

LIBERAE COGITATIONES

Liber amicorum Marc Bossuyt

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IN BLUEBEARD'S CASTLE? SOME MUSINGS ON ACADEMIC FREEDOM AND ACADEMIC INTEGRITY

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*“Attempts to understand the scope and foundation of a constitutional guarantee of academic freedom, however, generally result in paradox or confusion. (...) The problems are fundamental: there has been no adequate analysis of what academic freedom the Constitution protects or of why it protects it. Lacking definition or guiding principle, the doctrine floats in law, picking up decisions as a hull does barnacles.”
(J.P. Byrne, “Academic Freedom”, *Yale Law Journal* 1989, p. 252–253).*

I. INTRODUCTION

The revision clauses of the Constituent Assembly of 15 July 1988 referred repeatedly to the principle of *university autonomy* and the principle of *academic freedom* in Belgium. Academic freedom was defined as the non-interference of the government with respect to the administrative autonomy of non-state universities¹, but also with regard to the matter of freedom and autonomy in higher education and research.²

‘Academic freedom’ remained mainly an unwritten principle in Belgium, arguably of a high moral rank, until the Judgement of the Belgian Constitutional Court nr. 167/2005 was handed down on 23 November 2005. The Court’s broad

¹ J. DE GROOF, “Vrijheid van Vereniging versus vrijheid van onderwijs”, *Tijdschrift voor Onderwijsrecht en Onderwijsbeleid*, 2004–05, nr. 2–3, p. 215–217.

² See also J. DE GROOF, *De grondwetsherziening van 1988 en het onderwijs*, Story-Scientia, Brussels, 1989, p. 173 ff.

reading of the term opened surprisingly drastic perspectives. According to the Court, the questioned decree of the French Community of 31 March 2004 concerning the organization of higher education to promote its integration into the European area of higher education and on the refinancing of the universities wrongly restricted academic freedom to 'pedagogical freedom'. The principle of freedom of education included autonomy with respect to subsidized education³ and was then extended to the teaching corps *tout court*.⁴ Yet, the Court stipulated that the freedom 'of teachers' cannot be limited to pedagogical freedom or to the context of educational activities only.⁵

The judgment of the then 'Arbitration Court', qualified academic freedom as an aspect of freedom of expression and freedom of education (as enshrined in Article 24 §1 of the Belgian Constitution⁶). According to the judgment, academic freedom contains 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'.⁷

The Court gave an autonomous meaning to the term "... in the interest of the development of knowledge and the diversity of opinions". That academic freedom was 'also'⁸ explicitly mentioned as 'common value' of the EU in its Charter of Fundamental Rights, reinforced this principle. Unfortunately, the Court did not use the opportunity to clarify how the principle must be implemented. It can be expected that the delicate balance, as reflected in the Judgment, will require further litigation on the limitations to the academic freedom in light of the two constitutional principles: the freedom of expression and the freedom of education.⁹

II. PRELIMINARY REMARKS

A. OMNIPRESENT OR ELUSIVE?

Universities are challenged in many aspects.

³ J. DE GROOF, *De overheid en het gesubsidieerd onderwijs*, Brussel, 1985, 280 p.; *Idem*, "Omtrent de pedagogische vrijheid; Enkele juridische en beleidsmatige beschouwingen", *Nova et Vetera*, jg. LXXIII, 1995-96, nr. 1-2.

⁴ Within all universities; but see the reluctance of M. PAQUES, "Liberté académique et Cour d'Arbitrage" in *Liber Amicorum Paul Martens*, Brussels, 2007, p. 413 e.v.

⁵ B.20.2.

⁶ B.20.4.

⁷ B.18.3.

⁸ In the Dutch version: "... overigens ook ..."

⁹ B.18.2.

First: the relationship between universities and the State is different than in the previous decades.

Second: in many aspects, the existing balance of power between academic staff and professional management favoured the latter. The traditional monopoly of governance by academics already disappeared because of the participation or involvement in the administration and policy making of other groups, both from within and outside the university.

Third: higher education came under pressure to take into account the constantly changing social and economic developments. It became receptive to new claims from society.

The internationalization accelerated the decomposition of academic traditions, and legislation could hardly control the continuous changes.¹⁰

These and other developments triggered a wave of reforms in the culture and in the standardization of university management, administration, policy, and so in almost all areas of academic activity. Can the principle of academic freedom within the academic *métier* and within the differentiated Academia still be considered as a modern principle, solitary but firm as a rock? Does academic freedom function as a breakwater?

Academic freedom appears to be an intriguing theme, a versatile and complex notion for the academic 'enterprise'. The concept is both omnipresent and elusive. It is called self-evident but seems, at the same time, in many aspects, miles away from any evidence. Academics often pretentiously claim academic freedom but, unfortunately, for reasons of expediency, often betray it in practice.

B. SELF-EVIDENT?

I suggest to approach the notion of academic freedom only with caution. Rector of the Catholic University of Leuven, Piet DE SOMER, stated in his opening speech for the academic year 1970–1971 correctly as follows: "I would not even dare to define what academic freedom actually means, understanding that in academic circles is fenced so much..."¹¹

¹⁰ J. DE GROOF, "European Higher Education in Search of a New Legal Order" in B.M. KEHM, J. HUISMAN en B. STENSAKER, *The European Higher Education Area: Perspectives on a Moving Target*, Sense, Rotterdam, 2009, p. 79–104.

¹¹ P. DE SOMER, *Een visie op de universiteit*, Universitaire Pers, Leuven 1985, p. 101.

The reference to academic freedom is often lavishly used in administrative or management meetings and universities as the argument of the *status quo*, as an alibi or an excuse for not implementing necessary reforms. A review of the status of the academic staff or the renovation of the curriculum, external or internal control, the pressure to compete for external funding are – rightly or wrongly – perceived as ‘eroding’ academic freedom.¹²

Yet, in many other areas there are tensions with academic freedom. The ‘hybrid’ character of universities, with their public functions and economic activities, affect individual professors and scientists. The technique of corporate finances for new ‘Academic Chairs’ for example, does provide additional funding for basic research, not only in the biomedical and pharmaceutical industries but also in other scientific domains. Such private subsidies raises the issue of the unbound character of the established research and/or education. The governing boards of institutions ought to control whether the holders or beneficiaries of grants or contracts can still independently decide on the aims, methodologies, and uses of research funding. The pressure to produce ‘results’, through a result commitment, in my view should not be part of the equation. A privileged position with an industrial entrepreneur may not involve a violation of academic freedom or hinder competition among research groups. It remains advisable to check whether the distinction between patronage and contract research is always scrupulously respected.

C. DEMYSTIFICATION?

The term ‘academic freedom’ needs a ‘demystification’. In the ranking of “rights and freedoms”, academic freedom scores particularly high. It is a basic ‘human right’ called ‘directly linked to Human Dignity’. The U.S. Supreme Court already declared in 1967 *Keyishian v. Board of Regents* 385 U.S. 589: “Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment (to the American Constitution), which does not tolerate laws that cast a pall of orthodoxy over the classroom”.¹³

It seems relevant to test the revealing or concealing nature of the concept of academic freedom and to screen its consequent fulfilment at a time when science and innovation are considered to be a cornerstone for the future of any society. University officials will be regularly obliged to communicate clearly the relevance of their activity and thus the knowledge to be shared with all

¹² See also K.W.Ma. MOHRMAN, D. BAKER, “The research university in transition: The emerging global model”, *Higher Education Policy*, vol. 21, p. 5–27.

¹³ *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

stakeholders. Concern for academic freedom presents a decisive argument. The accountability of universities and other scientific institutions towards their communities, whether students, parents, government, and/or other 'carriers' of society), coupled with the way they navigate with the responsibilities granted to them, allows them to show how the further evolving autonomy is in need to be ensured. Academic freedom and autonomy offers institutions the opportunity to fulfil their missions.

D. ACADEMIC FREEDOM AND/OR AUTONOMY (ON THE INTERNATIONAL AGENDA)?

Academic freedom should resolutely be distinguished from 'autonomy'.¹⁴ In spite of their interrelationship, both concepts cover diverse contents, although the principle of the institutional autonomy of universities is instrumental both for the interpretation and application of laws and for the resolution of competing claims between governments, universities, scholars, administrative staff and students: "As a crucial guarantee of academic freedom, institutional autonomy is simultaneously the best insurance of the freedom to provide for education and the right to education."¹⁵ Moreover, it is simplistic to assume that academic freedom is acquired automatically in the case of privatization of universities or that academic freedom cannot thrive in the womb of State universities. One should be reminded of the fact that the autonomy of State higher education in Belgium is of rather recent date¹⁶ and that the autonomy of the university was conducive to realising the 'communitisation' ('defederalisation') of education through the revision of the Constitution in 1988.¹⁷

Of a different sort was the discussion that erupted in the international academic community with the creation of a campus established by Yale University in collaboration with the National University of Singapore. Can academic freedom thrive in a country where freedom of expression is curtailed and where the overall state policy is characterized by 'a culture of control'?¹⁸

¹⁴ On the differentiated content of the notion 'autonomy', see also J. DE GROOF, 'Gaining independence: "autonomy" versus "centralization" in the higher education of the Flemish community', in J. DE GROOF, W. BERKA and H. PENNEMAN, *Autonomy in education, Yearbook of the European Association for Education Law and Policy*, Kluwer Law International, Den Haag, 2000, p. 171-200; J. DE GROOF, G. NEAVE and J. SVEC, *Democracy and Governance in Higher Education*, Kluwer Law International, Den Haag, Council of Europe, 1998, 401 p.

¹⁵ ECtHR, *Tarantino and others v. Italy*, 2 April 2013, Partly dissenting opinion of Judge Pinto De Albuquerque.

¹⁶ See *Tijdschrift voor Onderwijsrecht en Onderwijsbeleid*-Archive: www.onderwijsrecht.be/databank/torbarchief.asp.

¹⁷ *Ibid.*

¹⁸ "Habitats for Academic Freedom", *Inside Higher Ed*, www.insidehighered.com/layout/set/print/news/2010/10/12/singapore.

However, coming into the international discourse, academic freedom seems less problematic, but there are striking contradictions. Almost all documents of the *Bologna process* solemnly and repeatedly refer to the principle of academic freedom.¹⁹ This is also the case in the '*Budapest-Vienna Declaration on the European Higher Education Area*', dated 12 March 2010 and later in the *Bucharest Communiqué*, dated 26–27 April 2012.

Reports prepared for the decade of '*European Higher Education Area*' discussed the different interpretation by the Member States of the concept of autonomy.²⁰ As with quality assurance, academic freedom was reluctantly acknowledged as a key issue for the European Higher Education Area.²¹ Reports of international quality agencies link effective quality cultures within higher education institutions to "the degree of operational autonomy, they enjoy".²² 'Expansion of institutional autonomy' is mentioned by the national Rectors' conference as the third most important change in the university landscape.²³

The autonomy of the institutions involved, though, while highly regarded as a principle (also in the *Bologna Declaration*²⁴), is not imposed as a condition for membership in the *Bologna Process*.²⁵ It fared autonomy as quality assurance:

¹⁹ Bergen Communiqué (2005), London Communiqué (2007), Leuven/Louvain-la-Neuve Communiqué (2009).

²⁰ In particular, then, the "different degrees of autonomy": A. MCCOSHAN and D.F. WESTERHEIJDEN (eds.), *The First decade of working on the European Higher Education Area, The Bologna Process Independent Assessment, Volume 1 Detailed assessment report*, CHEPS, INCHER-Kassel and ECOTEC, p. 114 and A. MCCOSHAN and D.F. WESTERHEIJDEN (eds.), *The First decade of working on the European Higher Education Area, The Bologna Process Independent Assessment, The Bologna Process Independent Assessment, Volume 2 Case studies and appendices*, CHEPS, INCHER-Kassel and ECOTEC, p. 221.

²¹ EURYDICE, *Focus on Higher Education in Europe 2010, The Impact of the Bologna Process*, Education, Audiovisual and Culture Executive Agency, 2010, p. 155.

²² ENQA, *Enqa Report to the Bologna Ministerial Anniversary Conference of March 2010, "Challenges for the future"*. Quality control should lead to a more extensive autonomy: EUA, *Quality Culture in European Universities: a Bottom-up Approach*, Report on the three rounds of the quality culture project, 2006, e.g. p. 33.

²³ EUA, A. SURSOCK, H. SMIDT, *Trends 2010: A decade of change in European Higher Education*, 2010, p. 15.

²⁴ "European higher education institutions, for their part, have... taken up a main role in constructing the European area of higher education, also in the wake of the fundamental principles laid down in the Bologna Magna Charta Universitatum of 1988. This 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.", Observatory for Fundamental University Values and Rights, *Case studies: Academic freedom and university institutional responsibility in Portugal*, Bononia University Press, 2003, p. 65.

²⁵ *Requirements and procedures for joining the Bologna Process*, November 2006. Even not in a penetrating manner: see "*Bologna Process – Template for national reports: 2005–2007*", Annex A, "Background information on your Higher Education system", under "National Organisation"... "areas for which HEIs are autonomous and self governing".

hardly high on the agenda in the starting period and somewhat hesitantly recognized as key for the *European Higher Education Area*.

This applies *a fortiori* to academic freedom. The *Bologna Process* was only at a later stage explicitly linked to academic freedom: "We, the Ministers, recommit to academic freedom as well as autonomy and accountability of higher education institutions as principles of the European Higher Education Area and underline the role the higher education institutions play in fostering peaceful democratic societies and strengthening social cohesion".²⁶

E. A NATIONAL AND/OR INTERNATIONAL INDICATOR?

The *open method of coordination* and the status of 'soft law' is more stringent than expected. Even so the implementation strategy remains²⁷ a national responsibility. This may differ radically among different countries.²⁸ The question may be raised if no sharper convergence is appropriate as regards the national strategy compliance with the academic freedom is concerned, since it constitutes the very essence of the scientific and academic mission of the university. The 'Bologna Follow-up Group' should in the next evaluation round of the Parties to the process reflect on this. A benchmark for the fulfilment of academic freedom should be accepted as a separate and imperative indicator in the evaluation of progress. The inevitable growing internationalization of education and research and the mobility among institutions cannot tolerate a lukewarm or selective application of academic freedom.

In conclusion, numerous international reports demonstrate that greater operational autonomy to universities is enabled by stronger external quality evaluation. The enforceability of university autonomy remains questionable if the implementation of academic freedom itself is not endeavoured as the essence of scientific education and research.

National higher education systems show a diverse mix of government interference and institutional autonomy. Yet, in terms of compliance with the academic freedom, a diversity in the degree of implementation of academic freedom throughout the *Common European Higher Education Area* can hardly be tolerated.

²⁶ Budapest-Vienna Declaration on the European Higher Education Area, dated 12 March 2010.

²⁷ See *ibid.*

²⁸ Cf. ENQA, *Standards and Guidelines for Quality Assurance in the European Higher Education Area*, Helsinki, 2005; INQAAHE, *Guidelines of Good Practice*, Dublin, 2005.

The trend towards more autonomy of the university is not accompanied by an increase in academic freedom, or at least this is the perception²⁹:

“... Findings reveal that autonomy of Higher Education institutions (HEIs) has increased in 38 percent of the countries covered in this study, academic freedom of higher education staff has decreased in 35 percent of the countries, together with a decrease in democracy in HEIs in 31 percent of the countries and a decrease in participation of academic staff in 38 percent of the countries. Concomitantly, and perhaps most importantly, public funding for HEIs has decreased in 38 percent of the countries. (...) where the Bologna Process impacted upon academic freedom and participation of academic staff, this seems to have worked against academics. This could be symptomatic of the manner of implementation of the Bologna Process at the national level where staff involvement is still lacking...”.³⁰

The effective guarantee of academic freedom should thus be a prominent agenda item for the screening of higher education legislation and policy, both within the European Union and from the *Common European Higher Education Area* and the Bologna strategy, although *Academia* itself seems uncomfortable with the notion of ‘academic freedom’.

III. PARADOXICAL CONTOURS OF THE CONCEPT OF ‘ACADEMIC FREEDOM’

A. THE FAR REACHING CHALLENGE OF ACADEMIC FREEDOM

The claim of academic freedom requires, even at the macro-level, in the bosom of every society, a self-investigation into the concrete effects of its implementation. An interesting debate took place following a suit by the professors of the Greifswald University and officials of the state of Mecklenburg-Vorpommern in Germany against a new article in the Higher Education Act. This Act stipulated that academic freedoms ‘framed’ should be: “The use of the rights specified in (sect. 5) subsect. 2 to 4 (LHG-MV) is bound to responsibility for the human being, society, and nature, and to the public character their fiduciary activities and does not exonerate them from the respect for the rights of others or from the respect for the rules governing cooperation in higher education”. The criticism was expressed that no constitutional grounds existed

²⁹ EDUCATION INTERNATIONAL, *Statement to the Bologna Anniversary Ministerial Conference*, Budapest-Vienna, 11–12 March 2010.

³⁰ *Enhancing Quality Academics’ Perceptions of the Bologna Process*, A Study by the Education International Pan-European Structure, On the Occasion of the Bologna Process Celebration Conference, March 2010, p. 12–13.

for the reference to 'society' and 'public character or academic activity' and that 'the bond or academic freedom' is incompatible with the German Constitution.³¹

The legislature adapted the law. Although the public interest of research cannot be denied, the incident reveals that in modern society the mutual academic rights and obligations need refinement. The question of whether an explicit legal guarantee is needed will be raised. The task for the legislator should be carefully conceived and executed in consultation with the academic community.

Both the law and the 'political culture' are seen as a yardstick for assessing respect for academic freedom. "Actually, the mistrust was not so much in the rule than in its implementation by a political regime deemed to be authoritarian and not particularly democratic".³² Generally, the idea is acquired that such autonomy goes together with accountability: "The enjoyment of academic freedom requires the autonomy of institutions of higher education. Autonomy is that degree of self-governance necessary for effective decision-making by institutions of higher education in relation to their academic work, standards, management and related activities. Self-governance, however, must be consistent with systems of public accountability, especially in respect of funding provided by the State."³³ This comment appears as an echo of the *UNESCO Recommendation*.³⁴

B. ACCOUNTABILITY VERSUS ACADEMIC FREEDOM?

The final decision in the standard work on the history of the university in Europe, reads: "No political system, no matter how democratic, could really accept the total autonomy of the universities."³⁵ The author continues: "Though they did retain a certain independence because of traditions often going back to the Middle Ages – that is to an age when universities were organically linked to the Western Christian Church – the universities were compelled under duress to accept more or less severe restrictions on their material and intellectual

³¹ See Observatory for Fundamental University Values and Rights, *Case Studies. Academic Freedom and University Institutional Responsibility in Mecklenburg-Vorpommern*, Bologna, 2003.

³² J.M. BRICALL, "University Institutional Autonomy, Observatory for Fundamental University Values and Rights", *Case Studies. Academic Freedom and University Institutional Responsibility in Portugal*, Bologna, 2006, p. 62.

³³ UN, "Economic and Social Council", *The right to education (Art. 13), General Comments*, 8 December 1999, E/C.12/1999/10, E, p. 7.

³⁴ *Recommendation concerning the Status of Higher-Education Teaching Personnel*, 11 November 1997.

³⁵ P. GERBOD, "Relations with authority" in W. RÜBGG, *A history of the university in Europe*, Volume III *Universities in the nineteenth and early twentieth centuries (1800–1945)*, Cambridge University Press, Cambridge, 2004, p. 100.

independence. Furthermore, any compromises that had been negotiated with the political power were always liable to be called into question according to the political, ideological and social fluctuations from one state to another throughout the Europe of the nineteenth and early twentieth centuries.”³⁶

The complex inter-relationship between government and higher education along with its possible tension with academic freedom already requires a separate investigation, one to which far little attention has been paid in the national context.

The Belgian Constitution stipulates that the legislature is competent to determine the establishment, organization, and funding of education (art. 24, §5: ‘§5. The organisation, the recognition, and the subsidising of education by the community are regulated by the law or federate law’). Yet, education law is inextricable tangled with excessive legislative initiatives and an expanding volume of legislative acts, especially in tertiary education and with respect to the legal framework on research.³⁷ How academic freedom is enforced within these standards remains a cautiously avoided issue.

The notion of ‘*principles of good governance*’ is hardly established in higher education.³⁸ The new relationship between government and universities requires a balancing of individual and collective academic freedom vis-à-vis the need for evaluation, control and audit³⁹, the so called ‘*Proven Trust*’ (‘*Verdiend Vertrouwen*’). The academic authorities must establish for themselves the precise limits of freedom and the scope of academic responsibility of all involved.⁴⁰

C. ACADEMIC FREEDOM AS AN INDEPENDENT FUNDAMENTAL RIGHT

Academic freedom cannot be circumscribed as a mere aspect of the ‘freedom of expression’. Most comments nevertheless consider it as a ‘natural’ starting point.

³⁶ *Ibid.*

³⁷ See *De universitaire Regelgeving – Coördinatie en Annotatie*, Wolf Legal Publishers, 2005, 1170 p.; *idem*, *Hogeschoolregelgeving – Coördinatie en Annotatie*, Wolf Legal Publishers, 2007, 1019 p.; *idem*, *De universitaire Regelgeving – Coördinatie en Annotatie; Addendum 2008/1*, Wolf Legal Publishers, 2008, 692 p.; *idem*, *Hogeschoolregelgeving – Coördinatie en Annotatie; Addendum 2008/1*, Wolf Legal Publishers, 2008, 362 p.

³⁸ See our report: J. DE GROOF and L. VAN DEN BERGHE, *Beginselen van goed bestuur voor universiteiten, hogescholen en wetenschappelijke instellingen in de Vlaamse gemeenschap, Proeve van aanbevelingen*, Wolf Legal Publishers, Nijmegen, 2011, 116 p.

³⁹ Cf. C. GLENN en J. DE GROOF, *Balancing Freedom, Autonomy and Accountability in Education*, 3 Volumes, Nijmegen, Wolf Legal Publishers, 2004, 1500 p.

⁴⁰ A. OOSTERLINCK, *Tussen academische vrijheid en behoorlijk bestuur, De universiteit in een complexe omgeving*, opening of the academic year 2003–04.

The reason may be found in the finding that the legislation does not so frequently mention academic freedom. At most, there are some references in parallel legislation. Even so, this silence raises the presumption that academic freedom is a fragment of other rights and freedoms or is 'unwritten' law, determined by tradition.⁴¹

Of course, academic freedom is intrinsically intertwined with the freedom of expression, as indeed, almost all liberties are 'interlinked, interdependent, inter-related' as mentioned by the human rights discourse. Still, academic freedom cannot simply be regarded as an aspect of other rights and freedoms. This freedom should not be described as a 'privilege' privileged practitioners of science. It is of itself an independent, universal standard notwithstanding its holders. Rather recently, academic freedom has been described as a truly autonomous human right.⁴² European jurisprudence partly follows this path: "... academic freedom 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".⁴³ This multifaceted, multilevel and complex principle requires recognition as an autonomous fundamental right, of the highest social and individual value and with full enforceability.

D. A NARROW INTERPRETATION OF THE LIMITATIONS ON ACADEMIC FREEDOM

As each right, academic freedom is not unconditional. International law and the Belgian constitution provide the legal framework for lawful restrictions. International jurisprudence should clarify the conditions for the restrictions. In a statement on a critical article by a scientist about the harmful effects of microwave ovens, the Swiss Federal Court, following the Commercial Court of Bern, ordered by the Swiss Association of Manufacturers and Suppliers of Household Electrical Appliances, concluded that the impugned scientific publication could affect indeed improperly the market competition.⁴⁴

⁴¹ Similarly, the Law on science education 1981 in the Netherlands: Tweede Kamer der Staten-Generaal, zitting 1980–81, 16 802, nrs. 3–4, p. 49.

⁴² Committee on Economic, Social and Cultural Rights, E/C.12/1999/10. General Comment No. 13, The right to education.

⁴³ ECtHR, *Sorguç v. Turkey*, 23 September 2009, nr. 35 (italic is done by the author). See also ECtHR, *Lombardi Vallauri v. Italy*, 20 January 2010, nr. 43.

⁴⁴ "The appeal was dismissed on the grounds that scientific research and publications, which are not in themselves directed at competition if they remain within the academic context, become so if the target readership may objectively construe the scientific opinions as being designed to influence the behaviour of market players and, in particular, of customers. The Federal Court declared that the statements held by H were clearly intended to influence the

Conversely, the 'Commission on Human Rights' decide in *Hertel v. Switzerland* that there was insufficient ground for limitations on this freedom:

"... (11) there was therefore a disparity between the measure imposed on H and the behaviour it was intended to rectify and, consequently, the measure could not be considered as 'necessary' in a democratic society and there was consequently a violation of Article 10".⁴⁵

Compliance with the scientific and moral integrity and ethics is not so much of a limitation as it is a condition for the responsible exercise of academic tasks. International standards refer also to the primacy of human dignity. The current toolbox contains a set of guidelines, by way of example the often invoked 'Article 16 - Protection of persons undergoing research' of the Oviedo Convention.⁴⁶

Such standards are further refined from a deontological and ethical perspective. "Nevertheless freedom of research is no more absolute than any other liberty. In the field of life sciences in particular, which involves the respect for human life and human dignity, researchers have to follow rigorous ethical principles. This balanced approach is reflected in many Opinions of the Group. For instance, the Opinion of the Group on "the Fifth Framework Research Programme" (11.12.97) calls for reconciling 'the freedom to carry out research activities with the imperatives linked to the protection of the fundamental rights of European citizens...'. In the same way, the Opinion on embryo research (11/23/98) deems 'that it is crucial to recall that the progress in knowledge of life sciences, which in itself has an ethical value, cannot, in any case, prevail over fundamental human rights and the respect which is due to all the members of the human family'.⁴⁷

The conclusion was: "The question of setting limits to research, balancing respect of dignity with the duty to carry out research for improving knowledge, contributing to man's understanding of the world and life, alleviating suffering and bettering the quality of life, is certainly a delicate one. But it has to be faced and it is the role of ethics to help in so doing."

market and thus apt to affect competition. The Federal Court expressed the opinion that anyone claiming scientific freedom was wholly free to expound his knowledge in the academic sphere but, where competition was concerned, he could not claim to have the truth on his side where the opinion he was putting forward was disputed." ECtHR, *Hertel v. Switzerland*, 25 August 1998.

⁴⁵ *Ibid.*, nr. 51.

⁴⁶ Article 16 of the 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, Oviedo, 4.IV.1997.

⁴⁷ See the *Report of the European Group on Ethics in Science and New Technologies (GEE)* on the Draft Charter of fundamental rights in the European Union, p. 23-24.

Limitations applicable to the freedom of education and the freedom of expression are mostly mentioned as relevant limitation grounds for academic freedom and applied with utmost restraint.⁴⁸ Addressing academic freedom in legislation seems a more than delicate task. How, for instance, should the notion of 'nature' ('natural') be defined when a State constitution mentions the following restriction ground: "Research is subject to limits imposed by law if violation of human dignity or permanent threat to the natural Fundamentals of life is imminent".⁴⁹

The term "academic activity" includes all endeavours which "are by content and design to be regarded as a serious methodological attempt to ascertain truth."

In selected modern states, the contours of academic freedom are drawn following the debate about creationism vs. evolution, the unacceptable nature of expressing undemocratic views under the guise of academic freedom, the absolute prohibition of 'negationism', ... The conclusion of these paragraphs is: *academic freedom is exercised under the criticism of the state of the science itself and with respect for human dignity.*

At this point it is worth referring to the intriguing conclusion of a confrontational language philosopher, George Steiner: "We now know that formal knowledge and the numerical diffusion of education systems do not have to involve an increased rationality and morality. Libraries, museums, theatres, universities and colleges, where the transfer of the humanities and the sciences takes place, can flourish next to concentration camps."⁵⁰

What, then, is "academic freedom"? Who is the carrier? At what level is academic freedom situated? Precisely because academic freedom is at the core of the 'mission' of universities, the concept needs to be clarified and its features, albeit cautiously, defined. The search is immediately a survey of the genius of universities themselves.

⁴⁸ J. DE GROOF, G. LAUWERS and K. SINGH, *The Right to Education and Rights in Education*, Nijmegen, Wolf Legal Publishers, 2006, 426 p.; F. COOMANS, 'In Search of the Core Content of the Right to Education', in A. CHAPMAN and S. RUSSELL, *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Antwerpen, Intersentia, 2002, p. 217–246.

⁴⁹ See, e.g. the above-mentioned constitution of Mecklenburg-Vorpommern.

⁵⁰ G. STEINER, *In Bluebeard's Castle. Some Notes Towards the Redefinition of Culture*, New Haven, CT., Yale University Press and London, Faber, 1971.

IV. CHARACTERISTICS AND DEFINITIONS

A. QUEST FOR TRUTH

In an earlier contribution on 'Academic Freedom: the *Palladium* of the University?' the main characteristics of academic freedom were outlined including 'the demanding nature of academic freedom', the 'far-reaching nature', the 'multi-faceted and multi-level' nature of academic freedom and the different bearers, the 'comprehensive nature of academic freedom'.⁵¹

The careless use of the term 'academic freedom' raises doubts about the value transfer and the ethical discourse of the university.⁵² Mgr. DONDEYNE made the connection between academic freedom and the 'Search for Truth'⁵³ and distinguished an internal and an external aspect: freedom as an attitude, an inner attitude, a *qualité d'âme*; external freedom refers to the 'framework' and 'climate', which may promote the 'Search for Truth' through science.

The concept of academic freedom differs in the European and American tradition. A great deal can be learned from the expanding jurisprudence.⁵⁴ The concern for academic freedom in the U.S. led to guidelines and recommendations which received great response and were signed by almost all major players in the American Academia. The 1940 Statement of Principles on Academic Freedom and Tenure from the American Association of University Professors stipulates at the outset: "Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition. Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth."⁵⁵

⁵¹ J. DE GROOF, "Omtrent de academische vrijheid. Het 'Palladium' van de Universiteit?", in F. FLEERACKERS en R. VAN RANSBEECK (eds.), *Ad Vocare, Interdisciplinair Cahier, 18.1 Recht en onafhankelijkheid. De onafhankelijkheid van de rechtswetenschap*, Brussel, Larcier, 2010, p. 5-90.

⁵² One of the leading authors on higher education, PG ALTBACH stipulates justifiably: "More attention needs to be given to the mission and values of the university, for without academic freedom, universities cannot achieve their potential nor fully contribute to the emerging knowledge-based society": J.F. FOREST and P.G. ALTBACH (ed.), *International Handbook of Higher Education*, vol. 18, Dordrecht, 2006, p. 2006.

⁵³ A. DONDEYNE, *Liberté et vérité. Etude philosophique*, Leuven, 1954. Also A. DONDEYNE, *Geloof en wereld*, Bilthoven, 1962.

⁵⁴ See, e.g., W. KAPLIN and B. LEE, *The law of higher education: a comprehensive guide to legal implications of administrative decision making*, San Francisco, Calif., 1995, 1023 p.

⁵⁵ 1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments, p. 3.

Although the 'Quest for truth' is not mentioned in the *Magna Charta*, the document speaks well of 'true' Universities although in the context of making the distinction between credible (and thus accredited) and other universities.⁵⁶

B. GUARDIAN OF DEMOCRACY

It does not seem exaggerated to assume that the history of Europe largely coincides with the history of its universities. This may be true in completely different terms for the future.⁵⁷ Within universities rages the tension between the 'utilitarian' and 'ethical' commitments. It is the public responsibility of institutional officials to find the right balance. Academic freedom is also for that reason a quality index for democracy: "... The idea is that to foster the intellectual and material conditions favourable to the free conduct of research is a key element of democracy."⁵⁸

The new democracies, not coincidentally, included academic freedom into their constitutions.⁵⁹ They remember the "older" democracies to the uncompromising nature of academic freedom as a basic requirement for any democracy, autonomy in its full scope to which, for example, the South African Constitutional Court, is repeatedly calling.⁶⁰ This is, particularly, the case in its highly appreciated judgment on *NM, SM, LH versus CS, PDL, New Africa Books Ltd.* together with *The Freedom of Expression Institute* where it stated: "Freedom of expression is important because it is an indispensable element of a democratic society. But it is indispensable not only because it makes democracy possible, but also because of its importance to the development of individuals, for it enables them to form and share opinions and thus enhances human dignity and autonomy. Recognising the role of freedom of expression in asserting the moral autonomy of individuals demonstrates the close links between freedom of expression and other

⁵⁶ This paper does not focus on the legal protection of the term 'university' or 'faculty' according to national and international law.

⁵⁷ Cf. among others J. DE GROOF, G. DONDELINGER and G. LAUWERS, *Globalisation and competition in education*, Wolf Legal Publishers, 2003, 318 p.

⁵⁸ M. DAXNER, "Academic Freedom and University Institutional Responsibilities in South East Europe (1989-2003), Observatory for Fundamental University Values and Rights", *Case Studies. Academic Freedom and University Institutional Responsibilities in South East Europe (1989-2003)*, Bologna, 2004, p. 49.

⁵⁹ *Ibid.*

⁶⁰ See also J. DE GROOF and E. BRAY, *Education under the New Constitution in South-Africa*, Acco, Leuven, 1996, 371 p.; J. DE GROOF and R. MALHERBE, *Human Rights in South African Education. From the Constitutional Drawing Board to the Chalkboard*, Leuven, 1997, 316 p.; J. DE GROOF, W. LEGOTLO, R. MALHERBE and J. POTGIETER, *Promoting a Human Rights Culture in Education: Responsibilities and Opportunities in a Transforming Society*, Mys & Breesch, Gent, 1999, 250 p.; J. DE GROOF, R. MALHERBE and A. SACHS, *Constitutional Implementation in South Africa*, Mys & Breesch, Gent, 2000, 207 p.

constitutional rights such as human dignity, privacy and freedom. Underlying all these constitutional rights is the constitutional celebration of the possibility of morally autonomous human beings independently able to form opinions and act on them. As Scanlon described in his seminal essay on freedom of expression, an autonomous person.”⁶¹

The same judgment took a broad quote from SCANLON⁶² to illustrate the consequences of the Court and to clarify them: “... cannot accept without independent consideration the judgment of others as to what he should believe or what he should do. He may rely on the judgment of others, but when he does so he must be prepared to advance independent reasons for thinking their judgment likely to be correct, and to weigh the evidential value of their opinion against contrary evidence.”

The fascinating *Gillberg*-case, ECtHR, 2 November 2010, sanctioned the principle of public access to official documents, including research findings, as “to allow for the public and the media to exercise control of the State, the municipalities and other parts of the public sector which, in turn, contributed to the free exchange of opinions and thoughts, and to efficient and correct management of public administration and, thereby, to maintain the legitimacy of the democratic system.”⁶³

C. ACADEMIC INTEGRITY

The reference to the relevance of academic freedom as an indicator of the degree of democracy in society is important. The principle of *pluralism of research* is considered a prerequisite for plurality and ultimately for pluralism in society.

Academic freedom demonstrates the democratic aspect the fight against all forms of corruption within university, something that is becoming a real problem, not only in non EU Member States.⁶⁴

⁶¹ Constitutional Court of South Africa, Case CCT 69/05 d.d. 4 April 2007, p. 61.

⁶² SCANLON, ‘A Theory of Freedom of Expression’, 1972, *Philosophy and Public Affairs*, 1., 204 ff.

⁶³ ECtHR, *Gillberg v. Sweden*, 2 November 2010, nr. 107. See also especially nrs. 113 and 116 on the implementation of the confidentiality clause.

⁶⁴ ELA, *Closed Workshop on Corruption in Higher Education*, 19 November 2009; S. HEYNEMAN, “Corruption in Education; causes and best practices” in T. BERTRAM GALLANT (ed.), *Creating the Ethical Academy: a Systems Approach to Understanding Misconduct and Empowering Change*, New York, Routledge and Kegan Paul; N.L. RUMYANTSEVA, “Taxonomy of Corruption in Higher Education” in *Peabody Journal of Education*, 2005, 80(1), p. 81–92; I. AHMADOV and E. AKBAROV, *Taxonomy of corruption in higher education system of Azerbaijan*; J. LATIFI, *Politics to fight corruption in higher education in Albania, paper presented to the closed workshop on corruption in education*; I. RICHTER, *Selling diplomas in*

The background paper of A. MUNGIU-PIPPIDI and Ligia DECA "Bringing Integrity Back in the Academia" for the 2nd World Conference on 'Global Justice and the Right to Education', Brussels, 8–10 November 2012, argued that the recent global demand for increased competitiveness of educational units and individuals had the unintended consequence of stimulating behaviour meant to meet only the formal criteria of knowledge, ranging from manipulation to sheer fraud.

According to the 2012 World Bank report⁶⁵, almost all countries in Eastern Europe and Central Asia have serious integrity in higher education issues and 60% of the respondents in their survey 'reported knowing of other students who had purchased either entrance at the university or a specific grade'.

The World Bank⁶⁶ also proposed a series of tools for strengthening basic academic and fiscal integrity in university-level institutions. Among the institutional tools which should also be promoted by peer pressure are the facilitation of public access to information, the absolute transparency in criteria for academic competitions and accreditations, the mandatory introduction of strong conflict of interest rules, and the independent monitoring of early awareness indicators known as red flags to alert of systemic distortion of merit as the basis for evaluation.⁶⁷

D. A DOMAIN BY EXCELLENCE OF CONFLICTING RIGHTS

Traditionally, a distinction is made between the *Freiheit der Wissenschaft* of the institution, the *Lehrfreiheit* of the *academic corps*, and the *Lehrnfreiheit* understood as the right to study where/what/how as guarantee to the formation of independent critical thinking. This distinction reflects the traditional rights of

Germany, Presentation at the Conference on Commercialisation and Competition in Education 20–21 November, Antwerp; A. MUNGIU-PIPPIDI, *Assessing corruption in the Romanian higher education system: The Coalition for Clean Universities*, paper presented to the closed workshop on corruption in education.

⁶⁵ L. SONDERGAARD *et al.*, 'Skills, not just diplomas. Managing Education for Results in Eastern Europe and Central Asia', Chapter 5, World Bank, 2012: http://siteresources.worldbank.org/ECAEXT/Resources/101411_FullReport.pdf.

⁶⁶ *Ibid.*, p. 154.

⁶⁷ See survey results in A. MUNGIU-PIPPIDI, "Understanding Balkan Particularism. The Ambiguous Social Capital of South-eastern Europe", *Journal of Southeast European and Black Sea Studies* Vol. 5, No. 1, January 2005, Taylor & Francis, London, pp. 45–65; A. MUNGIU-PIPPIDI, Civil Society and Control of Corruption: Assessing Governance of Romanian Public Universities, *International Journal for Education Law and Policy*, 2011, issue 1–2, p. 41–58; J. HALLAK and M. POISSON, "Academic fraud, accreditation and quality assurance: learning from the past and challenges for the future" in *Higher education in the world 2007. Accreditation for quality assurance: what is at stake?* Global University Network for Innovation (GUNI), 2006.

freedom of providing education, the freedom of receiving education, the freedom to carry out scientific research, respectively the freedom of the academic, the student, the researcher.

The concept can be applied more widely insofar as academic freedom can be invoked for the application of academic criteria and procedures for policy choices in sciences or in a comparative selection procedure such as those used in science projects; the priority, or even the exclusivity, of assessment/evaluation by peers seems to be the consequence of academic freedom. More generally, academic freedom also imposes limits on the economic approach of universities and science, on the modern pattern of quantification, the pressure for efficiency and competitiveness. Reflections on academic freedom justify rereading the vision of J.H. NEWMAN'S *The Idea of a University*⁶⁸, and his ideas about 'liberal education' placed versus the 'commercial' or 'professional education'. Academic freedom further reflects the concern to recalibrate constantly the mission and the character of the university.

The concrete interpretation by each of the holders of academic freedom however is not uniform. The university, as guardian of development of science, freedom of education and public service, should in this sense protect the intellectual independence of each academic. Academic freedom guarantees individual academics rights within and with respect to their institution. The scope of this guarantee and protection is hardly known.

The 1940 Statement of Principles on Academic Freedom and Tenure, cited earlier, declares: "Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment."⁶⁹

Research into the concept of academic freedom shows the relationships between the holders of the rights. Academic freedom thereby competes with the '*freedom of education*' as interpreted by the Belgian Constitutional Court and Council of State.⁷⁰

In sum, it seems particularly relevant to focus within each institution on the debate on the loyalty to the mission of the institution and the importance and impact thereof with respect to the academic community. Such reflection appears

⁶⁸ 1852, also his *Sermons before the University of Oxford*, 1843.

⁶⁹ 1940 *Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, p. 3 (own emphasis).

⁷⁰ J. DE GROOF, "Het onderwijs is vrij" (art. 24 §1, al. 1 Gw.). *Zienswijzen van het Arbitragehof en van de Raad van State omtrent de onderwijsvrijheid* in *Tijdschrift voor Onderwijsrecht en Onderwijsbeleid*, 2006-07, nr. 2-3-4, p. 124-167.

vital in order to articulate certain values, and refine more closely mutual legal relationships. Immanuel KANT, in *Der Streit der Fakultäten*⁷¹ already refers to the mutual conflicts of academics in the bosom of the university: "And so the theologians have the duty, and thereby also the authorization, to uphold faith in the Bible. But they must do so without impairing the freedom of the philosophers to subject this faith continually to the critique of reason."

V. THE PARADOX OF ACADEMIC FREEDOM

Positive legislation in Belgium is particularly sober and reluctant to enact an expressly sanction violations of the principle of academic freedom. The principle is implicitly embedded in legislation and often explicitly in internal institutional legal frameworks.

The international norms on academic freedom are also sparse. Article 15 §3 of the International Covenant on *Economic, Social and Cultural Rights* of 19 December 1966 requires that States respect the freedom indispensable for scientific research and creative activity. The Supreme Court of Belgium ruled that this article does not have any immediate effect can be assigned to that article.⁷² Article 19.2 of the International Covenant on *Civil and Political Rights* of 19 December 1966 includes academic freedom under the article on the freedom of expression as 'Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds.' In the same line, the Article 9.1 and 10.1 of the European Convention on Human Rights and Fundamental Freedoms of November 4, 1950, limit itself to the 'passive' reading of freedom and as a mere application of the freedom of thought and freedom of expression.

Article 13 of the *Charter of Fundamental Rights of the European Union* seems to treat the arts and the academic freedom as an autonomous and specific freedom. Article 13 "*Freedom of the arts and sciences*" stipulates: "The arts and sciences research shall be free of constraint. Academic freedom shall be respected." The notion of 'respect' offers not immediately the most extensive protection, but case law will have to clarify its degree of enforceability.⁷³

The explicit inclusion of the principle of academic freedom made the principle a common value of the EU, and by extension, for universities. The *Bologna Process* anchored rightly the notion in almost any policy. The second generation of

⁷¹ 1798.

⁷² Cass. 25 September 2003.

⁷³ "Charter of fundamental rights of the European Union", *Pb.C.* 2010/83/02 d.d. 30 March 2010.

higher education legislation after Bologna, should be evaluated on the basis of this principle.

Comments still describe academic freedom as an 'extension' of the aforementioned freedoms mentioned in article 9.1 and 10.1 of the ECHR. "This right is deduced primarily from the right to freedom of expression and thought"⁷⁴ and apply the limitation, as stated in article 9.2 and 10.2. – without any reserve – also to academic freedom.⁷⁵ We who? Earlier you used I; be consistent argued that the differences between the limitation-doctrine vis-à-vis the freedom of expression on the one hand and the freedom of education on the other hand lead to confusion. The limitation grounds are also associated with the principle of 'human dignity', as expressed to the article 1 of the Charter on human dignity⁷⁶ and with respect to the ethical dimensions of scientific research.

Artistic and academic freedom are named in the same breath with the aforementioned Charter and the European Constitution. This should not be surprising: both history and characteristics are similar and so seems their legal enforceability. Case law of the ECtHR (spell out: not used before) is hard to find.⁷⁷ Both their relevance to a democratic society is repeatedly postulated. More, both are as explicit for the trend of the EU as a '*Community of law*' to a '*Community of values*' – 'within a European identity which also has a chance to develop'.⁷⁸

The fact that the ECHR explicitly added a number of fundamental rights to the list of rights and freedoms which previously were designed by the 'Praesidium' of the Convention, and that the freedom of research was not included⁷⁹, reinforces the ethical vigour and the enforceability of academic freedom.

By way of contrast, abundant are the '*Guidelines*' issued by UNESCO, the Council of Europe and the EU.⁸⁰ The UNESCO '*Recommendation concerning the Status of Higher-Education Teaching Personnel*' include 'principles of self-

⁷⁴ Charte 4473/00, *Explanatory memorandum*, ket/GBK/jrb, EN, p. 15.

⁷⁵ Cf. *Explanatory memorandum*, *ibid.*

⁷⁶ See *supra*.

⁷⁷ *Muller and others v. Switzerland*, 24 may 1988, specially §27 and 33; *Gouda and others v. Commissariaat voor de Media*, 25 July 1991, case C-288/89, §22, 23 and 27.

⁷⁸ E.g. *Official Journal C 367*, 20/12/2000 P. 0026–0031: "A Charter of Fundamental Rights based on ethics, moral standards and solidarity does not merely codify rights and duties, it also represents a common set of values."

⁷⁹ Commission of the European Communities, *Commission Communication on the Charter of Fundamental Rights of the European Union*, COM(2000) 559 final, p. 6.

⁸⁰ Including UNESCO's 1997 Policy Recommendation Concerning the Status of Higher Education Teaching Personnel, Charter of Fundamental Rights of the European Union, CoE 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, etc.

governance and collegiality⁸¹, but also the 'duties and responsibilities'⁸², labour agreements and academic status.⁸³ Other international and multilateral institutions influence academic freedom in an indirect way. The Council of Europe adopted the following declaration for the protection of academic freedom of expression:

"4. In accordance with the Magna Charta Universitatum, the Assembly reaffirms the right to academic freedom and university autonomy which comprises the following principles:

4.1. 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;

(...)

4.3. history has proven that violations of academic freedom and university autonomy have always resulted in intellectual relapse, and consequently in social and economic stagnation."⁸⁴

Scientific research and technological development, further developed by the Maastricht Treaty, fall within the competence of the EU: Articles 179–190 of the Treaty on the Functioning of the European Union. The *Framework Programmes* refer to autonomy and academic freedom.

A comparative study could be conducted about the interpretation of academic freedom in national law to examine a 'common constitutional principle' within the EU framework.⁸⁵ A series of non-EU countries gave academic freedom a prominent place in their constitutions. This is, as noted, especially true for the young democracies.⁸⁶ The example of South Africa is a characteristic example.⁸⁷ Some national guidelines, as explicitly stated in the university system in the UK, Scotland, Quebec, Denmark and Ireland, explicate the principle.⁸⁸ Also relevant is the reference to the description by *Ex Corde Ecclesiae* the Apostolic Constitution of academic freedom, as applied to the Catholic universities.⁸⁹

⁸¹ Para. 31–32.

⁸² Para. 33 ff.

⁸³ Para. 40–72.

⁸⁴ Parliamentary Assembly Council of Europe, *Recommendation 1762 (2006): Academic freedom and university autonomy*, Text adopted by the Assembly on 30 June 2006 (23rd Session).

⁸⁵ E.g. The AAUP reports, on the latest *Protecting an independent Faculty Voice: Academic Freedom after Garcetti v. Ceballos*, November–December 2009, www.aaup.org.

⁸⁶ Cf. J. DE GROOF, "The freedom of teachers. Some notes" in J. DE GROOF en R. MALHERBE, *Human Rights in South African Education. From the Constitutional Drawing Board to the Chalkboard*, Leuven, 1997, p. 295–314.

⁸⁷ *Ibid.*

⁸⁸ F. HENARD, *Governance as a Tool to Improve Quality in Higher Education? A review of governance arrangements and quality assurance guidelines*, OECD, specially p. 55 ff.

⁸⁹ VATICAN COUNCIL II, "Pastoral Constitution on the Church in the Modern World *Gaudium et Spes*", n. 59: AAS 58 (1966), p. 1080. See C.J. Russo and D.L. GREGORY (2007), "Ex Corde

VI. DOES AUTONOMY OF ACADEMIC FREEDOM REQUIRE A STATUTORY BASIS?

Contrary to the Magna Charta group⁹⁰, a definition of academic freedom is mostly lacking in the positive law. The question whether the protection of academic freedom requires a legislative initiative, is often raised, but hesitation seems appropriate⁹¹ because the principle has been recognised in international law and guidelines of the European Union (EU). It is up to the institutions themselves to define the scope. Are national regulations needed?

Notwithstanding that academic freedom is not laid down in their Constitutions, some countries grant academic freedom a quasi-constitutional power, as in the case of France: "*L'indépendance des professeurs d'université est un principe de valeur constitutionnelle qui se déduit tant de l'article 11 de la Déclaration de 1789 que des principes fondamentaux reconnus par les lois de la République.*"⁹²

The Dutch legislature considered the need to integrate the principle of academic freedom into positive law, but a detailed description – if at all possible – can lead to rigidity and literalism. "Therefore we prefer the law to give a general description of the scope to common situations." "We consider the mentioned freedom so fundamental that it is contained in the General Provisions."⁹³

Nevertheless, widely divergent opinions did exist and the universities were definitely not the requesting parties. In the light of actual and future common Dutch/Flemish rules on accreditation⁹⁴ a uniform reference to academic

Ecclesiae and American Catholic Higher Education: The Calm Before the Storm or Dead in the Water?", *Journal of Personnel Evaluation in Education*, Vol. 19, No. 3, 147–158.

⁹⁰ *Bologna Magna Charta Universitatum*, 1988.

⁹¹ *Contra*: J. BAERT, "Academische vrijheid, juridisch bekeken" in *Ad amicissimum amici scripsimus. Vriendenboek Raf Verstegen*, Brugge, 2004, p. 21: "Het uitdrukkelijk in de wet opnemen van dergelijke bepalingen is van belang, want de academische vrijheid is slechts een door de wetgever uitgevaardigd juridisch afdwingbaar recht voor zover ze uitdrukkelijk als dusdanig wordt erkend."

⁹² 83–165 DC, 20 janvier 1984, *Journal Officiel* du 21 janvier 1984, p. 365, cons. 17 à 28, *Rec.* p. 30; 93–322 DC, 28 juillet 1993, *Journal Officiel* du 30 juillet 1993, p. 10750, cons. 7, *Rec.* p. 204: "One of the rare judgments in France described the principle of academic freedom as follows: "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."

⁹³ Second Chamber, *ibid.*, p. 50.

⁹⁴ J. DE GROOF and F. HENDRIKS, "Accreditatie in het hoger onderwijs in Vlaanderen en Nederland", *Tijdschrift voor Onderwijsrecht en Onderwijsbeleid*, 2005–06, nr. 4–5, p. 247–356.

freedom should be a preferential option, including the proportionality criterion in case of government intervention.⁹⁵

Leading historical research demonstrates that the solemn proclamation of the freedom of universities may be accompanied by regulations that leaves wide scope to limit the freedom: "To legitimize prevention and repression, the supervisory authorities, especially governments, first increased legislation, frequently contravening the content or the universities' founding charters and the traditions of higher education since the Middle Ages."⁹⁶

A more fruitful approach, rather than promulgate a specific legal prescription, may consist of a critical screening of laws and regulations on their compatibility with regard to academic freedom, above all with regard to those matters which directly or indirectly are linked to the core mission of the university and the academic community.

VII. FINAL REMARKS

European universities have their roots in *civic society*, one that was gradually controlled by the State and became, in a certain sense, characterized as 'state organs' that are not immune to the 'market' of which they became, in some respects, a part of. This development is in line with the diversification of the mission of universities which reinforces their hybrid character.

If the assertion that universities do not respond appropriately to the versatile and contemporary social crisis and if they seem to be a part of this crisis as well⁹⁷, then they must bear witness to their true mission, remain places of free and independent thought. The university should be the place where diversity is pursued instead of uniformity and conformity along with promises to transcend the division into disciplines into a new synthesis.

G. NEAVE writes: "Bearing in mind that for the past thirty years the tendency to transform the truth value of knowledge into the market truth value of knowledge

⁹⁵ See also our contribution "Recht en beleid ten behoeve van een gemeenschappelijke (hoger) onderwijsruimte der Lage Landen?" in P. ZOONTJENS and H. PETERS (red.), *Getuigend Staatsrecht; Liber Amicorum A.K. Koekkoek*, Nijmegen, Wolf Legal Publishers 2005.

⁹⁶ P. GERBOD, "Relations with authority" in W. RÜEGG, *A history of the university in Europe, Volume III Universities in the nineteenth and early twentieth centuries (1800–1945)*, Cambridge University Press, Cambridge, 2004, p. 94.

⁹⁷ Cf. brilliant argument BOAVENTURA DE SOUSA SANTOS, *The European University at crossroads*, opening speech for the XXII birthday of the "Magna Charta Universitatum", Bologna 16 September 2006.

has become increasingly strong, could there be any future for non-conformist, critical, heterodox, non-marketable knowledge, and for professors, researchers and students pursuing it? If yes, what will be its impact upon the criteria of excellence and inter-university competitiveness? If not, can we still call university an institution that only produces competent conformists and never competent rebels, and that only regards knowledge as a commodity and never as a public good?"⁹⁸

Be that as it may, universities will only realize their missions if they agree guaranteed a maximum degree of independence, an unlikely circumstance in a servile 'public service' setting. Academic freedom finds itself in the heart of this autonomy and transcends the State, the market, and civil society. Only then can universities be considered as the opponents of the economic, financial, environmental and energy crisis, and seek positive solutions for social conflicts, terrorism and insecurity, migration and other social challenges.

"Progress is shaped by the ability to question, criticize and to enquire. Ensuring progress is one of the Responsibilities of academia."⁹⁹

On the 5th of April 2011 an appeal of teachers and researchers, coordinated by the university of Fribourg, was launched on the "renewing the research and teaching in finance, economics and management to better serve the common good".

The authors of this appeal were deeply concerned that more than three years since the outbreak of the financial and macroeconomic crisis that highlighted the pitfalls, limitations, dangers and responsibilities of main-stream thought in economics, finance and management, the quasi-monopolistic position of such thought within the academic world nevertheless remains largely unchallenged. This situation reflects the institutional power that the unconditional proponents of main-stream thought continue to exert on university teaching and research. This domination, propagated by the so-called top universities, dates back at least a quarter of a century and is effectively global. However, the very fact that this paradigm persists despite the current crisis, highlights the extent of its power and the dangerousness of its dogmatic character. Teachers and researchers, the signatories of the appeal, assert that this situation restricts the fecundity of research and teaching in economics, finance and management, diverting them as it does from issues critical to society:

⁹⁸ *Ibid.*

⁹⁹ G. NEAVE, *Autonomy, Social Responsibility and Academic Freedom*, Unesco/IAU, Parijs, 1998.

“(3) Professors, lecturers and researchers have been entrusted by society with the task of serving the society through their search for a better understanding of reality. Only in this context does academic freedom have a real meaning. Such freedom entails a responsibility and not a mere license. Today the major priorities for research in finance, economics and management should be to examine their foundations as well as the implications of these foundations for practice in light of the events that led to the financial crisis. Only on the basis of such an examination will it be possible to design policies and remedies which lead to a balanced functioning of the economy.”

(4) The present situation requires the opening of the disciplines of economics, finance and management to a fundamental questioning, free of the trammels of the dominant conceptual framework, which is required for their regeneration. However, such efforts face strong resistance within the academic world and must therefore seek external support. Affirmation of the need of the disciplines of economics, finance and management for plurality of approaches entails debate concerning these disciplines' epistemological, ethical and anthropological foundations.”¹⁰⁰

The need for academic freedom seems to be more tense than ever.

Post Scriptum

Christian DE DUVE, 1974 Nobel Prize for Physiology or Medicine, passed away on 4 May 2013. On 13 April 2013 Prof. DE DUVE emailed the author of this contribution the following text:

“De mon temps, la pratique de la science reposait implicitement sur la notion d'objectivité, de rigueur et d'intégrité intellectuelle. Il était admis que tous les chercheurs se conformaient à ces principes. Mais il y a toujours eu des exceptions. Le plus souvent, les scientifiques ont fait 'le ménage'...”

¹⁰⁰ This appeal with the identity authors is accessible on line in different linguistic versions (the original is in French) at the website of the “Observatoire de la Finance”, Université de Fribourg (Switzerland) (www.obsfin.ch/) and on the blog www.responsiblefinance.ch/.