

SPECIAL ISSUE ARTICLE

ACADEMIC FREEDOM: CONCEPTUALISATIONS, CONTESTATIONS AND
CONSTITUTIONAL CHALLENGES

Academic freedom in Europe: Limitations and judicial remedies

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Abstract

Europe has recently struggled with democratic backsliding and autocratization. This autocratization has accompanied a decline in academic freedom in many backsliding countries, as reported by the Academic Freedom Index. Can the standards set by the European supranational courts effectively safeguard academic freedom? This article provides answers to this question. It argues that despite differences in their approaches, the theoretical conceptions of scholarship held by the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (ECJ) share an essential feature: both have moved towards embracing the ‘liberal science script’ by protecting academic freedom. The main difference between the two courts’ approaches is the subject of protection. The ECtHR focuses on the individual rights of academics: It protects free speech in the academic context by establishing a high standard for holding academics liable for publicly expressing their views inside and outside of academia. The ECJ has applied the concept of institutional autonomy, thereby setting a high standard for safeguarding the freedom of academic institutions. This standard can be applied with regard to the demands placed by policy-makers on academia regarding its role in democracy, including gender equality requirements for EU research funding.

Keywords: academic freedom; EU Charter of Fundamental Rights; European Convention on Human Rights; free speech in the academic context; limitations of scientific research

Introduction

Following the big waves of democratization after World War II and the fall of communism, Europe¹ has been grappling with democratic backsliding and autocratization.²

¹The first part of this article focuses on the larger Europe of the Council of Europe with its 46 member states. This Europe also included Russia. On 15 March 2022, because of the Russian invasion of Ukraine, Russia ceased to be a member of the Council of Europe. The second part focuses on the European Union (EU). The 27 EU member states are all members of the Council of Europe.

²For a political science account, see D Ziblatt and S Levitsky, *How Democracies Die?* (Harmondsworth: Penguin, 2019) and N Bermeo, ‘On Democratic Backsliding’ (2016) 27(1) *Journal of Democracy* 5, and for an

According to the Academic Freedom Index, many European countries experiencing autocratization are facing a decline in academic freedom.³ This has been particularly evident in Hungary, Poland⁴ and Turkey.⁵ Recently, legal challenges by plaintiffs seeking protection for academic freedom have been brought before the European supranational courts. The retrenchment of academic freedom in Turkey prompted a great number of Turkish scholars to turn to the European Court of Human Rights (ECtHR)⁶ after they were dismissed from their universities for signing the ‘Academics for Peace’ petition.⁷ The application of the Central European University (CEU), which was expelled from Hungary, prompted the Court of Justice of the European Union (ECJ) to engage with Article 13 of the European Union Charter of Fundamental Rights (Charter) on academic freedom for the first time.⁸

Notwithstanding these developments, academic freedom is not yet high on these European supranational courts’ agendas. In general, the ECtHR accords particular importance to freedom of expression,⁹ protected by Article 10 of the European Convention on Human Rights (ECHR), and the case law treats academic freedom as a manifestation of the right to freedom of expression. However, academic freedom is relatively under-explored in the ECtHR’s jurisprudence.¹⁰ Furthermore, in 2021 the ECtHR launched its new case-processing strategy, which gives preferential treatment to so-called ‘impact’ cases – that is, cases that might lead to a change in law, that touch upon moral or social issues or that deal with significant human rights issues.¹¹ Academic freedom cases – for instance, the

account of constitutional theory, see GA Tóth ‘Legal Preconditions for Democracy’ in RJN Schlössels, JJJ Sillen and RBJ Tinnevelt (eds), *Naar een weerbare rechtsstaat* (Amsterdam: Wolters Kluwer, 2022) 41.

³L Pelke, ‘Academic Freedom and the Onset of Autocratization’ (2023) 30(6) *Democratization* 1015, 1015–16. The following empirical analysis also proves that democratization has a positive effect on academic freedom: N Berggren and C Bjørnskov, ‘Political Institutions and Academic Freedom: Evidence from Across the World’ (2022) 190(1–2) *Public Choice* 205.

⁴Under the PiS (Law and Justice) Party’s governance, from 2015 to 2023.

⁵See especially Figures 2 and 3 in K Kinzelbach et al., ‘Academic Freedom Index – Update 2023’ (2023), FAU Erlangen-Nürnberg and V-Dem Institute, <<https://doi.org/10.25593/opus4-fau-21630>>. These figures show that Hungary, Poland and Turkey are countries with substantial, statistically significant decreasing cases of academic freedom over the past decade. See also K Roberts Lyer, I Saliba and J Spannagel, *University Autonomy Decline* (London: Routledge, 2022). This article does not address the specific causes (e.g. historical, social or cultural) and the difficulties (e.g. introducing a managerial management model, concerns about journal rankings) faced by these countries face when implementing academic freedom. For such an analysis, see G Kovats and Z Ronay, *Academic Freedom in Hungary* (Vienna: OSUN Global Observatory on Academic Freedom at the Central European University, 2021) M Stachowiak-Kudła, ‘The Scope of Academic Freedom Right and the Situation of Scientists in Poland’ (2022) 53 *Interchange* 99–111.

⁶The ECtHR does not provide statistics on the number of cases that involve academic freedom. Its 2021 factsheet on free speech does not mention academic speech as an issue that concerns the court. Yet on 12 July 2021, the ECtHR communicated that 43 applications were submitted to the court by 73 Turkish academics who were dismissed in 2016 and 2017 (See *Kamuran Akin v Turkey* and 42 other applications, Appl No 72796/16).

⁷The petition, titled ‘We Will Not Be a Party to This Crime!’ (11 January 2016), questioned the Turkish Government’s involvement in the conflict in South-East Turkey, as well as the associated severe human rights violations that resulted from it. It urged Turkey to end curfews and military operations in Kurdish settlements. See <<https://barisicinakademisyenler.net/node/63>>.

⁸Case C-66/18, *European Commission v Hungary*, 6 October 2020.

⁹In this article, I use the terms ‘speech’ and ‘expression’ interchangeably.

¹⁰H Duffy and P Leach, Written Submissions on Behalf of the Third Party Interveners, para 3, <<https://www.echrblog.com/2021/12/academic-freedom-in-turkey-before.html>>.

¹¹This is how the ECtHR explains the criteria to identify ‘impact cases’. European Court of Human Rights, ‘“A Court That Matters”: A Strategy for More Targeted and Effective Case-Processing’, 17 March 2021, <https://www.echr.coe.int/Documents/Court_that_matters_ENG.pdf> 1.

above-mentioned Turkish cases – did not receive such priority status.¹² This is despite the fact that the ECtHR faces ethical and moral issues in academic freedom cases¹³ and the precariousness of academic freedom is a matter of serious concern, not only in Turkey but also in other European states.¹⁴

Likewise, the ECJ case law on academic freedom is not yet well developed. Article 13 of the Charter codified the freedom of scientific research and academic freedom for the first time within the European context.¹⁵ However, until recently there was virtually no case law on academic freedom in EU law.¹⁶ It is only since October 2020, with the ECJ judgment on the expulsion of CEU from Hungary,¹⁷ that relevant case law on academic freedom has been available.¹⁸ Hence, academic freedom has seemingly had a somewhat precarious standing in European jurisprudence because the two European courts have only recently begun addressing academic freedom.¹⁹

¹²The ECtHR's lack of attention to the issue of academic freedom with regard to prioritization of pending cases was criticized by B Çalı and E Demir-Gürsel, 'A Court That Matters' to Whom and for What? Academic Freedom as a (Non-)Impact Case', *Strasbourg Observers*, 11 June 2021, <<https://strasbourgobservers.com/2021/06/11/a-court-that-matters-to-whom-and-for-what-academic-freedom-as-anon-impact-case/>>.

¹³J Laffranque, 'A Look at the European Court of Human Rights Case Law on Moral Issues and Academic Freedom' (2017) *Juridica International* 26, 42.

¹⁴European Parliamentary Research Service Scientific Foresight Unit, *State of Play of Academic Freedom in the EU Member States. Overview of the De facto Trends and Developments* (Brussels: EU, 2023) <[https://www.europarl.europa.eu/stoa/en/document/EPRS_STU\(2023\)740231](https://www.europarl.europa.eu/stoa/en/document/EPRS_STU(2023)740231)>.

¹⁵S Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (Oxford: Hart, 2014) 13.01.

¹⁶C Vedder and W Heintschel von Heinegg (eds) *Europäisches Unionsrecht. Handkommentar* (2nd ed, Baden-Baden: Nomos, 2018) 1340.

¹⁷*European Commission v Hungary* (n 8) point 3.b).

¹⁸For a detailed description of the case, see Zs Enyedi, 'Democratic Backsliding and Academic Freedom in Hungary' (2018) 16(4) *American Political Science Association* 1067.

¹⁹It is telling that neither the commentary of the ECHR nor the comprehensive book on EU law addresses academic freedom. B Rainey, P McCormick and C Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights* (Oxford: Oxford University Press, 2017); P Craig and G de Búrca, *Evolution of EU Law* (Oxford: Oxford University Press, 2021). The 129-page-long guide on Article 10 of the ECHR devotes two sentences to academic freedom. See *Guide on Article 10 of the European Convention on Human Rights*, 30 April 2021, <https://echr.coe.int/Documents/Guide_Art_10_ENG.pdf>, 44, 73. Two other commentaries dedicate only a short paragraph to this issue. C Grabenwarter, *European Convention on Human Rights: Commentary* (Helbing Lichtenhahn: CH Beck-Hart-Nomos, 2014) 259; U Karpenstein and FC Mayer, *Konvention zum Schutz der Menschenrechte und Grundfreiheiten* (2nd ed, Munich: CH Beck, 2015) 319. There is only one commentary that discusses academic freedom at length: K Pabel and S Schmahl, *Internationaler Kommentar zur Europäischen Menschenrechtskonvention* (Cologne: Carl Heymanns, 2013) 85. Likewise, academic freedom as a European legal concept has hardly been discussed in periodical literature. For instance, the otherwise comprehensive article of KD Beiter, T Karran and K Appiagyei-Atua looks at the European state performances with regard to academic freedom. KD Beiter, T Karran and K Appiagyei-Atua, 'Academic Freedom and Its Protection in the Law of European States' (2016) 3 *European Journal of Comparative Law and Governance* 254. Terrence Karran's article examines the compliance of EU universities with the UNESCO Recommendation. T Karran, 'Academic Freedom in Europe: Reviewing UNESCO's Recommendation' (2009) 57 *British Journal of Educational Studies* 191. Furthermore, the influential works on academic freedom mostly discuss certain European jurisdictions. Eric Barendt's seminal book discusses the relevant court decisions in three jurisdictions: the United Kingdom, Germany and the United States. E Barendt, *Academic Freedom and the Law: A Comparative Study* (Oxford: Hart, 2010). A rare exception is the book chapter on the European dimension of freedom of science. See G Demuro, 'Science and the European Dimension of Freedom of the Arts and Science' in M Seckelman et al (eds), *Academic Freedom Under Pressure? A Comparative Perspective* (Berlin: Springer, 2021).

The ECtHR hears complaints from individuals; however, it is not possible for individuals to directly appeal to the ECJ. Cases involving individuals or groups of individuals may only be brought before the ECJ through domestic courts or the European Commission. This also has an impact on the nature of cases involving academic freedom. In the ECtHR jurisprudence, academic freedom takes the form of an *individual* claim. In the ECJ jurisprudence, academic freedom takes the form of an *institutional* claim.

Yet, although there are differences in their approaches to academic freedom cases, both courts are moving towards embracing the 'liberal science script'. In the Introduction to this special issue, Janika Spannagel and I differentiate between liberal and illiberal science scripts. The concept of the liberal science script refers to the intersection of liberalism and science. This article understands liberalism as the political ideal that emphasizes equal human rights to all and democracy in public affairs and promotes meritocracy in culture (art and science). In the liberal science script, science uses critical thinking, serious and systematic inquiry and knowledge transfer to progressively further our understanding of the natural world and human affairs. This requires 'a system of ideas and institutions that creates a culture of individual intellectual responsibility',²⁰ including individual freedom in scientific inquiry as advocated by scholars from Immanuel Kant²¹ through Condorcet²² to John Stuart Mill²³ and from Michael Polanyi²⁴ to Karl Popper,²⁵ as well as the autonomy of academic institutions.

The liberal science script advocates for *the freedom of science*. The freedom of science encompasses the right to science and academic freedom. The right to science is a human right that applies to every human being to pursue knowledge.²⁶ By contrast, academic freedom is the professional freedom of those who engage in scientific activity. It includes freedom of scientific research, the free transmission of the research outcome and the autonomy of an academic institution.²⁷ An institution can be called academic if it aims to produce new scientific knowledge open to scientific criticism in a way that conforms to academic standards. Thus, an academic institution – such as the university or the institution of scholarship more generally – is a place where reflection takes place guided by some idea of the pursuit of truth, which it does for its own sake, at least to some extent.

In the liberal science script, academic freedom can legitimately be limited by the fundamental rights and freedoms of others (for instance, the right to bodily integrity), ethical considerations (as in the case of cloning) or clearly defined countervailing public interests (such as public health). Yet the *limitations* should be unavoidably necessary in all

²⁰R Dworkin, 'Why Academic Freedom?' in *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press, Cambridge, 1996) 244, 248.

²¹I Kant, *Kritik der reinen Vernunft* (1787).

²²See Condorcet's 'zeal for the truth': Condorcet, 'On Human Progress' (1995) 21(1) *Population and Development Review* 153, 157.

²³JS Mill, *On Liberty* (Ontario: Batoche, 2001) 35, 44, 98–99.

²⁴M Polanyi, *Science, Faith and Society* (Chicago: University of Chicago Press, 1964) 7, 15.

²⁵K Popper, *The Logic of Scientific Discovery* (London: Routledge, 2005) xix. Stanley Fish also points out that the task of the academic is to question existing knowledge rather than adhere to already established truths. S Fish, *Versions of Academic Freedom: From Professionalism to Revolution* (Chicago: University of Chicago Press, 2014) 50. Bromwich reaches the same conclusion, though he justifies it by arguing that 'unregulated markets are self-correcting'. D Bromwich, 'Academic Freedom and Its Opponents' in A Bilgrami and JR Cole (eds), *Who's Afraid of Academic Freedom?* (New York: Columbia University Press, 2015) 27.

²⁶For more on this aspect, see Katrin Kinzelbach's article in this special issue.

²⁷See Figure 1 in the Introduction to this special issue.

these cases and narrowly tailored to achieving a compelling interest. The liberal science script, and with it a liberal notion of academic freedom, lies between *two illiberal extremes*. It is demarcated by two versions of the illiberal script: one in which science is subservient to political and economic demands and another in which academic freedom has no limits.²⁸

This article engages in a discussion about how the boundaries of academic freedom are drawn within the liberal science script. It does so by analysing the relevant leading cases heard by the ECtHR and the ECJ and presenting the standards these courts apply when faced with academic freedom contestations. The research method applied in this article is to engage in a doctrinal analysis of the two European supranational courts' leading case law on issues of academic freedom, including academic speech, academic professional standards and institutional autonomy. The article does not attempt to present the relevant case law in an encyclopaedic or chronological manner; instead, it aims to reconstruct the underlying theoretical conceptions of scholarship adopted by the ECtHR and the ECJ.

The next section of this article focuses on the *individual aspect* of academic freedom, with the aim of elucidating how the ECtHR has conceptualized academic freedom under Article 10, the ECHR's freedom of expression clause. European authoritarian regimes have recently taken legal action against scholars for publicly expressing views outside of academia.²⁹ The example mentioned in this article's introduction is the dismissal of Turkish academics who signed the 'Academics for Peace' petition. The article examines what follows from ECtHR practice in this case. Does the ECHR protect the academic freedom of scholars to express their views beyond academia?

The article then turns to the *institutional aspect* of academic freedom by asking how many demands policy-makers can place on academia regarding its role in democracy. The example used by the article is the gender equality requirement in EU research funding. EU institutions are committed to gender equality, yet there are certain member states that have expressed dissatisfaction with it. The Hungarian Fidesz government and the Polish PiS government accused the EU institutions of bias and objected when EU institutions identified gender equality as one of the EU's foundational principles. Hungary's right-wing parliamentary majority approved laws to ban gender perspectives in education and research.³⁰ In Poland, under the PiS government, MPs and ministers called for a ban on gender studies at universities.³¹ At the same time, when these states claimed EU financial support for projects that they prioritized, they cited, among other things, academic freedom.³² Hence, the following section of the article analyses the standards developed by the ECJ to address these challenges.

²⁸See Figure 2 in the Introduction to this special issue.

²⁹See, for example, the case of Wojciech Sadurski in J Morijn, *The Plaintiff Who turned into a Prosecutor* (2020), <<https://doi.org/10.17176/20201007-004738-0>>. On the precarious situation of scholars in Hungary, see Zs Körtvélyesi, 'Academia' in Z Fleck *et al* (eds), *The Changes Undermining the Functioning of a Constitutional Democracy* (Paper VII) (Brussels: European University Institute), <<https://cadmus.eui.eu/handle/1814/74524>>.

³⁰Humán Platform (ed), 'Hungary Turns Its Back on Europe: Dismantling Culture, Education, Science and the Media in Hungary 2010–2019' (Budapest, 2020) 39.

³¹See, for example, 'Minister Calls for Ban on "LGBT Ideology" and Gender Studies at Polish Universities and Schools', <<https://notesfrompoland.com/2020/09/10/minister-calls-for-ban-on-lgbt-ideology-and-gender-studies-at-polish-universities-and-schools/>>; interpellation No 26997 of MP Anna Elżbieta Sobeck, <<https://www.sejm.gov.pl/sejm8.nsf/InterpelacjaTresc.xsp?key=B62K3T&view=S>>.

³²See, for example, Case T-115/23 *University of Debrecen v Council of the EU*.

The jurisprudence of the ECtHR: Academics' extramural speech

Does the ECHR guarantee academic freedom?

The question arises because the text of the ECHR makes *no explicit reference to academic freedom*. The ECHR was formulated in the late 1940s when protecting academic freedom in constitutional documents was not fashionable. At that time, only a handful of constitutions mentioned academic freedom or university autonomy.³³ Moreover, British legal experts made a substantial contribution to the drafting of the ECHR, and in the United Kingdom academic freedom was protected until the late 1980s only as a matter of convention and practice.³⁴ This may be the reason why the text does not explicitly mention academic freedom. However, this does not mean the ECtHR does not protect academic freedom at all.

The ECtHR jurisprudence treats academic freedom as a special concern of the freedom of expression clause of Article 10 and calls it the right to *free speech in the academic context*. Does that mean that the ordinary standard established by the ECtHR for holding someone liable for their speech applies to academics, or is there a specific standard for holding academics liable?

Article 10 of the ECHR acknowledges that the right to know is a precondition for freedom of expression; thus, it protects the freedom to receive and impart information and ideas. The situation is *no different in the scientific world*. Here, the freedom to access information on internet platforms constitutes a part of the right to free speech in the academic context.³⁵ The right to receive information plays a vital role in another sense, too. Article 10 protects researchers' right to access original documentary sources – for instance, when granting access is necessary for legitimate historical research.³⁶

Certain aspects of the work of an academic *require special protection*. The freedom of academics to carry out research is one such aspect, and disseminating the result of academic research is another. The ECtHR's case law grants strong protection to conducting research³⁷ and explicitly safeguards the right to publish and disseminate academic findings. For example, in one case the ECtHR held that the historian claimant had the right to impart information even if the disclosed information offended those affected.³⁸ Likewise, the ECtHR found that even doctoral researchers had the right to

³³See Janika Spannagel's article in this special issue.

³⁴It was only in 1988 that the Education Reform Act formulated a statutory right to academic freedom. See Andrés Bernasconi's article in this special issue and Barendt (n 19) 12.

³⁵This is what the court said in the case of *Cengiz and Others v Turkey*, Appl no 48226/10, 14027/11, Judgment of 12 December 2015. The Turkish court blocked the entire YouTube website because it found a handful of pages where videos insulted the memory of Kemal Atatürk, an act criminally prohibited in the country. Law professors turned to the ECtHR, alleging that the blocking order impacted their professional academic activities: they used YouTube to access videos relating to their disciplines and published videos about their academic activities. The ECtHR agreed and held that the blocking of YouTube in Turkey violated the law professors' right to receive and impart information and ideas because they actively used the platform for professional purposes and the blocking order restricted their access to certain information that was not accessible by any other means.

³⁶*Kenedi v Hungary*, Appl no 31475/05, Judgment of 26 May 2009. The Hungarian authorities denied a researcher certain documents regarding the functioning of the Hungarian secret services in the 1960s, but the ECtHR found that the granting of access was necessary for the researcher to publish a historical study.

³⁷*Aksu v Turkey*, Appl no 4149/04, 41029/04, Judgment of 15 March 2012, para 71.

³⁸*Ungváry and Irodalom Kft v Hungary*, Appl no 64520/10, Judgment of 3 December 2013, para 66. The historian publicly disclosed a Constitutional Court judge's previous involvement in the actions of the communist regime directed against a student movement using archival research and based on 'certain uncontested facts with regard to the operation of the State security'.

disseminate their research findings.³⁹ Moreover, the protection of Article 10 extends to the publication of research results that may offend the sensitivities of certain vulnerable group members.⁴⁰ As a result, academics enjoy broader protection of their freedom of speech than do ordinary people, and even some segments of the media.⁴¹ While, under the ECHR case law, political expression can be restricted to protect members of racial minorities – see, for example, the hate speech laws of many European countries – academic freedom trumps these concerns if the work in question is a serious work of scholarship. In such circumstances, Article 10 protects imparting the outcome of serious research even if the otherwise sincere findings may hurt the sensibilities of a vulnerable group. So, the moral distress of even a vulnerable group member alone cannot justify censoring a view that can be presented as an academic work.

Yet academics do not just conduct research and disseminate the results of their research; they often make public statements and comments. The scope of protection within the ECHR's framework depends on whether the academic takes a position inside or outside academia. The right to free speech in the academic context under Article 10 includes *intramural expression* – the freedom to criticize the institution or the system in which the academic works. The two most relevant ECHR cases involve scholars who, at scientific conferences, criticized the operation of their home institutions. In one case, a professor disapproved of how their work in their discipline was evaluated and how the examinations for assistant professors were being administered.⁴² In another case, a professor highlighted the shortcomings in the election procedure for the university's governing body, namely the absence of an open discussion of candidates for the academic senate election.⁴³ In both cases, the ECtHR upheld the scholars' claim by stressing the importance of open discussion concerning the organization of academic life and self-governance.⁴⁴

Yet the Turkish scholars' peace petition mentioned previously was not an intramural statement but a public one. The question is therefore whether this type of statement enjoys the protection of Article 10. In general, Article 10 covers the freedom of *extramural*

³⁹Hence, the seizure of a doctoral thesis-based book addressing the social phenomenon of stardom and focusing on a well-known Turkish pop singer was a violation of Article 10. *Sapan v Turkey*, Appl no 44102/04, Judgment of 8 June 2010.

⁴⁰*Aksu v Turkey* (n 37) The applicant alleged that the book *Gypsies of Turkey* and two connected dictionaries partly funded by the government violated the ECHR by including definitions and expressions that offended his Roma/Gypsy identity. In particular, he referred to the part that provided information about the Roma people's alleged involvement in illegal activities ('thieves, pickpockets, swindlers, robbers, usurers, beggars, drug dealers, prostitutes and brothel keepers'). The ECtHR held that the book was an academic study based on scientific research, not driven by racist intentions. The author did not make negative remarks about the Roma community in Turkey; on the contrary, he contended that Roma had been ostracized and targeted by vilifying remarks based mainly on prejudice: paras 14, 70.

⁴¹In many respects, freedom of the press and academic freedom have similar functions in a democratic society: among others, to allow bottom-up influencing of prioritization of societal goals. Accordingly, the ECtHR's extensive jurisprudence on the freedom of the press by providing a professional right granted to journalists functions similarly to the professional freedom of academics. Yet, the *Aksu* case suggests that academics enjoy broader protection regarding their research. Their freedom to conduct research cannot be limited even by the sensitivities of certain vulnerable groups.

⁴²*Sorguç v Turkey*, Appl no 17089/03, Judgment of 23 June 2009, para 35. The Turkish courts qualified the criticism of the academic system as defamation and ordered the lecturer to pay damages.

⁴³*Kharlamov v Russia*, Appl no 27447/07, Judgment of 8 October 2015.

⁴⁴*Ibid* para 29.

expression – that is, the freedom of an academic to speak outside of academia. However, the scope of protection depends on whether the topic addressed is a matter of public concern and whether the statement itself is within the speaker's expertise.

The ECtHR decision in *Mustafa Erdoğan and Others v Turkey* is the leading case in extramural expression. The applicant, Mustafa Erdoğan, was a constitutional law professor who harshly criticized a Turkish Constitutional Court decision and the judges who delivered this decision in a quasi-academic quarterly.⁴⁵ The professor alleged that the constitutional court judges who had ordered the dissolution of a party did not know the law and that their professional knowledge and intellectual capabilities were insufficient.⁴⁶ The constitutional court members brought separate civil actions against the professor, and the Turkish courts decided that the criticism constituted defamation of the constitutional court members. The ECtHR determined that this was a violation of Article 10, arguing that academics should be able to 'express freely their views and opinions, even if controversial or unpopular, in the areas of their research, professional expertise and competence. This may include an examination of the functioning of public institutions in a given political system, and a criticism thereof.'⁴⁷ So, even if the ideas expressed by the academic are controversial or unpopular, they are protected, provided that the extramural expression involves expressions on matters of public concern within a scholar's discipline and expertise.⁴⁸

The rationale of protecting academic freedom

As seen from the above analysis, the ECtHR gives special protection to academic freedom. What is the rationale for this? The ECtHR usually frames questions of academic freedom in terms of freedom of expression. Does the protection of freedom of expression provide a rationale for the special protection of academic freedom?

In the court's jurisprudence, the case for free speech often takes the form of a *consequentialist* argument: the role of this right is, according to this view, the argument of John Stuart Mill that truth emerges best from a marketplace of ideas from which no opinion is excluded.⁴⁹ Even false views are on the market, and only the free competition of ideas can ensure that no idea can remain untested. Furthermore, another argument is also

⁴⁵*Mustafa Erdoğan and Others v Turkey*, Appl no 346/04, 39779/04, Judgment of 27 May 2014, para 45.

⁴⁶*Ibid* para 12.

⁴⁷*Ibid* para 40. See also *Cox v Turkey*, Appl no 2933/03, Judgment of 20 May 2010. In this case, the ECtHR held that precluding Cox from re-entering Turkey on grounds of her past discussions with students and colleagues on the Kurdish and Armenian questions had been in breach of the ECHR.

⁴⁸Later, the ECtHR confirmed its position in the *Kula* and *Ayuso Torres* cases by finding a violation of Article 10 because university professors who participated in television programs discussing issues of general interest of a political nature were subjects to disciplinary procedures. *Kula v Turkey*, Appl no 20233/06, Judgment of 19 June 2018. In this case, the topic was the cultural structure of the EU and the traditional structure of Turkey. In the Spanish case, the scholar elaborated on the origins of the Spanish Constitution. *Ayuso Torres v Spain*, Appl no 74729/17, Judgment of 8 November 2022.

⁴⁹See, for example, the dissenting opinion of Judge Pinto de Albuquerque and the joint dissenting opinion of Judges Sajó, Lazarova Trajkovska and Vučinić in the judgment in the case of *Mouvement Raëlien Suisse v Switzerland*, Appl no 16354/06, Judgment of 13 July 2012. For more on this, see K Kovács & GA Tóth, 'Standing Upon Stilts: Philosophical Interpretations of the European Convention on Human Rights' in I Motoc, P Pinto de Albuquerque and K Wojtyczek (eds), *New Developments in Constitutional Law* (The Hague: Eleven, 2018) 239. But see J Komárek, 'Freedom and Power of European Constitutional Scholarship' (2021) 17 *European Constitutional Law Review* 422, 432.

present in the ECtHR case law: the argument that free speech aims to ensure a lively, participatory *democracy*; without it, a democratic society could not function. Some judgments conceive of free speech cases also in terms of *deontological* arguments, namely that freedom of expression contributes to the individual's self-fulfilment. For instance, in one case the ECtHR stressed that 'freedom of expression ... constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment'.⁵⁰

Interestingly, though, neither the democracy nor the deontological argument for free speech justifies the ECtHR's claim that academics have a certain professional freedom to speak in the academic context that ordinary citizens do not have. The first argument emphasizes the role of free speech in ensuring a lively democracy; it is essentially an egalitarian argument, 'contending that all citizens have equal rights to contribute to public discourse'.⁵¹ Thus, it does not explain the special protection of academic speech. The same can be said about the argument on individual self-fulfilment. In a democracy based on the principle of equal human dignity, academics do not have a stronger interest in self-fulfilment than everyone else.

Mill's consequentialist argument can provide a rationale for robust intramural discussion and dissemination of research outcomes, but even this argument does not justify the special protection of academics in public discourse or debates in the mass or social media. Furthermore, even the Millian arguments do not explain why Article 10 protects the conduct of research. The act of carrying out research activities is not, by definition, an 'expressive' act,⁵² or at least it is very rarely an expressive act. Often, it involves surveys, experiments or clinical trials. Still, the ECtHR holds that any restriction 'on the freedom of academics to carry out research' should be carefully scrutinized.⁵³

What arguments justify this strong protection? One cannot find a clear answer in the case law because the ECtHR does not give specific reasons why speech in the academic context deserves special protection. Although the judgments often emphasize the importance of academic freedom,⁵⁴ they do not conceive of academic freedom cases in terms of either consequentialist or deontological arguments, and they do not identify the arguments justifying academic freedom. As ECtHR judges rightly state in one of the leading cases' concurring opinions, 'The meaning, rationale and scope of academic freedom are not obvious, as the legal concept of that freedom is not settled.'⁵⁵

Nevertheless, some paragraphs in the relevant ECtHR judgements suggest that the focus on the pursuit of knowledge is present. So, while *prima facie*, the ECHR case law protection is a wide one based on free speech, the protection is narrowed down by linking this freedom to knowledge. For instance, in two cases the court confirmed

⁵⁰ *Lingens v Austria*, Appl no 9815/82, Judgment of 8 July 1986, para 41.

⁵¹ *Barendt* (n 19) 19.

⁵² *Karpenstein & Mayer* (n 19) 319.

⁵³ *Aksu v Turkey* (n 37) para 71; *Mustafa Erdoğan and Others v. Turkey* (n 45) para 40.

⁵⁴ *Sorguç v Turkey* (n 42) para 35. *Hasan Yazıcı v. Turkey*, Appl no 40877/07, Judgment of 15 April 2014. In the latter case, an academic was sanctioned by the Turkish courts for defamation of a prominent academic whom he had accused of plagiarism.

⁵⁵ *Mustafa Erdoğan and Others v Turkey*, joint concurring opinion of Judges Sajó, Vučinić and Kūris, para 4. Likewise, a PACE resolution emphasizes that there is a lack of common conceptual reference on the fundamental values of academic freedom. Council of Europe Parliamentary Assembly Resolution 2352 (2020) Threats to Academic Freedom and Autonomy of Higher Education Institutions in Europe.

that seeking historical truth is integral to freedom of expression.⁵⁶ Likewise, in many academic freedom cases, the ECtHR has referred to the Parliamentary Assembly's recommendation,⁵⁷ which states, among other things, that academic freedom should guarantee freedom to 'distribute knowledge and truth without restriction'⁵⁸ and recommends that the Committee of Ministers work on 'academic freedom and university autonomy as a fundamental requirement of any democratic society'.⁵⁹ These references elucidate that the ECtHR acknowledges that the distinction between speech and academic speech lies in the rationale of academic freedom, which is to enhance our comprehension of the world and human affairs in a way that complies with professional norms and standards.⁶⁰

The ECtHR's conception of scholarship

The ECtHR case law suggests that the court's conception of scholarship follows the 'liberal science script': it is based on the importance of *free and autonomous scholarly inquiry in the pursuit of knowledge*. At the centre of this conception is a critical, independent scholar with particular expertise who, due to their deep engagement and scholarly reflection, has a specific role in unmasking the true nature of things. This scholar pursues knowledge in a manner that conforms to the professional standards of her discipline. That is the case if the scholarship is written or produced otherwise within a complex methodology and research setup and presented to the academic community in a way that corresponds to academic standards.

In the ECtHR's conception of scholarship, the pursuit of knowledge is a protected task for academics. Therefore, academic freedom under the ECHR is not a universal human right in the sense that the protection of academic freedom is not available to every human being. It is the professional freedom of an academic to conduct research and choose a research topic freely. The ECtHR has not yet established a link between this freedom and other provisions of the ECHR. By examining the ECHR closely, it becomes clear that the ECHR is not a 'neutral' document; it is based on liberal democratic values. It is committed to ensuring equal human rights and it obliges member states to adhere to democracy that is based on two pillars: parliamentarism and pluralism.⁶¹ The ECtHR stresses the importance of pluralism in education⁶² and the plurality of opinions in

⁵⁶*Chauvy and Others v France*, Appl no 64915/01, Judgment of 29 June 2004, para 69. *Ungváry and Irodalom Kft v Hungary* (n 38) para 63. Notably, the ECtHR differentiates between 'clearly established historical facts – such as the Holocaust – whose negation or revision is removed from the protection of Article 10 by Article 17' (*Chauvy and Others v France*, para 69.) and those issues that do not belong to this category. In the *Chauvy* case, that was the history of the French Resistance movement and in the *Ungváry* case, it was the operation of the Hungarian communist regime's secret service.

⁵⁷PACE, *Academic Freedom and University Autonomy*, Recommendation 1762 (2006). For more on the Council of Europe's position, see Tanja A Börzel's and Janika Spannagel's article in this special issue.

⁵⁸PACE (n 57) para 4.1. See, for example, *Sorguç v Turkey* (n 42) para 35, *Hasan v Turkey* (n 54) para 55.

⁵⁹PACE (n 57) para 14.

⁶⁰Accordingly, in a concurring opinion, ECtHR judges stress that the democracy argument is not the only argument that justifies the special protection given to academic freedom; another argument is the need to communicate ideas 'for the sake of the advancement of learning, knowledge and science'. *Mustafa Erdoğan and Others v Turkey*, Joint Concurring Opinion of Judges Sajó, Vučinić and Küris, para 5.

⁶¹For more on this, see K Kovács, 'Parliamentary Democracy by Default: Applying the European Convention on Human Rights to Presidential Elections and Referendums' (2020) 2 *Jus Cogens* 237, 242ff.

⁶²*Kjeldsen, Busk, Madsen and Pedersen v Denmark*, Appl Nos 5095/71, 5920/72, 5926/72, Judgment of 7 December 1976, para 50.

public debates.⁶³ It is this pluralism that is required in scientific research, which means, among other things, that academics can conduct research and choose their research topics freely. So, Article 10 gives scholars a secure status as independent inquirers,⁶⁴ irrespective of their focus and field of research.⁶⁵

Regarding academic speech, the ECHR case law protects the academic's right to free expression in the areas of their research, professional expertise and competence, and the right to access the information that is necessary to conduct research. Moreover, the ECtHR jurisprudence enables academics to communicate their views within their research remit both inside and outside of the university's walls. Yet the court does not understand academic freedom as unlimited freedom of the academic to speak publicly on any issue (by using their institutional affiliation as a form of accreditation). Article 10 protects only extramural expressions that involve public matters within the scholar's discipline and expertise. Moreover, the court also acknowledges that when someone claims protection due to academic speech, they must proceed in a scholarly manner.

What does it all mean regarding the Turkish applications?

ECtHR judges put forward a legal standard for extramural speech cases in a concurring opinion. They suggest that the ECtHR should consider: (1) whether the person is academic; (2) whether their public statement falls within the academic's research; and (3) whether the statement amounts to opinions based on their professional expertise. The judges believe the statement must enjoy the utmost protection if these conditions are fulfilled.⁶⁶

Is the claimant an academic?

The case law indicates who can make legitimate claims to exercise academic freedom in particular circumstances. The ECtHR does not perceive free speech in the academic context as a general human right to science; hence, not everyone is entitled to bring an academic freedom case to the ECtHR.⁶⁷ The ECtHR treats academic freedom as *a professional freedom enjoyed by individual scholars*. Therefore, first and foremost, certified members of an academic profession have standing. Yet the ECtHR also acknowledges that scholarly research can be conducted outside the framework of academic institutions.

⁶³ *Handyside v the United Kingdom*, Appl no 5493/72, Judgement of 7 December 1976, para 49.

⁶⁴ On the importance of these aspects, see P Pettit, 'Two Concepts of Free Speech' in J Lackey (ed), *Academic Freedom* (Oxford: Oxford University Press, 2018) 61, 78.

⁶⁵ This conception is similar to that of the German Constitutional Court, which recognizes the freedom of the researcher engaged in scientific activity that, based on its content and form, can be seen as a serious and systematic endeavour to discover what is true. BVerfGE 35, 79 – Hochschul-Urteil 128.

⁶⁶ *Mustafa Erdoğan and Others v Turkey*, Joint Concurring Opinion of Judges Sajó, Vučinić and Kūris, para 8.

⁶⁷ Some scholars argue for defending academic freedom as a human right. See, for example, B Rajagopal, 'Academic Freedom as a Human Right: An Internationalist Perspective' (2003) *Academe* 25, <https://www.files.ethz.ch/isn/47917/Academic_Freedom_Human_Rights.pdf>, R Uitz, 'Academic Freedom as a Human Right? Facing Up to the Illiberal Challenge' (2021), <https://www.law.ox.ac.uk/sites/default/files/migrated/draft_3_academic_freedom_as_a_human_right_uitz_febr_2020.pdf>; R Quinn and J Levine, 'Intellectual-HRDs and Claims for Academic Freedom Under Human Rights Law' (2014) 18(7–8) *The International Journal of Human Rights* 898. Quinn & Levine do not argue for a new right, rather they claim that well-established human rights already include protection for the range of conduct that is known as academic freedom, 900.

Consequently, it offers protection against unjustified state intrusions both to academics who are affiliated with universities or research institutes and to freelance researchers on matters relevant to their work. This is an important guarantee for researchers – who, for instance, are not allowed to participate in organized education for political reasons.⁶⁸ In such circumstances, even if the researcher is not an academic in the strict sense, they can be a victim of a violation of academic freedom.

Furthermore, as the ECtHR case law confirms, if an individual is both an academic and a public office holder, the ECtHR considers whether the individual is speaking in public in their capacity as an office holder (a politician, a judge or a member of the military) rather than in their capacity as an academic – in the latter case, the court expects them to proceed in a scholarly manner by using academic arguments.⁶⁹ All these considerations guide the ECtHR in deciding the cases of the Turkish scholars who were allegedly dismissed from their positions for signing the peace petition while employed at various universities.

Does the public statement fall within the academic's research?

When evaluating a statement, the ECtHR considers whether the public statement falls within the scholar's research remit. A good example is the Hungarian historian whose primary research field concerns the Communist security services. He was convicted of defamation for publishing an article on the involvement of one of the constitutional court justices in the state security services of the Communist regime. The ECtHR found that this conviction violated the historian's right protected by Article 10 because past collaborations of the state security services were one of the research topics of the historian.⁷⁰ In the Turkish cases, the ECtHR has been asked to determine whether the Turkish scholars acted within their academic capacity and if their public statement remained within their research remit.

When considering the scholar's free expression, it is important to take into account the medium in which the statement is conveyed, such as academic journals, newspapers, public statements or social media comments. The Turkish scholars' petition can be found on the Academics for Peace group's public website, which documents the activities of the signatories and the various sanctions they have faced. In principle, the form of publication and the target audience are not decisive in determining whether an instance of speech has an 'academic element'; this is what the suggested test for extramural speech suggests.⁷¹ So the fact that an opinion by an academic has been published on a public website or social media does not in itself exclude it from the protection of academic freedom. Yet the opinion should have a link to the academic's research area. And this is where the third criterion of the test comes into play.

⁶⁸*Kenedi v Hungary* (n 36). János Kenedi was a member of the democratic opposition in Hungary before the 1989 regime change; therefore, he was not allowed to participate in organized education for political reasons.

⁶⁹In the case of *Perinçek v Switzerland*, the ECtHR argued that the applicant spoke as a politician and not a scholar when he declared that 'the allegations of the "Armenian genocide" are an international lie'. Appl no 27510/08, Judgment of 15 October 2015. In the *Wille* case, the applicant was not just an academic but a high-ranking judge who expressed his view on whether the prince of Lichtenstein was subject to the jurisdiction of a constitutional court. *Wille v Lichtenstein*, Appl no 28396/95, Judgment of 28 October 1999. Ayuso Torres, a member of the military and a constitutional law professor, expressed his scholarly position on the 'flawed' origins of the Spanish Constitution in a public debate. Disciplinary procedure was followed because the national courts did not properly take Torres's academic status into account. *Ayuso Torres v Spain* (n 48) para 56.

⁷⁰*Ungváry and Irodalom Kft v Hungary* (n 38).

⁷¹*Mustafa Erdoğan and Others v Turkey*, Joint Concurring Opinion of Judges Sajó, Vučinić and Küris, para 8.

Does the statement amount to opinions based on the scholar's professional expertise?

The question of whether the statement amounts to *opinions based on the academic's particular expertise* is decisive. If the opinion expressed is essentially a judgment based on extensive research previously carried out by the researcher, the statement is protected under academic freedom. If, however, the opinion is not a summary or a conclusion for the public sphere of sustained or concluded research, it may still be an exercise of free speech but is not academic freedom. This is a decisive point that the ECtHR is considering when delivering its decisions in the case of the 43 Turkish applicants who faced sanctions for signing the peace petition.

As this demonstrates, the ECtHR provides strong protection for the individual's academic freedom. Yet the court does not understand academic freedom as a functional right that primarily aims to protect the scientific system along with the conditions necessary for its proper functioning.⁷² The reason is clear: the court has not yet discussed the institutional aspect of academic freedom, namely autonomy. The issue of autonomy has only been raised in a minority opinion that emphasized that 'academic freedom refers, first and foremost, to institutional autonomy' and that 'institutional autonomy is meaningful only if they enjoy personal freedom of research that entails unimpeded communication of ideas within, but not exclusively within, the scholarly community'.⁷³ It is the ECJ that has already expressed its views on this particular aspect of academic freedom.

The ECJ's jurisprudence: Conditioning research funding*Academic freedom in the EU Charter*

Article 13 of the Charter stipulates that 'The arts and scientific research shall be free of constraint. Academic freedom shall be respected.' The Charter, which was drafted and adopted in the 2000s when scientists had extraordinary authority and science had prestige,⁷⁴ contains both the concepts of freedom of scientific research and academic freedom. Yet reports convincingly show that there was substantial disagreement between the members of the Convention⁷⁵ that drafted the text⁷⁶ about whether to incorporate an article on academic freedom into the Charter. Roman Herzog and his colleagues played a

⁷²D Grimm, 'Wissenschaftsfreiheit als Funktionsgrundrecht', in *Wissenschaftsfreiheit in Deutschland. Drei rechtswissenschaftliche Perspektiven* (Berlin: Berlin-Brandenburgische Akademie der Wissenschaften, 2021) 21.

⁷³*Mustafa Erdoğan and Others v Turkey*, Joint Concurring Opinion of Judges Sajó, Vučinić and Kūris, para 4. This opinion also refers to a Committee of Ministers' recommendation, according to which 'academic freedom should guarantee the right of both institutions and individuals to be protected against undue outside interference'. 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.

⁷⁴GS Drori, JW Meyer, FO Ramirez & E Schofer, 'World Society and the Authority and Empowerment of Science' in *Science in the Modern World Polity: Institutionalization and Globalization* (Stanford, CA: Stanford University Press, 2003) 23–42.

⁷⁵The body was instated by the Cologne European Council (3–4 June 1999), and it was meant to represent 'the Heads of State and Government and of the President of the Commission as well as of members of the European Parliament and national parliaments'. Conclusions of the Presidency, Annex IV, <https://www.eurparl.europa.eu/summits/kol2_en.htm>.

⁷⁶J Meyer, 'Bericht über Konventssitzung vom 29–30.6.2000' in J Meyer & M Engels, *Die Charta der Grundrechte der Europäischen Union* (Berlin: Deutscher Bundestag, 2001) 304–5.

significant role in these discussions.⁷⁷ Hence, it is not a coincidence that the Charter has a provision for academic freedom and its wording reminds the reader of Article 5(3) of the German Basic Law.⁷⁸ Nevertheless, the Convention never saw Article 13 as a reflection of German law. While the concept of academic freedom, more precisely the concepts of science and scientific freedom, may be ‘a typical German phenomenon’,⁷⁹ it is equally established in international treaties (e.g. the ICESCR)⁸⁰ and in many constitutions of EU member states.⁸¹ At the time of the drafting of the Charter, there was a longstanding constitutional tradition to guarantee academic freedom in constitutional texts, not just in Germany but in many other EU member states.⁸²

What does Article 13 mean in practice? There was virtually no case law on Article 13 in EU law⁸³ until 2020, when the ECJ gave effect to Article 13.⁸⁴ The case involved a university ban. Shortly after the Fidesz government entered power in 2010, it made George Soros and the private university, the CEU he founded in 1992, a public enemy.⁸⁵ In 2017, an amendment to the law on higher education was adopted to require, among other things, a prior international agreement between the foreign university’s home country and the host state, and proof that the foreign university provided education in its home country. The public called the amendment ‘Lex CEU’ because the decisive criteria primarily affected the CEU.⁸⁶

⁷⁷The Convention Responsible for Drafting a Charter of Fundamental Rights was chaired by Roman Herzog, former president of the German Federal Constitutional Court and former president of Germany and another German member, Jürgen Meyer was an important figure within the pro-academic freedom camp. He submitted a draft proposal for a Charter which included academic freedom as part of Article 5 (freedom of opinion and information). CHARTE 4102/00, CONTRIB, Brussels, 6 January 2000 (13.01) Later, Meyer claimed it had been ‘not least the German representatives to the Convention who ... with reference to Art. 5 (3) GG, emphatically and ultimately successfully demanded the integration of these freedoms into the Charter’. J Meyer and M Engels, *Die Charta der Grundrechte der Europäischen Union* (Berlin: Deutscher Bundestag, 2001) 21.

⁷⁸‘Kunst und Wissenschaft, Forschung und Lehre sind frei’ [‘Arts and Sciences, Research and Teaching Shall Be Free’].

⁷⁹C Thiele, ‘Artikel 13 GRC Freiheit der Kunst und der Wissenschaft’ in M Pechstein, C Nowak and U Häde (eds), *Frankfurter Kommentar zu EUV, GRC und AEUV* (Tübingen: Band I, Mohr Siebeck, 2017) 1187.

⁸⁰See Katrin Kinzelbach’s article in this special issue.

⁸¹N Bernsdorff, ‘Artikel 13: Freiheit der Kunst und der Wissenschaft’ in J Meyer and S Hölscheidt (eds), *Charta der Grundrechte der Europäischen Union* (5th ed, Baden-Baden: Nomos, 2019) 327, 328.

⁸²See Janika Spannagel’s article in this special issue.

⁸³C Vedder and W Heintschel von Heinegg (eds), *Europäisches Unionsrecht. Handkommentar* (2nd ed, Baden-Baden: Nomos, 2018) 1340. My focus is on ECJ judgments that involved academic freedom as a fundamental right issue in higher education. I do not examine ECJ judgments that dealt with higher education policy questions. More on this, see T Ziegler, ‘Academic Freedom in the European Union: Why the Single European Market is a Bad Reference Point’, *MPIL Research Paper Series* No. 2019-03, <<https://ssrn.com/abstract=3317406>>. It is important to mention, though, that at the EU policy level, academic freedom is explicitly mentioned in the European Democracy Action Plan (para 4.3) and in the EU Action Plan on Human Rights and Democracy 2020–2024 (1.3.j and 3.4.a).

⁸⁴*Commission v Hungary* (n 8).

⁸⁵The Hungarian Minister of Human Capacities stated in a radio interview that ‘we do not want CEU to continue operating in this form’: 5 April 2018. See W Krull and T Brunotte, ‘Turbulent Times: Intellectual and Institutional Challenges for Universities in Germany, Hungary, and Poland’ in JA Douglass (ed), *Neonationalism and Universities: Populists, Autocrats, and the Future of Higher Education* (Baltimore, MD: John Hopkins University Press, 2021) 92, 101–3.

⁸⁶Enyedi (n 18).

The European Commission filed a lawsuit against the Hungarian government at the ECJ, arguing that the amendment violated Article 13 because it affected the ability of certain universities to conduct research freely in Hungary and to disseminate scientific knowledge and advances.⁸⁷ The Hungarian government, by contrast, insisted that while the university was required to meet certain legal obligations, it would not affect the academic freedom of the institution or its staff, including their ability to undertake scientific activities.⁸⁸

The ECJ, in its judgment, offered inventive legal reasoning: the ECJ first established that Hungary had violated WTO trade law, more specifically the General Trade Agreement on Trade in Services (the GATS) in the area of trade in educational services. It did so because Hungarian legislation required a prior international treaty, the fulfilment of which depended solely on the political will of the Hungarian government. Furthermore, the ECJ found that Hungary had not provided evidence of why the requirement for the foreign university to prove it provided education in its home country was necessary to prevent deceptive practices. Then, the ECJ regarded the GATS requirements as an integral part of EU law⁸⁹ and determined that such a violation of the GATS was an unlawful means of implementing EU law to avail of the Charter and its Article 13 therein.⁹⁰ The ECJ condemned Hungary for violating Article 13 because the amendment endangered the academic activity of the CEU within Hungary, and it was not justified by 'any of the objectives of general interest recognized by the Union upon which Hungary relied'.⁹¹

The ECJ's conception of scholarship

Article 52(3) of the Charter stipulates that the Charter rights, which correspond to ECHR rights, must be given the same meaning or, at the very least, the same scope as those laid down by the ECHR. Therefore, following the relevant ECtHR case law on academic freedom is required when interpreting the concept of academic freedom as an autonomous right under Article 13 of the Charter. In the ECJ's jurisprudence the concept of academic freedom is 'understood more broadly' than in the ECtHR's jurisprudence.⁹² The ECJ incorporates the ECtHR's understanding, which protects freedom of speech in the academic context and the 'freedom to disseminate information and freedom to conduct research and to distribute knowledge and truth without restriction'.⁹³ However, the ECJ

⁸⁷ *Commission v Hungary* (n 8) para 38.

⁸⁸ *Ibid* para 220.

⁸⁹ Cs I Nagy, 'Case C-66/18. Judgment' (2021) 115(4) *The American Journal of International Law* 700, <<https://doi.org/10.1017/ajil.2021.45>>.

⁹⁰ Some scholars warn that since the ECJ linked the EU law protection to violating internal market rules, there is a danger that a shutdown of a public university or a faculty would not trigger any EU response. See T Ziegler, 'Academic Freedom in the European Union: Why the Single European Market is a Bad Reference Point', *MPIL Research Paper Series* No. 2019-03, <<https://ssrn.com/abstract=3317406>> 17.

⁹¹ *Commission v Hungary* (n 8) paras 217–43 and 240. Yet the ECJ decision came late for the CEU. It could not return to Hungary. See P Bard, 'A Schoolbook Case of Eliminating Dissent by an Illiberal Regime: Rule of Law Backsliding and Attacks against Academic Freedom' (4 May 2019), <<https://doi.org/10.2139/ssrn.4100402>>.

⁹² *Commission v Hungary* (n 8) para 226.

⁹³ *Commission v Hungary* (n 8) para 225. In a motion for resolution, the EP Committee on Industry, Research and Energy asked the Commission to put forward an EU act on the freedom of scientific research. The motion recommends ensuring the freedom of scientific research as a right of individual researchers and the institutional autonomy of scientific research organizations. Thereby, the motion proposes Europe-wide

goes further and interprets Article 13 more comprehensively.⁹⁴ It interprets the right to academic freedom as a right that includes ‘substantively autonomous research and teaching that is free from state interference’. Referencing the PACE’s recommendation on academic freedom,⁹⁵ the ECJ holds that matters relating to the organization of universities, including their establishment and operation, are also covered by Article 13.⁹⁶ Moreover, citing the 1997 UNESCO recommendation, the ECJ stresses the importance of the institutional and organizational framework of the research and teaching as the necessary precondition to ‘guarantee the proper fulfilment of the functions entrusted to higher-education teaching personnel and institutions’.⁹⁷ Institutional affiliation is an empowering means for academic research⁹⁸ because the institution serves as ‘a platform for academic discourse and a network and infrastructure for teaching staff, students and donors’.⁹⁹

Based on the interpretation given by the ECJ, we can understand the freedom of scientific research and academic freedom codified in Article 13 of the Charter as an idea that demands a kind of institutionalization at universities and other academic institutes where researchers organize themselves.¹⁰⁰ Academic freedom is a concept that presupposes that knowledge and truth are to be pursued within the type of framework of the academic institution. For this kind of institutionalized setting, the Charter ensures the autonomy that is necessary to guarantee the proper fulfilment of the functions entrusted to higher education institutions. These autonomous institutions are the gatekeepers that protect academics from intrusion via unjustified external pressure.¹⁰¹

The idea that the concept of academic freedom requires institutionalization is rooted in the liberal science script. Universities were established in the early Middle Ages. However, these institutions’ struggle for autonomy can be traced back only to the nineteenth century. As demonstrated by Mattias Kumm, it was only with the rise of the

protection for free academic inquiry, outlining a broad understanding of academic freedom. European Parliament Committee on Industry, Research and Energy, *Draft Report with Recommendations to the Commission on Promotion of the Freedom of Scientific Research in the EU*, 25 August 2023. On 17 January 2024, the European Parliament approved a report to promote the freedom of scientific research in the EU (2023/2184(INL)). V Kosta and O Ceran, ‘A Way Forward? Protecting Academic and Scientific Freedom in the EU’ *VerBlog* 2024/1/29.

⁹⁴A Hoxhaj, ‘The CJEU in *Commission v Hungary* Higher Education Defends Academic Freedom Through WTO Provisions’ (2022) 85(3) *Modern Law Review* 773, 783.

⁹⁵See (n 57).

⁹⁶T Kende & G Puskás, ‘Introductory Note to Case C-66/18 *Comm’n v Hungary* (CJEU)’ (2021) 60 *International Legal Materials* 667.

⁹⁷Recommendation concerning the status of higher-education teaching personnel, adopted on 11 November 1997 by the General Conference of the United Nations Educational, Scientific and Cultural Organisation (UNESCO), meeting in Paris from 21 October to 12 November 1997, at its 29th session, point 18.

⁹⁸Thus, exercising the individual dimension of academic freedom presupposes protecting the institutional dimension of academic freedom. According to Kosta and Piqani, ‘this reasoning could perhaps give room for the ECtHR also to include such institutional protection within the scope of Article 10 ECHR’. V Kosta and D Piqani, ‘Where Trade and Academic Freedom Meet: *Commission v Hungary* (LEX CEU)’ (2022) 59(3) *Common Market Law Review* 813, 841.

⁹⁹Case C-66/18 *Commission v Hungary* [2020] Opinion of Advocate General Kokott, para 146.

¹⁰⁰KD Beiter, ‘Where Have All the Scientific and Academic Freedoms Gone? And What is “Adequate for Science”? The Right to Enjoy the Benefits of Scientific Progress and Its Applications’ (2019) 52(2) *Israel Law Review* 233.

¹⁰¹P Engel, ‘Academic Freedom is the Freedom to Know’ *TRAFO-Blog for Transregional Research*, 24 February 2021, <<https://trafo.hypotheses.org/26796>>.

modern university that the idea of academics adhering to the internal scientific standards of their disciplines instead of the demands of external authorities emerged.¹⁰²

Conditioning academic freedom: The gender equality requirement

The last part of the article examines whether academic freedom defined in this way is violated by linking research funding to democratic ideals. The example this section takes is connecting EU research grants to gender equality requirements.

Gender equality has become a priority¹⁰³ for EU research funding, and since 2021 having a gender equality plan, integrating gender dimension into research content and increasing gender balance throughout the project have been eligibility criteria for accessing the EU Horizon Europe funding program for research. However, certain EU member state governments, such as the Hungarian Fidesz government or the Polish PiS government, prioritized preserving 'traditional family values' over achieving gender equality. Accordingly, they systematically lobbied to remove the concept of 'gender equality' from EU documents.¹⁰⁴ Legislation in Hungary banned the previously accredited study program of gender studies.¹⁰⁵ The Polish PiS government dropped anthropology to introduce the study of culture and religion.¹⁰⁶ In response to these acts, the European Commission has launched infringement proceedings against Hungary¹⁰⁷ and Poland,¹⁰⁸ put the EU recovery funds on hold and rejected

¹⁰² M Kumm, 'Academic Freedom in Liberal Constitutional Democracies. Justifications, Limits, Tensions, and Contestations' (2024) *SCRIPTS Working Paper* No. 42, Berlin: Cluster of Excellence 2055 'Contestations of the Liberal Script (SCRIPTS)'.

¹⁰³ L Eigenmann, "'This is a Union of Values': The Rise of the LGBTI Rights Norm as Part of the EU's Identity Construction" (2022) 29(1) *Social Politics: International Studies in Gender, State & Society* 95.

¹⁰⁴ E Zalán, 'Poland and Hungary Battle to Eradicate "Gender" in EU Policies' *EU Observer*, 16 December 2020, <<https://euobserver.com/eu-political/150395>>. G Baczynska, 'Poland, Hungary Block "gender equality" from EU Social Summit', Reuters, 7 May 2021, <<https://www.reuters.com/world/europe/poland-hungary-push-against-gender-equality-eu-social-summit-2021-05-07>>. See also E Fodor, *The Gender Regime of Anti-Liberal Hungary* (Cham: Palgrave, 2022) 2.

¹⁰⁵ Government Decree 188/2018 on amending Government Decree 283/2012 on teachers' education, specialization, and the list of teachers' education and amending Government Decree 139/2015 on the list of obtainable degrees in higher education and the transcription of new programs. For context, see A Pető, 'Current Comment: The Illiberal Academic Authority. An Oxymoron?' (2021) 44 *Berichte zur Wissenschaftsgeschichte* 1.

¹⁰⁶ E Bothwell, 'Poland Trying to Destroy Universities' Independence, Warns Rector: New Education Minister Threatens to Withdraw Funding from Universities Following Abortion Law Protests Clash', *Times Higher Education*, 23 November 2020. Furthermore, several Polish regions and towns have adopted resolutions declaring themselves 'free from LGBT ideology'. See, for example, the resolution adopted by the town Świdnik, <<https://notesfrompoland.com/2023/11/02/polands-first-ever-resolution-declaring-area-free-from-lgbt-ideology-withdrawn/>>.

¹⁰⁷ Case C-769/22 *European Commission v Hungary*, action brought on 19 December 2022. The case is pending before the ECJ. A second infringement has focused on a consumer protection authority decision that ordered the Labrisz Lesbian Association to place a disclaimer on its children's book, *Fairyland Belongs to Everyone*, stating that the tales 'depict behaviour inconsistent with traditional gender roles'.

¹⁰⁸ 'EU Founding Values: Commission Starts Legal Action Against Hungary and Poland for Violations of Fundamental Rights of LGBTIQ People', media release, 15 July 2021, <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3668>.

funding applications from Polish regions that failed to ‘respect EU values and fundamental rights’.¹⁰⁹

In what follows, the article examines whether certain substantive prerequisites attached to EU research funding schemes, including the gender equality requirement, restrict academic freedom. Funding is a key driver of scientific activities so, if EU research funding is limited because it requires compliance with specific principles (for instance, democracy or gender equality), scientists and institutions not attributing importance and value to these principles would be excluded from potential funding. Is this situation incompatible with the right to academic freedom, which is promoted and required by EU law?

The liberal science script defies the ‘external control’ by placing academia in charge of the definition of science and academic freedom.¹¹⁰ It insists that universities and research institutions should be free to determine their research topics and academics should be free to engage in research of their own choice. This is recognized by Article 13 of the Charter and its connected ECJ case law. Thus, at first sight, it may seem that linking research funding with the expectations of complying with democratic principles such as gender equality threatens the autonomy of the research institution and the academic freedom of the researcher. Yet, the foundational values on which the EU is built suggest otherwise.

Like the ECHR, the Charter is not a neutral document; it is premised on constitutional values. The Preamble of the Charter stipulates that the EU ‘is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity’. Moreover, in language similar to this, Article 2 of the Treaty on the European Union (TEU) states that the ‘Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.’ As the ECJ stressed, ‘Article 2 TEU is not a mere statement of policy guidelines or intentions but contains values which ... are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States.’¹¹¹ Member states that protect human rights and respect the system of checks and balances have values that harmonize with those listed in Article 2 TEU. Issues arise when a government of an EU member state, such as the Hungarian Fidesz or previous Polish PiS, disregards some of these principles. Yet, as member states, they are under the obligation to comply with the EU foundational values. They have freely and voluntarily committed themselves to these values and accepted them as common values. And their compliance with the foundational values ‘is a condition for the enjoyment of all the rights deriving from the application of Treaties’.¹¹²

¹⁰⁹Notes from Poland, ‘Polish Towns Denied EU Funding Due to “LGBT Ideology Free Zones”’, 29 July 2020, <<https://notesfrompoland.com/2020/07/29/polish-towns-denied-eu-funding-due-to-lgbt-ideology-free-zones>>. To get EU funding, the town of Świdnik replaced its earlier adopted resolution with anti-discrimination declaration. Notes from Poland, ‘Polish Town Replaces Anti-LGBT Resolution with Anti-discrimination Declaration Amid EU Funding Threat’, 7 January 2023, <<https://notesfrompoland.com/2023/01/07/polish-town-replaces-anti-lgbt-resolution-with-anti-discrimination-declaration-amid-eu-funding-threat>>.

¹¹⁰For more on this, see the Introduction to this special issue.

¹¹¹Case C-156/21 *Hungary v Parliament and Council*, para 232.

¹¹²Case C-896/19 *Repubblika v Il-Prim Ministru*, Judgment of 20 April 2021, paras 60, 63. Case C-204/21 *Commission v Poland*, Judgment of 5 June 2023, para 66. The complaining member states have three possible

The EU provides research funding on the condition that the researcher and their institution comply with the democratic principles upon which the EU was grounded. It does so because the EU is a community based on constitutional values, the ultimate aim of which is a European community of free and equal individuals. The EU policy of gender mainstreaming and the requirement of conforming with gender equality when applying for EU research funds do nothing more than give concrete expression to the principles of democracy, equality, and non-discrimination stated in Article 2 TEU. Of course, whether the specific provisions requiring a gender equality plan, gender balance in the composition of the research team and integrating the gender dimension into research¹¹³ constitute an unjustified limitation of academic freedom cannot be resolved on the conceptual level. The answer can be found as the result of a judicial process. A thorough proportionality analysis can establish whether these measures are justified and proportionate to the legitimate aim of overcoming persisting gender gaps and inequalities.

The EU foundational values have implications for how scientific research can be conducted throughout the Union. Due to EU foundational values, namely equality and democratic pluralism, an individual researcher is free to conduct research in the field of their choice. As the previous part of this article demonstrated, in the ECHR case law, academic freedom includes the choice of the field of research provided that the researcher applies scientific methods. Since the ECJ considers the ECHR case law to be authoritative, and indeed part of EU law, the individual researcher is also protected under EU law when conducting research. Yet, the wording of Article 13, 'scientific research shall be free of constraint', does not mean that scientific inquiry would enjoy absolute freedom. Freedom of science is conditioned by the EU foundational values. For instance, the Charter explicitly outlaws eugenic practices and reproductive cloning. It does so precisely because of the EU foundational values, more specifically the ethical considerations connected to equal human dignity and personal integrity.¹¹⁴

In addition to the EU foundational values and the connected case law, the nature of EU research funding is also relevant. Research is a major field for innovation and important to the economic positioning of the EU, so considerable funding is available to support universities and research institutes financially.¹¹⁵ When the EU provides funding for research focused on helping to achieve its agenda, it is something that all governments do to some extent. Nevertheless, the EU research funding scheme is not a substitute for internal research policy.¹¹⁶ It evolves as a parallel system that works alongside national scientific research policies and supports the EU's own scientific research policies.

Finally, EU funding is public funding, the sources of which are contributions coming from the member states. EU taxpayers' money provides the basis for financing

options: they can follow the principles they have voluntarily accepted in the past; they can opt not to follow the principles and accept the legal and financial consequences of doing so; or they can no longer consider these principles to be valid and consequently renounce their EU membership.

¹¹³European Commission, 'Gender equality in research and innovation', https://research-and-innovation.ec.europa.eu/strategy/strategy-2020-2024/democracy-and-rights/gender-equality-research-and-innovation_en.

¹¹⁴Articles 3(2)b and 3(2)d of the Charter.

¹¹⁵Z Kaló, LHM van den Akker, Z Vokó, M Csanádi and JG Pitter, 'Is There a Fair Allocation of Healthcare Research Funds by the European Union?' (2019) 14(4) *PLoS ONE* 1, 2.

¹¹⁶S Tranquilli, 'Freedom of Scientific Research in the European Research Area: Weaknesses and Strengths' in M Seckelman et al (n 19) 37.

research in the territory of the EU. No researcher is entitled to demand public funding for any type of research, nor is any research institute entitled to such funding. They have the right to participate in the tender, but receiving public funds is not a right. It is a possibility for those who conduct serious research by respecting the basic democratic principles on which the EU is built and who do so backed by standards of scientific inquiry: the scholarly findings are sincere, and the knowledge is produced in a manner that conforms to the professional standards of the academic's discipline. This condition does not mean an automatic exclusion of those who do not share these democratic ideals. For instance, an academic with expertise in the field can do serious research on 'traditional family values' and why gender equality measures are unnecessary and even defend their position in a scholarly manner while complying with the gender equality principles. Hence, in principle, connecting EU research grants to gender equality requirements does not violate academic freedom.

Concluding remarks

Academic freedom is vital to the liberal science script. The article has demonstrated that the ECtHR and the ECJ safeguard academic freedom in distinct ways. The ECtHR places emphasis on protecting individual rights, while the ECJ prioritizes the protection of institutional autonomy. However, both courts' theories of scholarship are rooted in the liberal science script, in which academic freedom has its 'edges'. This article has explored these 'edges': the justified limitations of an academic's extramural expression and the legitimate demands on academics regarding their role in democracy. It did so by analysing the leading case law of the two European supranational courts and focusing on recent contestations: the sanctioning of Turkish academics for expressing their opinion by signing an open petition and the attacks by the Hungarian Fidesz government and the Polish PiS government on links between EU policies and gender equality requirements.

The article sought to answer whether the ECHR protects academics when they speak outside of the walls of academic institutions. It argued that academic freedom is a distinctive freedom necessary for the scholarly profession under the ECHR. This professional freedom extends to conducting academic research in any field and transmitting the research result provided that the research itself and the dissemination of its results meet academic standards. Furthermore, ECHR protects scholars' freedom to express their views inside and outside of the university walls involving public matters within the scholars' disciplines and expertise. In the case of the Turkish scholars who were dismissed for signing the peace petition, the question is whether the petition is an opinion that is based on research. If it does not have an 'academic' element, it might still be an exercise of free speech but not of academic freedom.

Yet, a robust democracy with vibrant academic freedom does not just presuppose the individual rights of the researcher. It also presupposes the autonomy of the academic institution against unjustified state interventions. Therefore, the ECJ does not just consider the individual's freedom of research protected by the ECtHR but also the institutional autonomy as part of academic freedom ensured by Article 13 of the Charter.

The article then explored the ECJ's conception of scholarship by presenting the standards the ECJ developed to protect academic freedom. It examined the argument that academic freedom is violated by the gender equality requirement attached to EU research funding. The article argued that, based on the EU foundational values and the

ECJ's relevant case law, each independent researcher has the right to decide their research topic. Nevertheless, none of them has a fundamental right to public funding attached to their research project. EU research funding is an opportunity for those who are able and willing to carry out research in a way that is in line with the EU's foundational values, including democracy and equality, even if the research topic itself is incompatible with these principles.

Acknowledgements. I am very grateful to the following scholars for feedback on and discussions of previous versions of this article: Tanja A Börzel, Olga Ceran, Lilla Farkas, Katrin Kinzelbach, Vasiliki Kosta, Mattias Kumm, Juan Díez Medrano, Janika Spannagel, Gábor Attila Tóth and Tamás Dezső Ziegler. Peter Schwarz's research assistance was invaluable. I also thank the two anonymous reviewers for their comments, in light of which the article has been substantially improved.

Funding statement. Research for this article was part of the Cluster of Excellence Contestations of the Liberal Script (EXC 2055), funded by the *Deutsche Forschungsgemeinschaft* (DFG, German Research Foundation) under Germany's Excellence Strategy – EXC 2055 – 390715649.