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## The Rule of Law and Academic Freedom Between Personal Liberty and Public Order

- **ABSTRACT:** *In this study, the author discusses the fundamental questions of academic freedom in terms of personal and institutional liberty and the developments that have led to the current position of academic freedom in the body of constitutional law. Academic honesty, integrity, and curiosity are at the core of this concept, which has to be protected by the state by all means possible and regulations. Simultaneously, the author puts academic freedom in the broader framework of the rule of law and explains that, as with every right, these liberties require certain responsibilities. This study also analyses situations in which academic freedom may conflict with other prevailing basic human rights, emphasising the necessity to have dialogues when academic freedom and public order collide. In such cases, balancing and proportionality are possible solutions to resolve the issue. However, this study is not a case law study and instead provides theoretical guidelines to those who seek to find ground orientation in the huge field of academic work.*
- **KEYWORDS:** academic freedom, rule of law, personal liberty, public order

### 1. Introduction

Academic freedom is defined as the scope of allowances that entitle academic workers, which include students, professors, or instructors that teach, examine, analyse, and conclude facts to subsequently provide their opinions in form of research and findings. They also have the right to associate with scientific research and university-based activities that are in line with academic standards and honesty. Simultaneously, academic freedom requires a specific amount of organizational autonomy by universities and other academic institutions and a

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free environment in which they can perform their duties, and this is obviously something that should be provided by the state. Therefore, academic freedom is only possible in an adequate Free State environment that respects academic work. The keyword here is honesty. We live in a severely polarised society in which liberal and conservative tendencies deeply penetrate every aspect of public life, and academia is no exception. On one hand, there is a need for accurate and precise research and results delivered properly and clearly; on the other hand, there are demands that may, in some cases, jeopardise the accuracy of research. Of course, the essence of every honest research in academia has to be humanity and the desire for the greater good of humankind, and if that were missing, all research would be invalid. *Quod ab initio vitiosum set non potest tractu temporis convallescere*. Furthermore, if elementary democratic principles are fulfilled and universities operate within a specific legal system, these institutions are required to follow the rule of law and respect the public order in society. Thus, universities should be open to criticism from the government but should not be deliberately hostile towards foundations of the state and public order. It is not always easy to differentiate between the two; however, this study shows that, if we apply the same standards to all academic activities and secure the state protection of academic work, including its criticism of it, there could be a solution. This study examines the core of academic freedom, historical development of these values, and inter-connection between the two concepts of academic freedom and integrity and the rule of law. This study focuses on the more theoretical foundations that could be used as a litmus paper for further research in the field. Academic freedom, as a concept of European academic tradition, should not be changed to cater to the needs of any particular group or ideology; instead, it should be used to secure fair and independent research overseen by constitutional provisions of a system that is based on the democratic and moral traditions of European countries. This means that everyone can publish and talk without the desire to harm or offend (because the foundational *quod ab initio* principle has to be inculcated into the very foundations of the work). However, this does not mean that everyone should be happy with the outcome of the research and that research should be polished to fit all. This is not science. Free academic work should be available to all on the ideological spectrum but only if they respect the basic constitutional principles and legal framework of the country that follows specific morals.

## 2. A brief history of academic freedom

Academic work has always been considered important for society, from the Roman and especially Greek Ages<sup>1</sup> to the present day. Universities have been

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1 Fuchs, 1963, A.

a part of public life and were the centres of intellectual life, which was closely related to politics. As found in the literature, in the period just after the 10th century, universities from the Middle East and North Africa had lively scholarly activity.<sup>2</sup> While academic freedom is deeply rooted in history, most scholars agree that contemporary academic freedoms were planted during the era of Alexander Von Humboldt through two freedoms which were then considered above other subordinate freedoms and values.<sup>3</sup> As Ralph F. Fuchs has described, academic freedom enables faculty and students to have economic security and freedom that allows them to express their opinions and secure the safety of their positions that resemble those of judges in office.<sup>4</sup> Although Fuchs wrote from an American perspective, their ideas can be easily implemented in the various legal cultures of the Western civilisation.

The concept of academic freedom that is dominant across colleges and universities in the United States mainly rests on the following three foundations: 1) The philosophy of intellectual freedom, which originated in Greece, rose to popularity in Europe during Renaissance, and matured in the Age of Reason, 2) The idea of autonomy among scholarly communities existing in the universities of Europe, and 3) The freedoms guaranteed by the Bill of Rights in the federal constitution as elaborated by the courts.<sup>5</sup>

Interestingly, in discussions on academic procedural problems, academic freedom and tenure are considered closely connected with the legal due process of law,<sup>6</sup> which allows academics to be free in their expression and not expelled for their ideas and scientific results. This is directly connected with the rule of law and safeguards that academics and students enjoy in their academic lives. It is important to say that these rights belong to academics and students and not the institutions themselves, and while institutions have restrictions, academics do not. Therefore, institutions must follow the general laws of the state in which they operate. Although universities enjoy specific privileges, they are primarily reserves for academics. It is also important to stress that both academics and students must comply with university regulations and that universities and colleges operate within the framework of the general law of the state. This is valid only if we examine these relationships in a democratic society. The development of academic freedom has not been smooth by any means; it started to evolve in Medieval Europe, notably at universities across Germany and England. Many current scholars would complain that religious constraints used to be major obstacles to

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2 Fuchs, 1963; Dea, 2018.

3 Ibid.: 'Academic freedom re-emerged in early 19<sup>th</sup> century Germany with the Prussian reform and the so-called Humboldtian university. Wilhelm von Humboldt's educational reforms enshrined the twin concepts of *Lehrfreiheit* (freedom to teach) and *Lernfreiheit* (freedom to learn) under the rubric of *Akademische Freiheit* (academic freedom).'

4 Fuchs, 1963, At 2., also available at: Fuchs, 1993. Articles by Maurer Society.

5 Ibid.

6 Byse and Joughin, 1959.

fair, honest, and rigorous academic work, which was true in many ways. However, the pre-modern era is more influenced by political regimes and influences that contribute to the majority of problem today. The problem mainly goes (or could go) in two directions, namely, from university to students and faculty and vice versa. This study aims to show that, depending on the circumstances, academic freedom may be infringed upon from both the inside and outside, by the left and the right, and could be overused or misused for political purposes. Therefore, it is important to find common ground by striking a balance between rights while simultaneously maintaining the values that are embodied in public morals and the social public order.

### 3. Academic life

What is academic life? We could say that academic life is the interaction between students, professors, and all those who participate in the educational process, both as a part of formal education (classroom, lectures, grading, etc.) and the informal system that involves socialising, out-of-classroom discussions, and even lunches, dinners, and coffees on campus. However, all of these actions are associated with education as the cornerstone of the interaction. The question here is which part of academic life is covered by academic freedom and legal protection. To clarify, legal protection in academic life is primarily connected to academic freedom, but in some cases, legal protections concern broader catchments of academic life, such as discussions that are part of symposia and informal talk outside the principal place of instruction. In the latter case, the issue is that such interactions are covered by freedom of expression and stricter legislation, which covers hate speech, damages, and media law.

New York University's pages contain valuable definitions that almost solely cover the first portion of academic freedom and discuss the positions of teaching and learning, even though we know that learning is a lifelong process that could take place anytime, anywhere, and that there is an obvious connection between academic freedom and tenure positions.<sup>7</sup>

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<sup>7</sup> Section II. The Case for Academic Freedom.

'Academic freedom is essential to the free search for truth and its free expression. Freedom in research is fundamental to the advancement of truth. Freedom in teaching is fundamental for the protection of the rights of the teacher in teaching and of the student in learning. Academic freedom imposes distinct obligations on the teacher such as those mentioned hereinafter.'

Section IV. Academic Freedom

'Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties, but outside occupations and research for pecuniary gain, except in the case of sporadic and wholly unrelated

#### 4. Limitations of academic freedom

Academic freedom goes beyond the ordinary classification defined by the framework rules that have to be taken seriously and the views from the rule of law aspect. The catchments of academic liberties also deal with varieties of human rights. This includes the right to education, which is usually, at least in the European context, included in the constitutional law; however, the decision regarding who will be allowed to take part in particular education lies in the institution that enrolls students and chooses professors (lecturers).<sup>8</sup> Obvious restrictions are there on entering specific places of higher education, such as Catholic or Protestant universities, or institutions that teach religious subjects.<sup>9</sup> However, in the secular world of many European countries, these requirements have become increasingly vague. The major requirements include equality and due process, which are generally guaranteed by most constitutions, especially by the European Convention on Human Rights.<sup>10</sup> The right to education has public dimensions, first of which is connected to the right of citizens to educate themselves and their children

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engagements should be based upon an understanding with the administration of the University.

Teachers are entitled to freedom in the classroom in discussing their subject, but they should not introduce into their teaching controversial matter that has no relation to their subject.

Teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but this special position in the community imposes special obligations. As men and women of learning and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they at all times should be accurate, should exercise appropriate restraint, should show respect for the opinions of others and for the established policy of their institution, and while properly identifying themselves to outside audiences as associated with the University should clearly indicate that they are not institutional spokespeople unless specifically commissioned to serve in such a capacity.'

Tenured/tenure track faculty members also are entitled to other protections related to tenure and academic freedom, discussed in more detail in 'Faculty Policies Applicable to Tenured/Tenure Track Faculty.'

- 8 'Choice of who shall participate in higher education (which must be an institutional choice) is, along with determination of curricula and of areas of research, among the elements of that academic autonomy which is one of the bases of academic freedom and may be looked upon as its essence.' Fuchs, 1963, p. 5, according to Lennard, 1948, p. 21.
- 9 To teach religious subjects' teacher often have to have approval from the religious body who can issue decrees that entitle specific teachers to perform their duties even in the public school system. See, Savić. The problem arises is that if the teacher loses their right to teach in the public school system because their position is bivalent, that is, civilian and canonical. This is usually covered by the Law or by International Treaties if the state has any. This is the case with Croatia and Poland, who have both have stipulated agreements with the Holy See. In the hierarchy of norms, such agreements are above the Law and under the Constitution.
- 10 European Convention on Human Rights.

through compulsory and free education; second. they have the right to compete to be educated within the private sector. Both of these rights require the exercise of the equality principle.

It is impossible to discuss academic freedom, the rule of law, and equality without the general premise that the right to education in the contemporary world belongs to everyone, under equal circumstances and opportunities. A prerequisite that must be fulfilled is general equality regardless of race,<sup>11</sup> religion, sex, and national and social origins. A major case related to this concept is *Brown v. Board of Education*, 347 US 483 (1954), where the Supreme Court decided that segregation was against the American Constitution. The case was led by Thurgood Marshall, a famous civil rights advocate and associate justice of the US Supreme Court.<sup>12</sup> The conclusion is that for academic freedom, it is essential that all people are free to receive quality education under the same circumstances in which they could, but do not have to, exercise their rights. This is an explanation of the basic narrative of the 14<sup>th</sup> Amendment of the US Constitution, which essentially states that the State shall secure the same rights to all citizens under the same jurisdiction. This includes the same people, same place, same law, same rights, and same responsibilities.<sup>13</sup>

As early as the late 18<sup>th</sup> and 19<sup>th</sup> centuries, some concerns were raised in connection with the influence of governing authorities on the independence of universities and colleges, especially those that were formally public and funded by the state.<sup>14</sup> Around the world, there were examples of the political control of academia. This was especially observed during times of crisis that culminated in the 20<sup>th</sup> century with the emergence of destructive regimes in Germany and Italy, and to various extents, throughout Europe during the Second World War. Therefore, in these times, there was no academic freedom without the rule of law. When all freedoms are jeopardised, academic freedom falls as well. However, this is somehow paradoxical because many academics were actively defending the basic principles of truth and humanity in those turbulent times. All those who lived and worked in Eastern Europe after WWII experienced what it meant to be an academic in postwar Europe under the communist rule. Most academics were under surveillance, and any behaviour that was considered (this does not mean that it was contrary to socialist ideology) against communist or socialist ideology was heavily punished and often persecuted and prosecuted. In some countries, membership of the Communist Party was forced, and only a few remained out of the net

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11 See more in Lenard, 1948, pp. 704–710.

12 Thurgood Marshall (July 2, 1908–January 24, 1993).

13 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws,' from Constitution Annotated, Analysis and Interpretation of the U.S. Constitution.

14 See Fuchs, 1963.

thrown onto academia as a whole. Children of intellectuals could not be enrolled in universities and were forced to do lower-paid jobs and educate themselves in schools of lower quality and not pursue university diplomas or degrees.

Academic freedom in repressive societies was present in Europe through the 20<sup>th</sup> century but was not equally 'distributed' across places and times. In all these situations, many academic staff maintained their integrity, which sometimes was paid for by their jobs, and other times in their freedom or even life. Today, we live in a world of paradoxes and oxymorons. On one hand, there is the notion that freedom is a norm and a must, and that everyone should be free in thoughts and actions; on the other hand, the limits of freedom are put aside, including responsibility for actions, even in scientific research. Locke has described that, 'government should be limited to securing the life and property of its citizens. It is only necessary because, in an ideal, anarchic state of nature, various problems arise that would make life more insecure than under the protection of a minimal state.' Locke is also renowned for his writings on toleration in which he espoused the right to freedom of conscience and religion (except when religion was deemed intolerant!) and for his cogent criticism of hereditary monarchy and patriarchalism.<sup>15</sup>

Adam Smith believed that the three pillars of modern (democratic) society are justice, prudence, and benevolence.<sup>16</sup> Edmund Burke often argued that to possess freedom, one has to be limited. Of course, this has to be balanced in a way that cannot be used to limit political or academic life for the purpose of daily politics.

It is not solitary, unconnected, individual, selfish liberty, as if every man was to regulate the whole of his conduct by his own will. The liberty I mean is social freedom. It is that state of things in which liberty is secured by the equality of restraint. A constitution of things in which the liberty of no one man, and no body of men, and no number of men, can find means to trespass on the liberty of any person, or any description of persons, in the society. This kind of liberty is, indeed, but another name for justice; ascertained by wise laws, and secured by well-constructed institutions.<sup>17</sup>

These are ideals and not tools for eliminating enemies. All of the following philosophers were relying on the notions of natural law: Burke on ethical norms, Locke on the belief that the state should protect life, liberty, and property, and Smith supposing that self-interest provides greater benefit to society. All have acknowledged the importance of the existence of a state.

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15 Moseley, no date.

16 Smith, 1982.

17 Burke, 1789.

However, the essential question here is whether academic freedom and the quest for truth has limitations. The answers are complex. Obviously, academic freedom include expressions like ‘We live in a free and democratic state,’ but this is true only in principle. If academic freedom includes basic honesty and accuracy, it should not be limited to give way to the truth; however, the key is to have honesty and respect for the public order which has the same freedoms and foundations of existence. Therefore, if academic freedom cohabitates with the political framework of the (democratic) state, it does not have any limitations except one. This limitation disallows endangering the coexistence and cohabitation within society which has its rules shaped by public order and morals. Thus, we need honest academics and states with minimal influence over academic work and a safeguard to protect the basic foundation of state and public order. The state must secure the maximum possible space for academic exercise, but it does not have to allow academic activities that could implode its own existence. This means that academic freedom in the rule of law is absolute, but democratic states can impose restrictions, not on the content of research but on the use of findings that can be politically driven (or used for political purposes) and help oppress the constitutional order. If we have a democratic society and honest academia, academic freedom is indisputable.

In the same world, we face various incidences where academic freedom is increasingly used for political purposes; in some societies, specific values of the state are targeted, and values of the state and its majority (connected with the foundational principles) are targeted and in others minority feels it is left behind and its interests and view are in danger. How to avoid this and find a common ground? Using the rule of law. As stated, if the state is democratic and provides secure and safe place for academia, science should manoeuvre its way of speaking, but with basic respect for the society that provides the academic freedom. It is a hard task. However, there is a huge difference between repressive regimes and regimes of order that require academic freedom to remain within the legal framework of the constitutional order. If we do not discuss the lack of the basic elements of humanity and freedom argued by German philosopher Gustav Radbruch,<sup>18</sup> we

18 Savić, 2023: ‘Radbruch argued that when laws do not contain an elementary desire for justice or when, most importantly, equality, which should be the heart of justice, is renounced in the process of legislating, then the law is not just flawed (erroneous), it is illegal in nature because law needs to serve justice.’ p. 5, according to: Radbruch, 1946, p. 107: *‘Der Konflikt zwischen der Gerechtigkeit und der Rechtssicherheit dürfte dahin zu lösen sein, daß das positive, durch Satzung und Macht gesicherte Recht auch dann den Vorrang hat, wenn es inhaltlich ungerecht und unzweckmäßig ist, es sei denn, daß der Widerspruch des positiven Gesetzes zur Gerechtigkeit ein so unerträgliches Maß erreicht, daß das Gesetz als “unrichtiges Recht” der Gerechtigkeit zu weichen hat. Es ist unmöglich, eine schärfere Linie zu ziehen zwischen den Fällen des gesetzlichen Unrechts und den trotz unrichtigen Inhalts dennoch geltenden Gesetzen; eine andere Grenzziehung aber kann mit aller Schärfe vorgenommen werden: wo Gerechtigkeit nicht einmal erstrebt wird, wo die Gleichheit, die den Kern der Gerechtigkeit ausmacht, bei der Satzung positiven Rechts bewußt verleugnet wurde, da ist das Gesetz nicht etwa nur ‘unrichtiges’ Recht,*

would require fight against the law, because unjust law is not a law. This was also accepted by Hans Kelsen.<sup>19</sup> Thus, state order has to prevail and should be protected and respected. Every person has their own values and pursues specific goals and academics are not an exception; however, if the honesty principle is respected, then the rule of law will not be endangered.

Various constitutions guarantee free speech and freedom of academic work but within the limitations described above. These limitations are always more or less connected with the protection of the basic fibre of states' laws, particularly constitutions, which shape legal and public order.<sup>20</sup> When we elaborate on the rule of law and academic freedom, we also discuss the constitutional order of democratic states and free expression.

## 5. Responsibilities

When we discuss academic freedom, as with other freedoms, we must consider that there are obligations arising from each specific right. As discussed before, honesty is a prerequisite for academic integrity. This section concentrates on this important issue. In Germany, it is believed that universities should be places where academic freedom must be developed and preserved.<sup>21</sup> This is the root of the constitutional provisions of the integrity and autonomy of universities in the modern European constitutional landscape. Universities should be places where 'freed interplay of ideas'<sup>22</sup> takes place without honesty being stripped out. Fuchs has quoted German professor Friedrich Paulsen in suggesting that there is some level of classification – for instance, while philosophy professors are free, professors of theology have the right to maintain a positive attitude towards religion and religious institutions, like the church. The professors of political science would suggest that the law should have a reason to protect itself and the state of the country.<sup>23</sup> Here, we see that professors have certain responsibility towards the authority they are teaching about. This does not mean that some professionals are exempt from freedom of research or from asking questions. However, some professions, by the nature of the scope of their science and expertise, have a framework for their research because they possess specific truths and beliefs. Additionally, if universities are founded and supported in a particular country and, it is expected that they possess minimal standards of respect and understanding despite their

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*vielmehr entbehrt es überhaupt der Rechtsnatur. Denn man kann Recht, auch positives Recht, gar nicht anders definieren als eine Ordnung und Satzung, die ihrem Sinne nach bestimmt ist, der Gerechtigkeit zu dienen.'*

19 Ibid., p. 4.

20 See more in Milić Vujinović, 2021, pp. 967–988.

21 Fuchs, 1963, p. 435.

22 Ibid.

23 Ibid.

right to criticise. Universities are also subject to the constitutional framework of the country, and no two countries are not the same. Even in the European Union, laws in Malta are different from those in Finland, Poland, Sweden et cetera. What is common are the standards, some shared values, and the rule of law.

The following is an excellent example provided by Paulsen and elaborated on by Fuchs:

The professor who can find absolutely no reason in the state and law, who, as a theoretical anarchist, denies the necessity of a state and legal order...may try to prove his theory by means of as many good arguments as he can, but he has no call to teach political science at the state institution.<sup>24</sup>

Furthermore, it is stated that ‘German universities dwell in their own world, outside of politics, and their highest achievements are in science’...and that professors ‘representatives of science should not engage in politics, but should reflect upon state and law.’<sup>25</sup> This does not mean that professors or students should not be involved in political processes but that their work should not use the classroom for political fights. However, there have been times in history when this has been necessary. These examples belong to extreme social appearances when fighting on all fronts is necessary. It is also possible to predict situations in which some academic freedoms are restricted or frozen for the sake of urgency, but that should happen only in extremely rare circumstances, with a valid test of proportionality. It is always a matter of balance. For instance, a religious institution of higher education funded and owned by a specific religious organisation or community can have the right to request a minimal standard for academic behaviour; however, the question is in which way does this limitation develop. Academic institutions should always bear in mind the characteristics of free thought and rigorous and honest research. This suggests that even religiously affiliated institutions of higher education remain bodies which seek truth and transparent results.

Public speech is a basic human right and, as such, a part of the broader scope of rights that guarantee that all citizens have the right to openly express their views. Academics are more prone to such activities, and their roles are often positioned outside the walls of universities or colleges. Therefore, for integrity, honesty, and expertise, academics are trusted and wanted even beyond their classrooms. The direction of their activity is from primary school to the street and not from the street to the school, all in accordance with the lines mentioned above. This is why there are many university professors (or former university professors) across all branches of social activity, including politics.

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24 Ibid. See Rockwell, 1950; Metzger, 1955.

25 Fuchs, 1963, p. 436.

Free speech belongs to all citizens and is not specifically an academic right;<sup>26</sup> however, academics often practice it openly and more often. In this context, Moshman has made the following statement:

I agree with the AAUP about the importance of protecting the right of faculty to public ('extramural') speech but disagree with its long-standing classification of this right as part of the academic freedom of professors, which seems to construe it as a special right of higher education faculty rather than a matter of basic human rights.<sup>27</sup>

## 6. Public order vs academic freedom

As mentioned before, academic freedom within the scope of law falls under constitutional protection and is a part of the system of law in a particular country. On this basis, we can examine two scopes of activities related to academic freedom. The first is described as internal, and the other is not necessarily connected to work in a university setting, but instead considered more external. Accordingly, teachers must teach what is determined as the curriculum or program of study while simultaneously being individuals with their own views. Therefore, the character of teachers is bivalent. On one hand, they are obliged to teach exactly what is expected from them, and on the other hand, they have the freedom to criticise and express their own (scientific) views. Therefore, they play both collective and personal roles as teachers and people of integrity.<sup>28</sup> Moshman has said that,

with regard to schools and colleges, it is the purpose of an academic institution to do academic work. Therefore, it is important to respect the intellectual autonomy of schools and educational systems at all educational levels. However, this does not mean that schools are free to censor their faculty or indoctrinate their students.<sup>29</sup>

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26 Moshman, 2017, pp. 9–10.

27 Ibid., p. 10.

28 Ibid., p. 12. 'The tradition of collective faculty responsibility for academic matters is much stronger in higher education than at elementary or secondary levels, but it is relevant at all levels. Members of the faculty are generally more expert and less politically motivated than are external powers and interests, but individual faculty members have biases of their own. With respect to the overall curriculum of an academic department or unit, the collective faculty is the best source of genuine academic judgements. Students are entitled to a curriculum determined on academic grounds by those qualified to make the relevant academic judgements. Individual faculty must teach the properly approved curriculum but should be free to criticize or supplement it. Thus, the academic freedom of faculty is both individual and collective.'

29 Ibid., pp. 12–13.

Overall, as individuals, have the collective duty to respect the integrity of students and general faculty. Without the respect for others, there is no responsibility. Responsibility also means that the integrity of schools should be protected along with that of the state and its institutions, providing a secure and democratic framework governed by the constitution and law in general. Universities should not be used for political clashes or as platforms for practising behaviour that is contrary to public order and morals. In this section, I address the basic question of balancing the rights of specific groups. In this study, I have insisted on dialogue between the majority and minority groups, and as a proper method of doing so, I have suggested balancing.<sup>30</sup>

Without any doubt, the justification of academic freedom lies in a free democratic state where free academic debate exists; however, this does not mean that academia should not respect the democratic order of the state because there are no two identical constitutions that are grounded in years, decades, and sometimes centuries of national and legal history and developments, and there are no two identical sets of values completely the same across the two jurisdictions. Although these are similar, they are not the same. Each state has the right to protect its basic foundations that are its pillars. Of course, this critique is allowed, but political activism should be excluded because politics may jeopardise the quest for truth and endanger basic honesty.<sup>31</sup>

However, there are many analyses on particular countries in which, according to different preferences, legal standpoints, and political ideas, we can find critical approaches to academic freedom and the rule of law, for example, Poland, Hungary, and Germany.<sup>32</sup> In their work on the defensive rights of academic freedom, authors have correctly stated that ‘ensuring the proper implementation of academic freedom can be difficult both for policymakers and university authorities.’<sup>33</sup> Academic freedom is guaranteed in Article 13 of the EU Charter<sup>34</sup>

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30 See Savić, 2023, pp. 47–75; Savić, 2015, pp. 679–726.

31 Badamchi, 2022, pp. 619–630. In their work, she had described academic freedom as a very broad concept without talking about responsibilities towards public order and basic fundamentals of the constitutional framework. However, even in their remarks, they have talked about democratic debate; however, democratic debate has its limits that are shaped by particular democratic order. Democracy does not exist if there is not demos, people, because people govern by living according to a particular set of values shaped by the democratic process. In this sense, cohabitation is necessary to protect stability of values and free and critical science. ‘On a very last note, I added, the justification of equal autonomy of academia as a realm of free democratic debate complement each other. This is to say, I concluded, academics can only participate in the free democratic debate by exercising their free speech rights. In other words, democratic debate assumes the presence of and depends on equal autonomy of individuals, and of course, academics.’

32 Bard, 2020, pp. 87–96. Also, see Stachowiak, et al. 2023.

33 Ibid., Stachowiak, et al., 2023, pp. 1, 3.

34 Charter of Fundamental Rights of the European Union. Art. 13 of the Charter: ‘The arts and scientific research shall be free of constraint. Academic freedom shall be respected.’

and the constitutional texts of EU countries.<sup>35</sup> Interestingly, the EU charter uses the word “constraint” for scientific research and word “respect” for academic freedom. Let us deeply analyse these two words. According to the Oxford dictionary, the word “constraint”<sup>36</sup> describes a very strict and sharp limitation of the ability to perform some activity, while “respect”<sup>37</sup> shapes an environment of recognition, protection, and understanding where there is a special relationship between two parties, the one that respects and one that is respected. This etymological distinction can help us understand academic freedom in the rule of law. Scientific research should not be interrupted; academics have the right to perform honest and dedicated work in their field of study while being respected for the work they perform such that there is a (at least minimal) mutual level of understanding. I believe this is the key to solving the problem of potential excesses and clashes between engaged academics, the legal system, and public order. A universal magical formula for each case and country does not exist; however, on a theoretical level, when scientists are free to work, talk, be respected in the constitutional framework of the (democratic) environment, they solve issues that should be resolved. If we discuss democratic countries, solutions must be found within the framework of the system.<sup>38</sup> As previously mentioned, “academic freedom” has many definitions. Its meaning is based in history and culture, and it

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35 Ibid. Footnote 34., p. 3.

36 Oxford Learner’s Dictionaries, available at Oxford University Press’s website [Online]. Available at: <https://www.oxfordlearnersdictionaries.com/definition/academic/constraint> (Accessed: 24 July 2023).

37 Oxford Learner’s Dictionaries, Oxford University Press’s website [Online]. Available at: [https://www.oxfordlearnersdictionaries.com/definition/english/respect\\_1](https://www.oxfordlearnersdictionaries.com/definition/english/respect_1) (Accessed: 24 July 2023).

38 Here, I have to mention Gustav Radbruch’s theory in which he has advocated (in his positivistic approach to law) that law is separated from morals. Laws are to be followed except in exceptional cases when it becomes unjust and ceases to become a law. When discussing positivism, he has argued that norms are detached from both morals and facts. The only important thing is that the norm is attached to another norm from which it draws its legitimacy. Together with his colleagues, Radbruch was a supporter of pure positivism. According to this school of thought, every norm belongs to the same tree; taken together, all the norms make a logical system that resembles a living creature with a complete body. Before World War II, his support of this idea was unconditional. After the war and his experience with Nazi Germany, Radbruch wrote the essay ‘*Gesetzliches Unrecht und übergesetzliches Recht*,<sup>8</sup>’ in which he described his amended theory. Radbruch always felt that the conflict between justice and positive law should be resolved in favor of positive law. This was because of the stability or certainty of the legal system itself. The predictability of positive law was very important to Radbruch. This was so even in cases where legal solutions were unjust in the sense of content and purpose. However, Radbruch allowed for the following exception: when the difference between positive law and justice is so great that the law itself becomes non-law, or law with errors that invalidate it. Based on this exception, Radbruch argued that when laws do not contain an elementary desire for justice or when, most importantly, equality, which should be the heart of justice, it is renounced in the process of legislating. Thus, the law is not just flawed (erroneous), it is illegal in nature because the law needs to serve justice. See in Savić, 2023, *ibid.*, footnote 19.

can change across time and regions. An<sup>39</sup> interesting example is Germany, where the constitutional rights of universities and autonomy do not exist and the constitutional courts derive this right from the right to teach.<sup>40</sup> It is also said that

the fact that the holder of academic freedom is a different entity than a university's right to autonomy can be seen in the case of collision of rights. According to Robert Alexy's theory, fundamental rights and freedoms, including academic freedom are principles that may collide with other rights. Constitutional courts and international tribunals settle conflicts between two or more rights by applying the principle of proportionality.<sup>41</sup>

On another occasion, the German Constitutional Court has said that the defensive right to academic freedom is connected to its relation to states and includes protection from interference by university or faculty authorities.<sup>42</sup> Here, we must be careful about private universities, especially those with religious affiliations, because applying this standard would mean that religious freedom may be in jeopardy. Again, we need a balanced and careful approach.<sup>43</sup> After the Court of Justice of the European Union ruled that there is a limitation protecting academic freedom in Article 13 of the EU Charter, it was said that academic freedom spreads equally. The Hungarian Constitutional Court ruled that when the funding body deprives university bodies from organizational and economic authority, it is unconstitutional and leads to the erosion of university autonomy; subsequently, this would mean endangering academic liberties.<sup>44</sup> 'However, the uniqueness of academic freedom lies within the fact that the obligation to create conditions

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39 Stachowiak, et al., 2023, p. 1.

40 Ibid., p. 19.

41 Ibid. There is also an example that constitutional courts in Germany and Spain came to a conclusion that university autonomy is a separate right and not another aspect of academic freedom.

42 Ibid., p. 22.

43 See Art. 9 of the European Convention on Human Rights, Art. 9, Freedom of thought, conscience and religion, [Online]. Available at: [https://www.echr.coe.int/documents/d/echr/guide\\_art\\_9\\_eng](https://www.echr.coe.int/documents/d/echr/guide_art_9_eng), (Accessed: on 25 July 2023). '1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.' 'Religious freedom in respect of this article should be understood as both personal and institutional religious freedom; you can't have one without another. Since religious people are the most often members of particular religious organizations, you cannot have personal religious freedom if organization also does not have one.'

44 Ibid., pp. 27–28.

for implementation of this right rests primarily not with the state, but with universities.<sup>45</sup> This shows the complexity of this matter, which may be resolved by the principles of balancing and proportionality.

Many articles have provided dozens of examples of critiques towards the legal system of particular countries, many of which are ideologically driven; however, this study aims not to elaborate or criticise any particular legal system, but instead to go to the roots of academic freedom and the rule of law as concepts that promote both freedom of research and the concept of public order. From the viewpoint of legal theory, every right has its own responsibility. Rights and obligations are two sides of the same coin. There are multiple ways to advocate rights and responsibilities; the right to exercise a free academic life is closely connected with scientific and social responsibility but not in the ideological agenda. It is not fair to use academic freedom as a platform for political agenda, and this is valid for all subjects of the academic process – academics, students, and the state that is the social guarantor of the entire scope of law.

## 7. Conclusion

When we discuss academic freedom and the rule of law, we first address the core questions of the development of academic freedom in Western legal thought and try to understand the chronology of the development of the very important right that is characteristic of the free and democratic world we want to live in. Honest and free research, free from state intervention and interference, is necessary for academics, teachers, and students entitled to seek the truth and present it to the wider public. Academic liberties have been, especially in times of repressive regimes, a beacon for the word. Even if they were not freely practiced, remarkable people of the world have kept humanity and free minds alive, even in the darkest hours of our history. Scientists, researchers, professors, and students have always sought light in the world. Today, we live in a democratic Europe, where academic freedom and free speech are covered by constitutional frameworks and international agreements, meaning that contemporary states underline the importance of this right of free people, primarily those working in an academic environment. Simultaneously, the notion of academic freedom could be used for purposes contrary to the basic requirements required by academic freedom (honesty, hard work, and seeking the truth) and be replaced by the political and ideological agenda of particular groups. The constitutional laws of each (democratic) county usually set limits on any activity contrary to the basic functioning of the state, the legal order, and public morals. In such cases, the state has the right to set some limits on such behaviour, ensuring that human rights are always protected. Academic

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45 Ibid., pp. 28–29.

freedom can conflict with some other rights also secured by the constitution or international treaties, in which case, the balancing and proportionality principle is to be used to secure the application of law that is coherent with the legal system as a whole. Through true and honest dialogue, potentially conflicting rights can be found in coherent systems of legal norms.

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