of ICESCR revealed an inseparable link between academic freedom and the right to education. However none of the documents provide more detailed information on freedom of research and academic freedom. The very basic wording of Article 13 of the EU Charter and the extremely modest Explanations to the EU Charter leave the notion of academic freedom open to interpretation. The current absence of jurisprudence of the Court of Justice of the European Union also does not contribute to providing further guidance.

Although the ECHR does not explicitly recognize academic freedom, it found its protection in the case-law of the ECtHR under Article 10 which protects freedom of expression.

For a long time the case-law lacked the emphasis of academic freedom in a wider sense, however the recent cases showed that the Court finally recognized academic freedom as a fundamental value for a democratic and knowledge based society. The case-law obviously demonstrates the lack of conceptual clarity and precision of academic freedom, however it reflects the tendency of evaluating the academic context under the claim of freedom of expression. It is not entirely clear whether the academic context was a consciously decisive element or actually it did not have essential impact on the decisions of the Court. For this reason it is not certain whether academic freedom is given adequate and deserved protection within the case-law of the ECtHR or it was only coincidental protection.

The diverse roles of higher education in society and in particular the issues concerning academic freedom were recognized and underlined by the documents of the CoE. In Recommendation 1762(2006) the CoE outlined a number of important aspects of academic freedom and suggested the principles it comprises. The Recommendation CM/Rec(2007)6 and Recommendation CM/Rec(2012)7 recognized the need of public responsibility which must be exercised with due regard to academic freedom. These documents indicate the need to settle more precise requirements to public authorities with relation to academic freedom and can be recognized as, finally, a good example of more precise recommendations towards the so needed protection of academic freedom.

Inconsistency and diverse interpretations of academic freedom at higher international and transnational levels results in various interpretations at lower levels, and incoherent application and protection of academic freedom at national levels. The analysis showed that this is the case in Lithuania. The analysis of the Lithuanian constitutional jurisprudence demonstrated that the Constitutional Court when discussing the issues of academic freedom recognized the significance of freedom of research and publication, the right to self-governance, conducive working environment and conditions for academics and fair procedure for research productivity evaluation. Although these aspects reflected in the constitutional doctrine of academic freedom do not reflect all elements of academic freedom, they served as guidelines for the analysis of national higher education legislation.

The Lithuanian higher education policy documents reflected an increasing engagement in a process of convergence and concentration on internationalization and competitiveness in order to achieve the common goal of European higher education. At the same time they indicated an insufficient amount of attention on safeguarding the fundamental values of higher education. Academic freedom was not mentioned in any of the analyzed higher education policy documents.

The Law on Higher Education and Research recognizes an ample scope of academic freedom which covers: freedom of thought, freedom of expression, freedom to choose methods of and access to research and pedagogical activities, freedom of research and publication. The only limitations of academic freedom established in the Law is the requirement to comply with accepted principles of ethics and if any of these activities is related to information which is declared a state or official secret and/or contradicts national laws. Given distinction of separate elements of academic freedom does not contribute much to a better understanding of what academic freedom actually stands for. It can be argued that Law on Higher Education and Research should establish the main elements of academic freedom: freedom of research and publication, freedom of teaching and freedom of intramural expression. Ideally, each of these elements should be defined.

The content analysis of the statutes and the codes of academic ethics of HEIs which are prepared in accordance to 2015 Recommendation reflect the lack of awareness of the concept and content of academic freedom, inconsistency in addressing different aspects of academic freedom, insufficient recognition of its significant value and its recognition only as an aspect or a principle of academic ethics. The codes of academic ethics should explicitly incorporate the separate elements of academic freedom and their possible limitations. They should also include the responsibilities and duties of the academic staff and institution in regard to the protection of academic freedom. Having in mind the fact that academic freedom is a fundamental right and a constitutional value, it is evident that the attention that is paid by the state and HEIs to ensure its protection is insufficient.

The suggestion is that the Law on Higher Education and Research, the 2015 Recommendation, the statutes and the codes of academic ethics should implement changes in regard to the provisions on academic freedom, responsibilities and the protection against undue outside interference by public authorities or others relying on Recommendation 1762(2006), Recommendation CM/Rec(2007)6 and Recommendation CM/Rec(2012)7 of the CoE.

In particular the following provisions must be regarded:

- *history has proven that violations of academic freedom and university autonomy have always resulted in intellectual relapse, and consequently in social and economic stagnation (4(3) of the Recommendation 1762(2006));*
- *high costs and losses, however, could also ensue if universities moved towards the isolation of an “ivory tower” and did not react to the changing needs of societies that they should serve and help educate and develop; universities need to be close enough to society to be able to contribute to solving fundamental*

problems, yet sufficiently detached to maintain a critical distance and to take a longer-term view (4(3) of the Recommendation 1762(2006));

- *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 (4(1) of the Recommendation 1762(2006));*
- *Public authorities should ensure appropriate conditions for higher education and research institutions to fulfill their function as a service to society (6 of Recommendation CM/Rec(2007)6)*
- *Public authorities should endeavor to ensure that basic research remains a public good (15 of Recommendation CM/Rec(2007)6);*
- *Public authorities should therefore provide substantial funding for higher education and research (16 of Recommendation CM/Rec(2007)6);*
- *Public authorities must promote academic freedom as essential feature of their national education systems as well as in European higher education, and as value underlying the EHEA (1 of Recommendation CM/Rec(2012)7);*
- *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 (5 of Recommendation CM/Rec(2012)7);*
- *Public authorities should set the framework for academic freedom <...> and continuously monitor the implementation of those fundamental rights, while encouraging the adoption of sustainable long-term strategies for higher education. For academic freedom <...> to become and remain a reality, public authorities should devise policies that call for positive measures in some areas, such as adopting a qualifications framework and making provisions for external quality assurance, while in other areas they should refrain from intervening, and from providing detailed guidelines for curricula and teaching programmes or regulating the internal quality development of institutions, for example (7 of Recommendation CM/Rec(2012)7);*
- *Public authorities should establish and maintain the necessary conditions for the exercise of the right to a supportive working environment (14 of Recommendation CM/Rec(2012)7).*

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**A LEGAL JUSTIFICATION OF ACADEMIC FREEDOM
AS A FUNDAMENTAL RIGHT:
CHARTING VAGUENESS FOR MORE CLARITY**

Doctoral Dissertation

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