

EDITORIAL

NEW THREATS TO ACADEMIC FREEDOM

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Universities have become such a common trait of modern civilization that some tend to forget two salient facts; that is, their origin and the importance of academic freedom. Historically, while other centers of higher learning have existed in other epochs and in other regions of the world, the modern Western universities have arisen in Europe during the Middle Age, including Bologna (1088), Oxford (1096), Paris (1150), Coimbra (1290), Vienna (1365), and Heidelberg (1386). Especially the universities created by both scholars and students (as distinct from those established by religious or secular authorities), have recognized their rights to teach and learn, respectively, without interference by governmental authorities and social groups.

Even in Europe, though, academic freedom has had its ups and downs. The latter characterized the dark years of the last century, especially in Germany and Italy. As a reaction to those attacks to academic freedom, both national and supranational bills of rights recognize and protect it. The European Convention on Human Rights does so through its general clause concerning freedom of expression, and the European Court of Human Rights has ruled that the limits of permissible criticism are greater for universities. The underlying reason is that, in the Court's view, academic freedom includes the academics' right to express freely their opinion about the institution or system in which they work (judgment of 19 June 2018, case of *Kula v Turkey*, application no. 20233/06). Moreover, Article 13 of the EU Charter of Fundamental Rights accords particular importance to arts and scientific research, which "shall be free of constraint", as well as to academic freedom.

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According to the Court of Justice, the concept of academic freedom must be understood very broadly, including not only the establishment of universities, but also their research and teaching activities, which cannot be disproportionately limited (judgment of 6 October 2020, Case C-66/18, *European Commission v Hungary*).

Although these judgments can be, and have been, welcomed by all those who deem that academic freedom is a value, especially for liberal democracies, in Europe, the Americas, and elsewhere, it is important to be aware that the threats do not come only from political or religious authorities, as has happened in Italy in the cases *Cordero* and *Lombardi Vallauri*. Threats come from individuals and social groups within universities. Consider the following examples. Firstly, after a prestigious university has accepted a rich donation from the ruler of a non-democratic government, his son receives a doctorate from that university. Secondly, after another old university has received an even richer donation (hundreds of million Euros) by a foundation of a State that adheres to a certain religious belief, the invitation sent to the the ambassador of a third State (for example, Israel) to take part in a public debate is withdrawn by the university's rector on grounds that the ambassador's intervention risks to ignite the debate among students belonging to different political groups. This does not happen in Hungary or Turkey, which are involved in the legal disputes previously mentioned, but in one of the founders of the European Community. Thirdly, a religious authority decides to dismiss the invitation to lecture in a public university after a group of insiders, both professors and students, vehemently contested such invitation. Fourthly, an adjunct professor of history loses her position as a result of the university administrators' decision to sanction the showing a portrait of religious character, notwithstanding the warnings timely given by the instructor. And this is decided on grounds that academic freedom matters, but other things matter more.

As the above situations show, there are various contexts in which academic freedom can be subject to threats and these do not come only from national rulers, for example by way of forbidding discussion of a certain issue, but also by other actors. A part of the problem is that even the insiders (scholars, students, and administrators) accord to academic freedom less importance than other things, including the opinion of vociferous minorities. The main purpose of this editorial is not simply to express concern

about these these insidious internal threats to academic freedom, but to discuss the test for determining when a certain conduct is a threat to academic freedom and the mechanisms that could be used to protect it.

In the US context, which is characterized by the broad protection granted by the First Amendment, the courts have often adopted a test based either on a reasonable speaker or on a reasonable listener. The courts using these tests seek to determine whether or not a reasonable person would might react to either a speech or an exhibition, as happened in our first three cases and in the last one, respectively. The tests nonetheless have more than one flaw. A first one is the risk to ban ideas and beliefs “heretical” ideas, which either the majority or a minority of the public dislikes, in sharp contrast with one of the salient traits of academic freedom; that is, the free expression of ideas that may upset most participants in a debate. Another flaw is that these tests do not pay enough attention to the measures that are susceptible to prepare those participants, such as the warnings given by the adjunct professor of history in the fourth scenario indicated earlier. Last but not least, the tests are unsuited to protect academic freedom from indirect threats. They would be used by the courts, for example, in the last hypothetical case, where the adjunct professor of history might convincingly argue that her academic freedom has been infringed. A court might disagree with the university administrators’ decision on grounds that it is disproportionate. Similarly, the exercise of disciplinary powers could be contested, in light of the measures (the warnings) taken by the teacher. The tests might be used in the second hypothetical case, for instance, if the professor who organizes the event contests the rector’s withdrawal of the invitation before a court. The court might not agree with the rector’s contention that the withdrawal was not the only possible measure.

However, the question that arises is how intellectual freedom and independence could be protected in the first and third hypothetical cases. Would the elaboration of more precise standards by an independent institution, such as the Venice Commission be helpful? Alternatively, could a network of national agencies funding universities define measures, such as the delivery of information about the infringement of academic freedom, that are susceptible to have an adverse impact on the reputation of the university in the community at large?