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A PROCEDURAL VIEW ON INDIVIDUAL ACADEMIC FREEDOM

A COMPARATIVE-EVALUATIVE LAW RESEARCH ON THE LEGAL AND JUDICIAL PROTECTION OF INDIVIDUAL ACADEMIC FREEDOM AGAINST INSTITUTIONAL INTERFERENCE

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SUMMARY

Academic freedom is a central value in university life, crucial to the pursuit of knowledge and the free marketplace of ideas. Despite its importance, academic freedom is a fragile right. The multifaceted nature of academic freedom results in inherent tensions between different holders of this right, particularly between academics and their institutions. The conflict between academics and their institutions has only recently received attention in legal scholarship. However, this conflict marks an important challenge to the legal and judicial protection of individual academic freedom that should not be underestimated. Most of the European literature advocates for enhanced legislative or constitutional protection and a judicial body to protect individual academic freedom from institutional (and other) interference. In contrast, the Canadian legal system relies on collective agreements and arbitration rather than legislation and the judiciary. This observation in the literature begs the question of the extent to which the European legal systems and Canada differ in terms of the legal and judicial protection of individual academic freedom.

This study is the first one to compare the legal and judicial protection of individual academic freedom in the European legal systems – Germany, the Netherlands and Belgium – and the Canadian system, in particular how they relate to the enforceability and legal certainty of individual academic freedom. In all of the legal systems studied, there are enforceable legal provisions in force that can protect individual academic freedom, whether through constitutional and legislative provisions in Europe or contractual provisions in Canada. Although in theory, academics appear to be able to enforce their claims before a dispute resolution body, practical issues arise regarding the enforcement against universities. In the European legal systems, the enforcement of individual academic freedom relies on the uncertain doctrine of the direct horizontal effect of constitutional rights, which places academics in private institutions in a particularly vulnerable position. So far, legal scholarship has overlooked these important practical problems, too easily assuming that individual academic freedom is enforceable in a conflict with institutional academic freedom. In Canada, on the other hand, universities are explicitly bound by the academic freedom provisions in the collective agreements, making enforcement straightforward and not dependent on the public or private status of the university.

The differences in legal certainty between the Canadian and European systems are less significant than initially assumed, contrary to the expectations based on a literature review suggesting that the Canadian legal system provides for more legal certainty. However, the arbitrators' consistently broad approach to the contractual terms of the collective agreement and their use of notions of academic freedom are not only counter-intuitive but also undermine the legal certainty of individual academic freedom in Canada. This is not to say that European legal systems do not face practical problems of legal certainty as questions of interpretation arise and inconsistent methods of interpretation exist in case law. Unfortunately, the legal uncertainty about the concept of academic freedom even leads to judges in the Netherlands not applying the concept. What is certain is that academic freedom is an extremely complex notion that is not easy to enforce in practice.

This research highlights the complexity of protecting academic freedom from institutional interference and emphasises the challenges posed by the different legal and judicial frameworks of various legal systems. This study was the first one to place these problems in a comparative context and aimed to contribute to a broader normative question by offering a new perspective on the enforceability and legal certainty of academic freedom. The last word on academic freedom has not been said. I therefore call for further normative research.

ACKNOWLEGDEMENTS

Since the beginning of my academic adventure at the Catholic University of Leuven, I have been passionate about academic research, which explains my choice for the Research Master of Laws. This option, and particularly this thesis, taught me that research is not only a social investment, but also a personal learning opportunity. I learnt that a critical and open mind, a healthy dose of independence and a plethora of hard work are pivotal. For me, writing this thesis was the icing on the cake of my law education. I can honestly say that I have enjoyed every word of my thesis. For two full years, I have been passionate about the topic of academic freedom. Its complexity, topicality and controversy surrounding it have captivated me.

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INTRODUCTION

1. THE PARAMOUNT IMPORTANCE OF ACADEMIC FREEDOM – "*Academic freedom is a central, arguably the central value, of university life*."[1] Indeed, academic freedom is a concept that lies at the heart of the university community. Academic freedom is considered a necessary condition for the pursuit of knowledge and the free marketplace of ideas.[2] Therefore, academic freedom serves the public interest, arguably even more so today than in the past, as the acquisition of knowledge and scientific research is one of the foundations of modern societies.[3] An authoritative Council of Europe recommendation underscores the importance of the legal and judicial protection of academic freedom by stating that *"the fundamental principles and rights of academic freedom and institutional autonomy are essential for universities, and that continued observation of those values is for the benefit of individual societies and humanity in general."*[4]

2. A VULNERABLE RIGHT – Despite its importance, academic freedom is a fragile right.[5] Knowledge is often created by challenging and controversial ideas, which implies that academics will often be in conflict with states or universities.[6] The legal and judicial protection of academic freedom is not self-evident due to its multifaceted nature, which results in inherent tensions between academic freedom claims from different academic freedom holders.[7] Conflicts particularly arise between academics and their institutions, with the former appearing to be the most vulnerable in practice.[8]

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[1] H. ARTHURS, *Academic freedom; when and where?* [Notes for Panel Discussion], Annual Conference of AUCC, Halifax, 1995, 1, https://www.aunbt.ca/wp-content/uploads/2019/08/HWA-AcademicFreedom2.pdf.

[2] E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 1; T. KARRAN, "Academic Freedom in Europe: Time for a Magna Charta?", *Higher Education Policy* 2009, (163) 163.

[3] H. TRUTE, *Die Forschung zwischen grundrechtlicher Freiheit und staatlicher Institutionalisierung*, Tübingen, Mohr Siebeck, 1994, 7.

[4] Paragraph 2 Recom. 1762 on Academics Freedom and University Autonomy, Parliamentary Assembly, Council of Europe, 2006, https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17469&lang=en.

[5] E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 5-10; J. VRIELINK, P. LEMMENS, K. LEMMENS and S. PARMENTIER, "Challenges to academic freedom as a fundamental right", League of European Research Universities (LERU), Advice Paper No. 31, 2023, 4.

[6] T. KARRAN, "Academic Freedom in Europe: Reviewing Unesco's Recommendation", *British Journal of Educational Studies*, 2009, (191) 191.

[7] J. VRIELINK, P. LEMMENS, K. LEMMENS and S. PARMENTIER, "Challenges to academic freedom as a fundamental right", League of European Research Universities (LERU), Advice Paper No. 31, 2023, 3.

[8] T. KARRAN, *Academic Freedom in Europe: De Jure Legalities & De Facto Realities* [Conference presentation], Council of Europe Global forum on academic freedom, institutional autonomy, and the future of democracy, Strasbourg, 2019, https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Frm.coe.int%2Fkarran-terrence-council-of-europe-strasbourg-presentation%2520june-2019%2F1680967183&wdOrigin=BROWSELINK.

For several decades, the European institutions[9], Scholars at Risk[10], legal scholars[11] and others have been exploring how states, regional organisations and universities can better and more legally protect academic freedom. The legal and judicial protection of academic freedom is an evolving area of law and remains high on the political agenda.[12] The bulk of European literature argues for enhanced legislative or constitutional protection and a judicial body to protect individual academics.[13] Other legal systems, however, make very different choices regarding the procedural design for the legal and judicial protection of academic freedom. Notably, the Canadian legal system has explicitly chosen not to protect academic freedom through legislation and the judiciary, but rather through collective agreements and arbitration.[14] An underemphasised question in the academic literature is the extent to which the European legal systems and the Canadian legal system differ in terms of legal and judicial protection of individual academic freedom.

[9] P. MAASSEN, D. MARTINSEN, M. ELKEN, J. JUNGBLUT and E. DACKNER, *State of play of academic freedom in the EU member states: Overview of de facto trends and developments*, 2023, Panel for the Future of Science and Technology (STOA), 1, available at https://www.europarl.europa.eu/stoa/en/document/EPRS_STU(2023)740231.

[10] See for example SCHOLARS AT RISK, *Academic Freedom and Its Protection Under International Law*, https://www.scholarsatrisk.org/resources/academic-freedom-and-its-protection-under-international-law/ (consulted on 17 Januari 2024).

[11] A leading European study in the field of legal protection of academic freedom is K. BEITER and T. KARRAN, "Academic Freedom and Its Protection in the Law of European States: Measuring an International Human Right*", European Journal of Comparative Law and Governance*, 2016, 254-345.

[12] See for example the recent conference of STOA on 29 November 2023 "Academic Freedom - The state of a fundamental value for Europe".

[13] E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 73-75; K. BEITER and T. KARRAN, "Academic Freedom and Its Protection in the Law of European States: Measuring an International Human Right*", European Journal of Comparative Law and Governance*, 2016, (254) 260; R. BECKER, "Academic Freedom in England and Germany: A Comparative Perspective", *Global Values Education: Teaching Democracy and Peace*, 2009, (115) 115; T. KARRAN and L. MALLINSON, *Academic freedom in the U.K.: legal and normative protection in a comparative context* [Report for the University and College Union], University and College Union, 2017, 2.

[14] D. ROBINSON, "ACADEMIC FREEDOM IN CANADA: A LABOR LAW RIGHT", *Academe*, Vol. 105(4), 2019, (22) 22.

CHAPTER 1. THEORETICAL AND METHODOLOGICAL FRAMEWORK

PART 1. THEORETICAL FRAMEWORK

1.1.1 STATE OF THE ART

3. LEGAL AND JUDICIAL PROTECTION OF ACADEMIC FREEDOM – The academic community and legal scholarship seem to be almost unanimous: academic freedom is a right that must be strongly protected, and its protection must be improved.[15] However, protecting academic freedom is anything but straightforward. A major challenge in efforts to improve the *de jure* and *de facto* protection of academic freedom in is the lack of a generally accepted definition.[16] A rich body of legal literature on academic freedom focuses on substantive discussions, with many authors defining and determining its scope.[17] SINDER'S bibliographic analysis, for example, illustrates this focus.[18] However, the academic debate on the protection of academic freedom is much less concerned with discussions exploring the procedural mechanisms that legally and judicially protect academic freedom.[19] This dissertation, therefore, takes a procedural view on academic freedom.

4. A PROCEDURAL VIEW ON ACADEMIC FREEDOM – In reviewing the academic research on the legal and judicial protection of academic freedom, it is clear that the European academic debate is strongly and almost exclusively focused on the promotion of legislative and constitutional protection.[20] In their evaluation of European states' legal

[15] H. ARTHURS, *Academic freedom; when and where?* [Notes for Panel Discussion], Annual Conference of AUCC, Halifax, 1995, 1, https://www.aunbt.ca/wp-content/uploads/2019/08/HWA-AcademicFreedom2.pdf; T. KARRAN, "Academic Freedom in Europe: Reviewing Unesco's Recommendation", *British Journal of Educational Studies*, 2009, (191) 191.

[16] P. MAASSEN, D. MARTINSEN, M. ELKEN, J. JUNGBLUT and E. DACKNER, *State of play of academic freedom in the EU member states: Overview of de facto trends and developments*, 2023, Panel for the Future of Science and Technology (STOA), available at https://www.europarl.europa.eu/stoa/en/document/EPRS_STU(2023)740231, I.

[17] See for example: J. VRIELINK, P. LEMMENS, K. LEMMENS and S. PARMENTIER, "Challenges to academic freedom as a fundamental right", League of European Research Universities (LERU), Advice Paper No. 31, 2023, 36 p.; T. KARRAN, "Academic Freedom in Europe: Time for a Magna Charta?", *Higher Education Policy*, 2009, 163-189.

[18] See J. SINDER, "Academic freedom: A bibliography", *Law and Contemporary Problems*, 53(5), 1990, 381–392.

[19] See however E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 331 p.

[20] J. BAERT, "Academische vrijheid, juridisch bekeken" in R. VERSTEGEN, (ed.), *Ad amicissimum amici scripsimus. Vriendenboek Raf Verstegen*, Brugge, 2004, 20; K. DEKETELAERE, *Academic Freedom as a*

protection systems for academic freedom, K. BEITER and T. KARRAN argue that national higher education legislation and preferably national constitutions should adequately protect academic freedom. They advocate for more comprehensive and effective legislation and constitutional provisions.[21] This strong preference of European academics for robust legislative and constitutional protection translates into an aversion to other forms of protection of individual academic freedom. K. BEITER and T. KARRAN point out that *"in many cases, the absence of such legislation or its failure to provide effective guarantees will constitute the basis for threats to academic freedom"*[22], while *"protective standards contained in subordinate legislation may, moreover, easily be changed or abrogated again."*[23]

At first glance, it may not seem surprising that European scholarship focuses mainly on legislative and constitutional protections of academic freedom as the key mechanisms for providing enforceable protection. In the European tradition, the right to academic freedom has long been defended by scholars as a fundamental right,[24] and in some instances, even as a human right.[25] However, it is remarkable to observe, especially with reference to North American scholarship, that some legal systems have chosen a very different procedural design for the legal protection of academic freedom. In Canada, for instance, academic freedom is almost entirely kept outside legislative and constitutional provisions, and thus outside the sphere of fundamental rights. Instead, it is embedded in collective agreements as a result of collective bargaining.[26] Canadian academics assert that *"collective bargaining is key to protecting these unique attributes of the academy"*[27] and *"Canadian labor law has generally provided solid protection for the enforcement and enhancement of academic freedom rights"*[28]. It is notable that the European literature does not consider or at least

Fundamental Right [Conference presentation], STOA high-level conference on Academic Freedom in Europe, STOA, Brussels, 2022, https://www.europarl.europa.eu/cmsdata/258912/Deketelaere%20-AF%2028.11%20updated.pdf (consulted on 24 May 2024), slide 17-18.

[21] K. BEITER and T. KARRAN, "Academic Freedom and Its Protection in the Law of European States: Measuring an International Human Right*", European Journal of Comparative Law and Governance*, 2016, (254) 260.

[22] *Ibid*.

[23] *Ibid*, 259.

[24] J. VRIELINK, P. LEMMENS, K. LEMMENS and S. PARMENTIER, "Challenges to academic freedom as a fundamental right", League of European Research Universities (LERU), Advice Paper No. 31, 2023, 4.

[25] K. BEITER and T. KARRAN, "Academic Freedom and Its Protection in the Law of European States: Measuring an International Human Right*", European Journal of Comparative Law and Governance*, 2016, (254) 261-267.

[26] D. ROBINSON, "Academic freedom in Canada: a labor law right", *Academe*, Vol. 105(4), 2019, (22) 22.

[27] L. ROSE-KRASNOR and M. WEBBER, "The parties agree that… The role of collective bargaining in advancing university goals", *Academic Matters*, 2018, 10 p.

[28] D. ROBINSON, "ACADEMIC FREEDOM IN CANADA: A LABOR LAW RIGHT", *Academe*, Vol. 105(4), 2019, (22) 22.

analyse other possible forms of legal protection for academic freedom, especially in the light of some of the risks to which academic freedom is exposed. Empirical research has shown that the current legislative or constitutional frameworks in many European states are proving inadequate in practice to protect individual academics against interference from states and even from the universities themselves.[29]

In the literature, I observe, broadly speaking, two different forms of legal protection mechanisms for academic freedom, i.e. the 'European' system and the 'Canadian' system. The academic literature on both systems argues that their respective systems provide the best protection against infringements of academic freedom. This research will elaborate on these hypotheses in the literature, examining the legal and judicial protection of individual academic freedom from a particularly overlooked perspective: the tension between individual and institutional academic freedom.

5. CONFLICTS BETWEEN INDIVIDUAL AND INSTITUTIONAL ACADEMIC FREEDOM – Academic freedom is a multifaceted concept encompassing an individual and an institutional dimension. The former refers to a set of individual rights granted to individual academic staff (and students), including the freedom to study, freedom of research, freedom of publication and freedom of academic expression. The latter pertains to a university's right to self-governance in terms of academic work, standards and management. Due to this complexity, academic freedom faces inherent tensions between its main dimensions.[30] Traditional literature on the legal protection of academic freedom has tended to focus on protecting universities' institutional academic freedom from state interference[31] or safeguarding individual academic freedom against state interference.[32]

[29] T. KARRAN, *Academic Freedom in Europe: De Jure Legalities & De Facto Realities* [Conference presentation], Council of Europe Global forum on academic freedom, institutional autonomy, and the future of democracy, Strasbourg, 2019, https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Frm.coe.int%2Fkarran-terrence-council-of-europe-strasbourg-presentation%2520june-2019%2F1680967183&wdOrigin=BROWSELINK.

[30] J. VRIELINK, P. LEMMENS, K. LEMMENS and S. PARMENTIER, "Challenges to academic freedom as a fundamental right", League of European Research Universities (LERU), Advice Paper No. 31, 2023, 24.

[31] See for example: C. GLENN, J. DE GROOF and C. CANDAL, *Balancing Freedom, Autonomy and Accountability in Education*, Nijmegen, Wolf Legal Publishers, 2012, 324; M. STACHOWAIK-KUDLA, S. WESTA, C. BOTELHO and I. BARTHA, "Academic Freedom as a Defensive Right", *Hague Journal on the Rule of Law* 2023, 161-190; P. ZOONTJENS, *Vrijheid van wetenschap: Juridische beschouwingen over wetenschapsbeleid en hoger onderwijs*, Zwolle, W.E.J. Tjeenk Willink, 1993, 188-189; R. BARROW, "Academic freedom: it's nature, extent and value", *British Journal of Educational Studies*, 2009, 181; See also the recent attention to the protection of universities from state interference with their rights to academic freedom due to the case C-66/18 Commission v. Hungary (ENYEDI, Z., "Democratic Backsliding and Academic Freedom in Hungary", Perspectives on Politics, 16(4), 2018, (1067) 1067).

[32] J. GROEN, *Academische vrijheid: een juridische verkenning*, 2017, Rotterdam, Erasmus University Rotterdam, 77.

However, conflicts between the individual academic freedom rights of academics and the institutional academic freedom rights of universities have received much less attention. Only recently has academic literature acknowledged the importance of protecting individual academic freedom from university interference and the possible conflict between these concurrent claims.[33]

It is striking, to say the least, that little attention has been paid in the literature to the aforementioned conflict. I believe there are several explanations for why this conflict is overlooked. Firstly, authors often assume that internal decision-making processes within university life, based on collegiality, reduce the likelihood of conflicts escalating to negative decisions by university councils, rectors, deans, etc.[34] Moreover, conflicts between universities and academics may be overlooked due to doubts about the existence of institutional autonomy as a component of academic freedom.[35]

As a result of the overlooked conflict between individual and institutional academic freedom, the defensive and enforceable function of individual academic freedom against university interference remains underexplored. M. STACHOWAIK-KUDLA et al. examined the significance of academic freedom as a fundamental right with a defensive function in different European states, particularly focusing on the role played by the constitutional courts in shaping this defensive function when they explicitly pronounce on it.[36] While their research primarily addresses state interference with individual academic freedom, it also acknowledges that academic freedom has a defensive function against interference by the university.[37]

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[33] See: B. SWANNIE, "Protection from Institutional Censorship: An Essential Aspect of Academic Freedom", *University of New South Wales Law Journal*, 45(4), 2022, 1489-1512; D. HOHENLOHE, "Private Higher Education and Academic Freedom" in M. SECKELMANN, L. VIOLINI, C. FRAENKEL-HAEBERLE, G. RAGONE (eds.), *Academic Freedom Under Pressure?*, Cham, Springer, 2021, 165-174; R. VAN GESTEL, "Wie beschermt de academische vrijheid?", *Regelmaat* 2023, 141-154; R. VAN GESTEL, "Academische vrijheid onder druk", *NJB* 2024, (§1) §3.

[34] W. LÖWER, "Freiheit wissenschaftlicher Forschung und Lehre" in D. MERTEN and H. PAPIER (eds.), *Handbuch der Grundrechte in Deutschland und Europa*, Heidelberg, C.F. Müller, (699) 721.

[35] See, for example, the questionable nature of institutional academic freedom in German literature: E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 143; W. LÖWER, "Freiheit wissenschaftlicher Forschung und Lehre" in D. MERTEN and H. PAPIER (eds.), *Handbuch der Grundrechte in Deutschland und Europa*, Heidelberg, C.F. Müller, (699) 740-741.

[36] M. STACHOWAIK-KUDLA, S. WESTA, C. BOTELHO and I. BARTHA, "Academic Freedom as a Defensive Right", *Hague Journal on the Rule of Law* 2023, (161) 161.

[37] M. STACHOWAIK-KUDLA, S. WESTA, C. BOTELHO and I. BARTHA, "Academic Freedom as a Defensive Right", *Hague Journal on the Rule of Law* 2023, (161) 181-182.

6. RESEARCH ON DIFFERENT PROCEDURAL DESIGNS FOR THE PROTECTION OF INDIVIDUAL ACADEMIC FREEDOM – Comparative legal research on different forms of legal and judicial protection of academic freedom remains largely absent. The research of E. BARENDT addresses this gap in legal research,[38] but the author does not consider collective agreements, which are prevalent in the Canadian legal system. Unlike previous comparative research on the legal and judicial protection of academic freedom[39], this research does not systematically examine the substance of the academic freedom provisions. In-depth comparative research on the substance of academic freedom as embedded in legal provisions has already been conducted in Europe. The most significant of these is the work by T. KARRAN[40] and the subsequent research by K. BEITER and T. KARRAN, which evaluated the legal protection mechanisms of all the member states of the European Union by reviewing their constitutional and legislative provisions on the subject matter.[41] The evaluation of the latter study[42] was carried out in light of the substantive standards of the 1997 UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel.[43]

This research, however, focuses primarily on the procedural implications of legal and judicial protection mechanisms. It distinguishes itself from previous research by taking a comparative look at different legal and judicial protection mechanisms that serve to safeguard individual academic freedom. This research is the first to include collective agreements and arbitration in the European debate about legal and judicial protection of individual academic freedom. Indeed, the question of whether academics might experience differences in their legal and judicial protection in a system characterised by legislation or constitutional protection, as opposed to a system of collective agreements, has not yet been thoroughly addressed in the academic debate.

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[38] See E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 331p.
[39] For instance: T. KARRAN, "Academic Freedom in Europe: A Preliminary Comparative Analysis," *Higher Education Policy*, 20(3), 2007, 289–313; T. KARRAN, "Academic Freedom in Europe: Reviewing unesco's Recommendation," *British Journal of Educational Studies* 57(2), 2009, 191–215.
[40] See T. KARRAN, "Academic Freedom in Europe: A Preliminary Comparative Analysis," *Higher Education Policy*, 20(3), 2007, 289–313.
[41] K. BEITER and T. KARRAN, "Academic Freedom and Its Protection in the Law of European States: Measuring an International Human Right*", European Journal of Comparative Law and Governance*, 2016, (254) 254-255.
[42] K. BEITER and T. KARRAN, "Academic Freedom and Its Protection in the Law of European States: Measuring an International Human Right*", European Journal of Comparative Law and Governance*, 2016, (254) 254-255.
[43] Recommendation concerning the Status of Higher-Education Teaching Personnel of the General Conference of UNESCO (11 November 1997), available at https://en.unesco.org/about-us/legal-affairs/recommendation-concerning-status-higher-education-teaching-personnel.

1.1.2 CONCEPTUAL FRAMEWORK

7. ACADEMICS – It is crucial to establish a specific definition of 'academics' to effectively discuss issues surrounding academic freedom, as academics are one of the primary addressees of academic freedom. Additionally, a clear definition of this concept is important due to ongoing debates in the academic literature regarding which members of academic staff are entitled to academic freedom.[44] For the purposes of this research, academics are defined as all academic staff engaged in teaching and/or research at a university. This encompasses both permanent and temporary academic staff.

8. ACADEMIC FREEDOM AS A CLAIM-RIGHT – The underlying idea of this dissertation is that academic freedom constitutes an enforceable right belonging, amongst others, to individual academics, which can be asserted against the institution before a dispute settlement body. This occurs when the institution itself exercises its academic freedom rights while interfering with those of individuals. Only within this understanding of academic freedom can conflicting claims between individuals and institutions be addressed.[45] The assumption that academic freedom is indeed a right that can be enforced underpins most of the academic freedom research focusing on legal and judicial protection of the right.[46] However, the academic literature suggests that it is not necessarily self-evident that academic freedom is understood as an enforceable right for individuals.[47] W. VAN ALSTYNE argues that academic freedom is merely a freedom rather than a right that establishes an enforceable claim ensuring protection from the powers of others who might have the authority to restrain academic freedom.[48]

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[44] See for example the debate in Germany: M. MAY, "Kunst- und Wissenschaftsfreiheit" in R. BROCKHAUS, A. ECK, A. GUNKEL, A. HOFFMANN, B. HOFFMANN, L. KATHKE, U., KNOKE, D. LECHTERMANN, J. MAIWALD, M. MAY, J. SCHACHEL, K. SCHMIEMANN, J. TIEDEMANN, S. WERRES (eds.), *Beamtenrecht des Bundes und der Länder – Kommentar*, München, R. v. Decker, (Vorbemerkungen §120) para. 11.

[45] E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 45.

[46] See for example: K. BEITER and T. KARRAN, "Academic Freedom and Its Protection in the Law of European States: Measuring an International Human Right*", European Journal of Comparative Law and Governance* 2016, 259; M. STACHOWAIK-KUDLA, S. WESTA, C. BOTELHO and I. BARTHA, "Academic Freedom as a Defensive Right", *Hague Journal on the Rule of Law* 2023, (161) 165; S. STACHOWAIK-KUDLA, "Academic freedom as a source of rights' violations: a European perspective", *Higher Education* 2021, (1031) 1032.

[47] E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 43 and 45-49.

[48] W. VAN ALSTYNE, "The Specific Theory of Academic Freedom and the General Issue of Civil Liberty", in E. PINCOFFS (ed.), *The Concept of Academic Freedom*, University of Texas Press, 1975, (59) 71.

PART 2. METHODOLOGICAL FRAMEWORK

1.2.1 RESEARCH AIM

9. COMPARATIVE-EVALUATIVE RESEARCH OBJECTIVE – In the state of the art above, I identified two 'models' for protecting academic freedom: the 'Canadian model' and the 'European model'. This dissertation will map out and analyse the procedural implications arising from the particularities of different legal and judicial protection mechanisms. Moreover, this thesis aims to evaluate the Canadian legal system and the selected European legal systems regarding the enforceability and legal certainty of individual academic freedom in conflicts with institutional academic freedom, supported by the comparative research conducted. This includes addressing certain practical and theoretical risks associated with the legal and judicial protection mechanisms of the legal systems under scrutiny concerning the aforementioned norms. However, the goal is not to make a final judgment on the desirability of one system over another. This research certainly serves as a first building block for a normative question. Overall, this dissertation aims to shed light on the defensive and enforceable dimension of academic freedom in conflicts between academics and their institution.[49]

1.2.2 RESEARCH QUESTIONS

10. ENUMERATION OF THE RESEARCH QUESTIONS – The **main research question** that will be answered in this thesis is as follows:

To what extent do Canada and the chosen European legal systems differ in terms of legal and judicial protection of individual academic freedom, when the latter conflicts with institutional academic freedom?

The **sub-research questions** necessary to answer the main research question are the following:

1. *On what legal basis can academics in the selected European legal systems and in the Canadian legal system claim individual academic freedom when their rights are allegedly violated by the university?*

[49] M. ODERKERK, "The Need for a Methodological Framework for Comparative Legal Research", *RabelsZ* 2015, (589) 600.

2. *Before which dispute settlement body can academics enforce individual academic freedom in the Canadian legal system and in the selected European legal systems?*

3. *What legal remedies are available for violations of individual academic freedom in the Canadian legal system and in the selected European legal systems?*

4. *How do the Canadian legal system and the selected European legal systems relate to the enforceability of individual academic freedom in a conflict with institutional academic freedom?*

5. *How do the Canadian legal system and the selected European legal systems relate to the legal certainty of individual academic freedom in a conflict with institutional academic freedom?*

11. FURTHER CLARIFICATION OF THE RESEARCH QUESTIONS – Some of the research questions require further clarification. In particular, the term 'enforcement' in the fourth research question must be operationalised. For the purposes of this study, enforcement is divided into three parts: (1) whether there is an enforceable provision protecting individual academic freedom at all, (2) whether this provision is binding on the university, and (3) how the defensive function of academic freedom operates.[50] For part (1), the research relies on the results of the first research question, i.e. whether there is an enforceable legal basis for the protection of academic freedom in the legal systems under scrutiny. Regarding the term 'defensive function,' this study refers to the function of academic freedom as a defence against interference. It is invoked before a dispute resolution body after there has been an alleged violation by the university.[51]

The fifth research question also requires further explanation. The term 'legal certainty' needs to be operationalised. Legal certainty is not understood as a subjective evaluation by academics. Instead, it is discussed at the organisational level of the legal system. Specifically, legal certainty will be addressed based on two aspects: (1) the clarity of the norm and (2) its application in case law. This first aspect revolves around the idea that a

[50] This classification is based on the preliminary research carried out by the researcher on the enforceable dimension of academic freedom.

[51] M. STACHOWAIK-KUDLA, S. WESTA, C. BOTELHO and I. BARTHA, "Academic Freedom as a Defensive Right", *Hague Journal on the Rule of Law* 2023, (161) 174; S. STACHOWAIK-KUDLA, "Academic freedom as a source of rights' violations: a European perspective", *Higher Education* 2021, (1031) 1032; W. LÖWER, "Freiheit wissenschaftlicher Forschung und Lehre" in D. MERTEN and H. PAPIER (eds.), *Handbuch der Grundrechte in Deutschland und Europa*, Heidelberg, C.F. Müller, (699) 723 and 740.

legal provision should be clear enough for those to whom it is addressed to be able to deduce their own rights from its wording.[52] The second part concerns the application of academic freedom in the case law, where legal certainty is ensured by judges defining and enforcing citizens' rights.[53] The research will thus assess the meaning of collective agreements and legislation on academic freedom in practice, and determine the extent to which these provisions provide legal certainty.

1.2.3 DELIMITATION OF THE RESEARCH

12. SUBSTANTIVE QUESTIONS REGARDING ACADEMIC FREEDOM – This research confines itself to one aspect of academic freedom, specifically the legal and judicial protection of individual academic freedom. It is not concerned with substantive questions about the meaning of academic freedom, nor is it limited to the discussion of one or more sub-rights of academic freedom.

13. INTERNATIONAL LAW AND INTERNATIONAL COURTS – Regarding the European legal systems, this research will focus on national law that embeds the principle of academic freedom. Additionally, it will discuss the European Union's provision regarding academic freedom.[54] International treaties such as the European Convention on Human Rights (ECHR) that incorporate academic freedom will not be discussed.[55] This research is focused on the procedural design of academic freedom enforcement, not the content of academic freedom law. International treaties that incorporate academic freedom do not specify the procedure to be followed to defend the right.

14. UNIVERSITY ORGANISATION – Although different types of universities (public and private) and differences in the legal status of university staff are sometimes considered, this is not a thesis on the organisational structures of universities. While these issues are often related to academic freedom, the thesis does not delve into the relationship between

[52] P. POPELIER, *Rechtszekerheid als beginsel voor behoorlijke regelgeving*, Antwerpen – Groningen, Intersentia, 1997, 139.
[53] *Ibid*, 141.
[54] European Union law regarding academic freedom is only marginally addressed in this thesis. It is discussed because it is part of the internal legal order of the European systems examined and because it may be directly invoked in a dispute. The limited discussion of European Union law is due to the fact that the European Court of Justice has only explicitly ruled on institutional academic freedom in the case of *Commission v. Hungary* (Court of Justice of the European Union 6 October 2020, nr. C 66/18, ECLI:EU:C:2020:792, 'Commission v. Hungary').
[55] For an overview of these provisions, I refer to J. VRIELINK, P. LEMMENS, K. LEMMENS and S. PARMENTIER, "Challenges to academic freedom as a fundamental right", League of European Research Universities (LERU), Advice Paper No. 31, 2023, 36p.

the state and the university, the nature of university governance, or the financing of universities.[56]

15. INTERNAL UNIVERSITY STATUTES AND INTERNAL UNIVERSITY PROCEDURES – As far as European systems are concerned; the research focuses on external judicial channels and legislation to enforce academic freedom. Internal university regulations and internal university procedures are not addressed. An important methodological limitation concerns the lack of public availability of the internal procedures of the universities in the European systems under review. Second, internal regulations do not comprehensively regulate academic freedom. Internal regulations of Canadian universities are also not considered because they are not permanent.[57]

16. TRANSVERSAL LEGAL PROBLEM – The judicial protection of academic freedom transcends different branches of law. The research will, for example, draw on higher education law,[58] constitutional law and labour law. Additionally, it touches on various legal issues such as the substantive balance between individual and institutional academic freedom and the legal nature of employment in higher education. These are, however, not the main focus.[59]

1.2.4 RESEARCH METHOD

1.1.4.1 Overall comparative legal methodology

17. FUNCTIONALISM – Since this research project aims to describe, explore and evaluate legal system's approach to a similar social problem – i.e. legally and judicially protecting individual academic freedom against university interference – comparing similar social functions is appropriate. Functionalism will thus prove to be an appropriate

[56] For further information, see: E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 144-153; J. GROEN, *Academische vrijheid: een juridische verkenning*, 2017, Rotterdam, Erasmus University Rotterdam, 285; T. SCHRÖDER, *Leistungsorientierte Ressourcensteuerung und Anreizstrukturen im deutschen Hochschulsystem: ein nationaler Vergleich*, Berlin, Duncker und Humblot, 2003, 308 p.

[57] Faculty association agreements lack the permanence of collective agreements. Senate by-laws and resolutions may be incorporated by reference into Faculty Association agreements. The Senate reserves the right to unilaterally change these terms with reasonable notice. In contrast, the terms of collective agreements are fixed for the duration of the agreement and cannot be changed by internal resolutions or by-laws, such as those of the Senate (R. CAMPBELL, "Tenure and Tenure Review in Canadian Universities", *McGill Law Journal*, 1981, (362) 366).

[58] The concept of academic freedom is intrinsically linked to higher education law. This is due to historical developments, in particular the advancement of science in universities (H. TRUTE, *Die Forschung zwischen grundrechtlicher Freiheit und staatlicher Institutionalisierung*, Tübingen, Mohr Siebeck, 1994, 16).

[59] L. VENY, *Onderwijsrecht - I. Dragende beginselen*, Brugge, die Keure/ la Charte, 2010, 3.

method.[60] However, given that academic freedom is a politically and culturally sensitive topic, one should not simply presume the similarity of problems. A nuanced approach to functionalism should be applied to this topic, fully taking into account the differences in solutions.[61] What is similar for the chosen legal systems is that the function of the solutions is to address the legal problem.[62]

18. TERTIUM COMPARATIONIS – As follows from the application of the functional method, the common element or *tertium comparationis* shared by the objects of comparison in this research project is their social function of solving a legal problem.[63] The legal provisions and dispute resolution procedures for academic freedom in Canada and in the selected European systems tackles the legal and judicial protection of individual academic freedom when it conflicts with institutional academic freedom. The objects share the same objective of providing legal protection for individual academic freedom, but in different formats.[64] Specifically, the European legal systems provide academic freedom protection through legislation and the judiciary, while the Canadian legal system provides academic freedom protection through collective agreements and arbitration.

19. CHOICE OF JURISDICTIONS – The choice of legal systems will primarily be based on the aim and topic of the research.[65] This research draws upon *Lösungstypen*, i.e. 'typical' solutions to a legal problem, for which a representative legal system can be identified.[66] Based on preliminary research on the topic, this research design distinguishes two types of solutions. First, a legal system can set up a procedural design protecting academic freedom through constitutional and legislative acts, combined with enforcement by judicial bodies. The Belgian legal system will serve as the representative system in this respect. When

[60] M. ODERKERK, "The Need for a Methodological Framework for Comparative Legal Research", *RabelsZ* 2015, (589) 611.
[61] C. VALCKE, "Comparing Legal Systems: Methodology." in *Comparing Law: Comparative Law as Reconstruction of Collective Commitments*, Cambridge, Cambridge University Press, 2018, (1) 6; G. DANNEMANN, "Comparative Law: Study of Similarities or Differences", in M. REIMANN and R. ZIMMERMAN (eds.), *The Oxford Handbook of Comparative Law*, Oxford, Oxford University Press, 2019, (390) 401; M. ADAMS, "Structuur, praktijk en theorie van rechtsvergelijkend onderzoek", *TPR* 2018, nr. 3, (889) 907.
[62] R. MICHAELS, "The Functional Method of Comparative Law" in M. REIMANN and R. ZIMMERMAN (eds.), *The Oxford Handbook of Comparative Law*, Oxford University Press, 2019, (345) 376.
[63] M. ODERKERK, "The Need for a Methodological Framework for Comparative Legal Research", *RabelsZ*, 2015, (589) 610-611; M. ADAMS, "Structuur, praktijk en theorie van rechtsvergelijkend onderzoek", *TPR* 2018, nr. 3, (889) 912-913.
[64] L. KESTEMONT, *Handbook on Legal Methodology. From Objective to Method.*, Cambridge, Intersentia, 2018, 39.
[65] M. ODERKERK, "The Need for a Methodological Framework for Comparative Legal Research", *RabelsZ*, 2015, (589) 602.
[66] *Ibid.*, 607-608.

legislation is consulted, it comes from the Flemish and not the Walloon Region.[67] Insights from the German[68] and Dutch legal systems will be added. Germany and the Netherlands will prove fruitful when comparing case law and will address the small amount of Belgian legal scholarship. The Belgian, German and Dutch legal and judicial protection mechanisms for individual academic freedom are similar in the sense that all three provide constitutional protection for academic freedom.[69] Moreover, it follows from the analysis of K. BEITER and T. KARRAN that Belgium, the Netherlands and Germany all score relatively well[70] in terms of legal protection of academic freedom measured against UNESCO standards, though Germany does even better on some aspects.[71] Eastern European countries are not included in the comparison, as their history complicates nuanced research on academic freedom.[72] Second, academics can be guaranteed academic freedom protection through collective agreement provisions, accompanied with judicial protection by independent arbitrators. The Canadian legal system is a clear example and will be chosen as a representative system for this type of solution.[73]

[67] In the case of the Belgian legal system, I have chosen to include state legislation in the discussion of academic freedom, as there is no explicit constitutional provision. I have limited myself to the legislation of Flanders for feasibility reasons.

[68] Regarding the German legal system, I limited myself to federal legislation on academic freedom. There is an explicit and quite extensive constitutional provision on academic freedom, and it is only this provision that is discussed in the literature (*Infra* 110). The state legislation that touches upon the right to academic freedom mainly concerns legislation on the organization of universities (See, E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 144-153).

[69] Belgian Constitutional Court 23 November 2005, nr. 167/2006, *C.D.P.K.*, 2006/3, 664-672; E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 117.

[70] This is not to say that the chosen European states do not face threats to academic freedom. A recent and leading study by STOA examined the *de facto* state of academic freedom in the EU Member States. STOA also provides an overview of the current 'external' threats to academic freedom in each country. For Germany, there are particular concerns about academic freedom of expression, which is allegedly threatened by academic activism, relations with China and 'science scepticism in civil science'. For Belgium, the research reports that there are threats to academic freedom of expression in light of an increasingly polarised university climate, with ideology and politics increasingly influencing academic debates. For the Netherlands, there are more concerns about freedom to research, freedom to teach and freedom of academic expression, caused, among other things, by cancel culture movements and new forms of management. Only for the Netherlands does the research indicate that there are 'internal' threats about the relatively weak legal protection of academic freedom in general (P. MAASSEN, D. MARTINSEN, M. ELKEN, J. JUNGBLUT and E. DACKNER, *State of play of academic freedom in the EU member states: Overview of de facto trends and developments*, 2023, Panel for the Future of Science and Technology (STOA), available at https://www.europarl.europa.eu/stoa/en/document/EPRS_STU(2023)740231, 29, 85, 132-133).

[71] K. BEITER and T. KARRAN, "Academic Freedom and Its Protection in the Law of European States: Measuring an International Human Right*", European Journal of Comparative Law and Governance* 2016, (254) 340-345.

[72] M. STACHOWAIK-KUDLA, S. WESTA, C. BOTELHO and I. BARTHA, "Academic Freedom as a Defensive Right", *Hague Journal on the Rule of Law* 2023, (161) 161.

[73] D. ROBINSON, "Academic freedom in Canada: a labor law right", *Academe*, Vol. 105(4), 2019, (22) 22.

1.1.4.2 Methodological considerations for each research question

1.1.4.2.1 Research questions one, two and three

20. DESCRIPTION AND COMPARISON – To answer the first, second and third research question, the research will systematically describe the legal basis for individual academic freedom, identify the competent dispute resolution body, and outline the available legal remedies in case of an academic freedom violation in both Canada and European legal systems. The research will delve into primary sources and academic literature to gather information. Following this descriptive phase, the two systems will be compared using the comparative methodology outlined above.

1.1.4.2.2 Research question four

21. COMPARISON AND EVALUATION – The third chapter examines whether and to what extent the legal provisions are enforceable by academics before the dispute resolution body. The research will first describe and explore the legal implications associated with enforcing academic freedom, including the binding effect on the institution, and the defensive function, in both the European legal systems and in Canada. Both primary sources and academic literature will be consulted for this purpose. For the exploration of the defensive function of academic freedom, the research will partly draw on European and Canadian case law. The same cases used for the substantive case law analysis conducted for research question five will be utilised (*Infra* 23). However, in this part of the dissertation, the case law will not be analysed in depth but rather superficially analysed to explore how the defensive function of academic freedom operates. Secondly, the research conducts a comparative analysis according to the comparative methodology above. Third, the research performs an evaluative analysis to assess how the Canadian legal system and the selected European legal systems relate to the enforceability of individual academic freedom in order to be able to identify certain risks associated with the particular legal and judicial protection mechanisms. The evaluative criterion used is the enforceability of individual academic freedom. For a further elaboration of this evaluation criterion, please refer to point 13.

1.1.4.2.3 Research question five

22. COMPARISON AND EVALUATION – The fifth research question is again a comparative and evaluative inquiry. This chapter involves both a literature review and a substantive, in-depth case law analysis. First, I theoretically explore the extent to which there is legal certainty about the legal concept of academic freedom in both legal systems, through an examination of primary sources and a literature review.[74] Next, I discuss legal certainty at the level of its application in case law.[75] This issue will be substantiated through case law analysis and, to a lesser extent, through a literature review. The evaluative criterion used is the legal certainty of individual academic freedom. For a further elaboration of this evaluation criterion, please refer to point 13.

23. SELECTION OF DECISIONS – The first step in the case law analysis involved creating a database of the selected decisions. For the Canadian system, all electronically published arbitral awards were included,[76] accessible via CanLii.org. I conducted a search within all decisions in the database classified as labour adjudications, as disputes about academic freedom in arbitration proceedings are almost exclusively related to labour law.[77] For feasibility reasons, I then limited my search to the following Canadian provinces: British Columbia, Alberta, Saskatchewan, Newfoundland and Labrador, Manitoba, Ontario and Québec, as they are home to the largest universities in Canada. Subsequently, I searched only for decisions containing the term "academic freedom," resulting in 277 files in the database.[78] Narrowing my focus to final decisions only, the use of the search term "NOT interim" reduced the total number of files to 204. I further refined the search to focus on universities only, excluding colleges. I used the search terms 'NOT college' and 'AND university', which reduced the number of cases to 164. For Canada, I limited my search to cases from 1990 onwards, as the use of collective agreements to address academic freedom

[74] P. POPELIER, *Rechtszekerheid als beginsel voor behoorlijke regelgeving*, Antwerpen – Groningen, Intersentia, 1997, 139.
[75] *Ibid.*, 141.
[76] L. WIJNTJENS, "Het verrichten van een gestructureerde rechtspraakanalyse – De rol van excuses in de civiele rechtspraak en de medische tuchtrechtspraak" in P. VERBRUGGEN, *Methoden van systematische rechtspraakanalyse*, Den Haag, Boom Juridisch, 2021, (27) 30.
[77] C. GILLIN, "The Bog-like Ground on Which We Tread: Arbitrating Academic Freedom in Canada", *Canadian Review of Sociology/Revue canadienne de sociologie* 2002, (301) 314; M. LYNK, "Academic Freedom, Canadian Labour Law and the Scope of Intra-Mural Expression The Campus Speech Issue", *Constitutional Forum* 2020, (45) 47.
[78] L. WIJNTJENS, "Het verrichten van een gestructureerde rechtspraakanalyse – De rol van excuses in de civiele rechtspraak en de medische tuchtrechtspraak" in P. VERBRUGGEN, *Methoden van systematische rechtspraakanalyse*, Den Haag, Boom Juridisch, 2021, (27) 30.

has become more common since then.[79] This filtering left me with 126 cases. In consideration of the relevance of the decisions to this study, a further selection was made based on content. The cases selected are those where the freedom of teaching, the freedom of research and the freedom of publication[80] are the main components of the discussion, rather than a side issue. These cases also involve disputes concerning the understanding of academic freedom, not procedural issues related to it. Furthermore, I only selected cases involving a dispute between an academic and their institution. Moreover, for feasibility reasons, I limited myself to landmark judgments in Canadian jurisprudence. My database includes only judgments that are regularly cited in the most important literature.[81] Through the previous criteria and selection, my database resulted in 10 decisions.

On the European side, all online published judgments of labour courts, administrative courts, and constitutional courts were included. Similar to Canada, only cases where there is a dispute between academics and a university, and where there is a conflict over the substance of one of the three sub-rights mentioned above, were considered. For Belgium, I consulted the Stradalex and Jura databases using the search term "academic freedom". In Belgium, there is not a single electronically published academic freedom case in which an academic has claimed his or her academic freedom against the university. For the Netherlands, I used the Rechtspraak.nl database, where the search term “academic freedom” yielded 25 results. After the selection based on content, I was left with four decisions. For Germany, I used the Juris database and the following search terms: TEXT:Wissenschaftsfreiheit TEXT:Universität [Forschungsfreiheit ODER Lehrfreiheit ODER Meinungsfreiheit] [NICHT Krankenhaus] DATUM:"1973 bis 2024" [NICHT

[79] C. GILLIN, “The Bog-like Ground on Which We Tread: Arbitrating Academic Freedom in Canada”, *Canadian Review of Sociology/Revue canadienne de sociologie*, 2002, (301) 304; V. SMALLMAN, “Academic Labor: The Canadian Context”, *Cinema Journal*, 45(4), 2006, (108) 110, D. ROBINSON, “Academic freedom in Canada: a labor law right”, *Academe*, Vol. 105(4), 2019, (22) 24.

[80] For feasibility reasons, I limited myself to these three sub-rights, leaving aside participation. Additionally, cases concerning criminal opinions were excluded from consideration for the same reason.

[81] C. FORCESE, “The Expressive University the Legal Foundations of Free Expression and Academic Freedom on Canada’s Campuses”, *SSRN Scholarly Paper*, 2018, 36; C. GILLIN, “The Bog-like Ground on Which We Tread: Arbitrating Academic Freedom in Canada”, *Canadian Review of Sociology/Revue canadienne de sociologie*, 2002, (301) 307, 310 and 316; D. ROBINSON, “Academic freedom in Canada: a labor law right”, *Academe*, Vol. 105(4), 2019, (22) 25; M. BASTARACHE, *Report of the Committee on Academic Freedom*, 2021, https://www.uottawa.ca/about-us/sites/g/files/bhrskd336/files/2021-f11/report_committee_academic_freedom_en_final_v9.pdf, 16-17 and 24; M. LYNK, “Academic Freedom, Canadian Labour Law and the Scope of Intra-Mural Expression The Campus Speech Issue”, *Constitutional Forum* 2020, (45) 53 and 55-57.

Akkreditierung] [NICHT Vertraulich] [NICHT Mitbestimmung] [NICHT fusion] [NICHT strafrecht]. This search yielded 111 decisions, which were then selected based on content.

24. SUBSTANTIVE ANALYSIS – The second step in my analysis involves the substantive analysis of the decisions from the database. I have proceeded in the same way for both Canadian and European case law. For both legal systems, the research examined the role of the academic freedom provisions in defining and enforcing individual academic freedom by the deciding authority. Additionally, I explored the manner in which the dispute resolution body applies the legal provisions in practice.

1.2.5 RESEARCH PREMISE

25. SIMILAR SUBSTANCE OF ACADEMIC FREEDOM – The research premise of this paper posits that academic freedom does not substantially differ in terms of substance between the legal systems being compared. This premise is grounded in the fact that the Belgian, Dutch, German, and Canadian legal systems are all signatories to the 1997 UNESCO Recommendation, which mandates substantive standards for academic freedom protection. There is ample evidence in the literature indicating that all legal systems give considerable weight to the UNESCO standards.[82] A related research premise is that similar conflicts between academics and institutions arise in the legal systems under consideration.

1.2.6 RESEARCH HYPOTHESIS

26. SIGNIFICANT DIFFERENCES – Based on preliminary research and a literature review, this study proposes the hypothesis that there is a significant difference between the 'models' studied in terms of both legal and judicial protection of academic freedom. This hypothesis primarily pertains to legal certainty. Specifically, it is hypothesised that a detailed and negotiated contractual provision on the right to academic freedom leads to greater legal certainty, both in theory and in practice, than the open standard of academic freedom in the European legal systems examined. Additionally, the research suggests that

[82] The UNESCO standards are not only often used as a criterion for assessing robust substantive protections of academic freedom, but they are also usual as the first starting point for outlining the meaning of academic freedom in the literature. See: K. BEITER and T. KARRAN, "Academic Freedom and Its Protection in the Law of European States: Measuring an International Human Right*", European Journal of Comparative Law and Governance* 2016, 254-255; M. LYNK, *Academic Freedom and the Law in Canada: An Introduction* [PowerPoint-slides], Academic freedom and the law conference, Harry Crowe Foundation, 2022, https://www.crowefoundation.ca/sites/default/files/2_lynk.s_en.pdf (consulted on 21 December 2023); CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS, *Legal Basis for Academic Freedom in Canada*, https://www.caut.ca/equity-toolkit/article/legal-basis-academic-freedom-canada (consulted on 17 Januari 2024).

other points of difference, given the major differences in the legal 'design' for the protection of individual academic freedom – contractual versus constitutional protection – will generally result in significant differences. The purpose of this research is not to confirm this hypothesis, but to falsify it.[83]

1.2.7 SIGNIFICANCE AND ORIGINALITY

27. THEORETICAL AND PRACTICAL RELEVANCE – This research holds significance for both the academic discipline and society. The defensive function of academic freedom against university interference presents a novel perspective that has not been previously examined from a comparative standpoint, thus introducing a new research question to the field. Furthermore, the procedural aspects of academic freedom have been largely overlooked in legal literature, which has predominantly focused on substantive questions. Moreover, there has been a growing demand for research on the legal and judicial protection of academic freedom, not only from the academic community but also from organisations such as STOA (*Supra* 4, 5 and 6). By incorporating a comparative dimension, this study aims to revitalise research on the protection of academic freedom, offering insights into how different legal systems approach and safeguard this right. Such insights could inform policies and practices aimed at safeguarding academic freedom in various jurisdictions. From a practical standpoint, the findings of this research could have significant implications. Depending on its outcomes, a professor in Canada may have different protections for individual academic freedom than a professor in one of the European states under study.

1.2.8 STRUCTURE

28. CHAPTERS – In a second chapter, I will introduce the concept of academic freedom. This chapter does not explicitly address a research question but provides the necessary substantive background for the reader to understand the procedural perspective taken on individual academic freedom. The third chapter will focus on outlining the procedural design for the legal and judicial protection of the Canadian legal system on one hand, and the selected European legal systems on the other hand. In this chapter, I will address the first three research questions. Moving on to the fourth chapter, the research will delve into the practical enforcement of individual academic freedom, addressing the fourth research

[83] R. MICHAELS, "The Functional Method of Comparative Law" in M. REIMANN and R. ZIMMERMAN (eds.), *The Oxford Handbook of Comparative Law*, Oxford University Press, 2019, (345) 369.

question. Finally, in the fifth chapter, the research will examine issues regarding the legal certainty of individual academic freedom, thereby addressing the fifth research question.

CHAPTER 2. ACADEMIC FREEDOM AS A LEGAL RIGHT WITH TWO CONFLICTING DIMENSIONS

PART 1. NOT AN EXACT SCIENCE

29. LACK OF CONSENSUS – "*There is, one soon discovers, no clear and widely accepted definition or justification of academic freedom and no settled account of the way in which claims of violation may be assessed*."[84] E. PINCOFFS' quote from 1975 asserting the absence of a clear and widely accepted definition or justification of academic freedom, remains relevant today. Indeed, there is no universally legally binding text that provides a definition of academic freedom.[85] Despite the efforts of many scholars to define the concept of academic freedom[86], there is little consensus in academic literature regarding its exact scope and meaning.[87] The conceptual ambiguity of the right to academic freedom is largely due to the lack of consensus on its inherent sub-rights.[88] Individual academic freedom is a multifaceted right encompassing various sub-rights for academics. However, there is no universally recognised set of these sub-rights.[89] Nonetheless, some elements enjoy consensus, which will be elaborated upon below.[90] Additionally, the presence of multiple rights-holders for academic freedom further complicates conceptual clarity.[91]

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[84] E. PINCOFFS, "Introduction", in E. PINCOFFS (ed.), *The Concept of Academic Freedom*, University of Texas Press, 1975, vii.

[85] G. KOVATS and Z. RONAY, *How academic freedom is monitored: Overview of methods and procedures*, 2023, Panel for the Future of Science and Technology (STOA), available at https://www.europarl.europa.eu/RegData/etudes/STUD/2023/740228/EPRS_STU(2023)740228_EN.pdf, 7.

[86] See for example G. AKERLIND and C. KAYROOZ, "Understanding academic freedom: The views of social scientists", *Higher Research and Development*, 22(3), 2003, 327; J. VRIELINK, P. LEMMENS, K. LEMMENS and S. PARMENTIER, "Challenges to academic freedom as a fundamental right", League of European Research Universities (LERU), Advice Paper No. 31, 2023, 36 p.; T. KARRAN, "Academic Freedom in Europe: Time for a Magna Charta?", *Higher Education Policy* 2009, 163-189.

[87] E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 1; K. WHITTINGTON, "Academic freedom and the scope of protections for extramural speech", *Academe*, 105(1), 2019, 20; T. KARRAN, "Academic Freedom in Europe: Time for a Magna Charta?", *Higher Education Policy* 2009, (163) 164; P. MAASSEN, D. MARTINSEN, M. ELKEN, J. JUNGBLUT and E. DACKNER, *State of play of academic freedom in the EU member states: Overview of de facto trends and developments*, 2023, Panel for the Future of Science and Technology (STOA), available at https://www.europarl.europa.eu/stoa/en/document/EPRS_STU(2023)740231, 1.

[88] A. PASVENSKIENĖ, *A legal justification of academic freedom as a fundamental right: charting vagueness for more clarity*, Doctoral Dissertation Vytautas Magnus University, 2017, 36.

[89] G. KOVATS and Z. RONAY, *How academic freedom is monitored: Overview of methods and procedures*, 2023, Panel for the Future of Science and Technology (STOA), available at https://www.europarl.europa.eu/RegData/etudes/STUD/2023/740228/EPRS_STU(2023)740228_EN.pdf, 11-15,

[90] A. PASVENSKIENĖ, *A legal justification of academic freedom as a fundamental right: charting vagueness for more clarity*, Doctoral Dissertation Vytautas Magnus University, 2017, 36.

[91] A. PASVENSKIENĖ, *A legal justification of academic freedom as a fundamental right: charting vagueness for more clarity*, Doctoral Dissertation Vytautas Magnus University, 2017, 37; J. VRIELINK, P. LEMMENS, K.

30. OPERATIONALIZABLE DEFINITION – For the purposes of this study, academic freedom is presented as a cluster[92] of rights[93] associated with the university mission, leading to decisions based on scientific autonomy in the search for knowledge.[94] Academic freedom embodies two[95] potentially conflicting[96] dimensions: individual academic freedom and institutional academic freedom, representing the academic freedom rights of academics and the university, respectively. The definitions of individual and institutional academic freedom that come closest to achieving universal acceptance are those outlined in the 1997 UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel.[97] Although the Recommendation is not legally binding, its authority is widely recognised in legal scholarship. Its broad acceptance within the international academic community signifies a consensus on the essence of academic freedom.[98] This

LEMMENS and S. PARMENTIER, "Challenges to academic freedom as a fundamental right", League of European Research Universities (LERU), Advice Paper No. 31, 2023, 14.

[92] G. KOVATS and Z. RONAY, *How academic freedom is monitored: Overview of methods and procedures*, 2023, Panel for the Future of Science and Technology (STOA), available at https://www.europarl.europa.eu/RegData/etudes/STUD/2023/740228/EPRS_STU(2023)740228_EN.pdf, 12,

[93] For the scope of this study, academic freedom is understood as a right. This is however not self-evident. Academic freedom is often understood by the academic community as a responsibility in the sense that academics, and the university in its whole, serve society by disseminating knowledge and conducting research (A. PASVENSKIENĖ, *A legal justification of academic freedom as a fundamental right: charting vagueness for more clarity*, Doctoral Dissertation Vytautas Magnus University, 2017, 37).

[94] German Constitutional Court 11 January 1994, nr. 1 BvR 434/87, ECLI:DE:BVerfG:1994:rs19940111.1bvr043487, https://www.bundesverfassungsgericht.de/DE/Homepage/homepage_node.html, para. 46.

[95] J. VRIELINK et. al. identifies a third dimension, namely the obligation for the state to ensure effective enjoyment of academic freedom (J. VRIELINK, P. LEMMENS, K. LEMMENS and S. PARMENTIER, "Challenges to academic freedom as a fundamental right", League of European Research Universities (LERU), Advice Paper No. 31, 2023, 14).

[96] It must be nuanced that in some cases the individual and institutional dimension will reinforce each other, and that institutional autonomy is a necessary precondition for individual academic freedom. For the scope of this research, however, individual and institutional academic freedom are presented as (potentially) conflicting rights (Paragraph 18 Recommendation concerning the Status of Higher-Education Teaching Personnel of the General Conference of UNESCO (11 November 1997), available at https://en.unesco.org/about-us/legal-affairs/recommendation-concerning-status-higher-education-teaching-personnel; J. VRIELINK, P. LEMMENS, K. LEMMENS and S. PARMENTIER, "Challenges to academic freedom as a fundamental right", League of European Research Universities (LERU), Advice Paper No. 31, 2023, 3).

[97] In essence, the Recommendation is a normative instrument providing standards on which UNESCO and the international academic community agreed that they are of paramount importance for proper and effective legal protection of individual academic freedom. The most important elements are guaranteeing the several sub-rights of individual academic freedom and institutional academic freedom, setting up a system of tenure and providing sufficient self-governance and collegiality (Recommendation concerning the Status of Higher-Education Teaching Personnel of the General Conference of UNESCO (11 November 1997), available at https://en.unesco.org/about-us/legal-affairs/recommendation-concerning-status-higher-education-teaching-personnel; A. PASVENSKIENĖ, *A legal justification of academic freedom as a fundamental right: charting vagueness for more clarity*, Doctoral Dissertation Vytautas Magnus University, 2017, 136; T. KARRAN, "Academic Freedom in Europe: Reviewing Unesco's Recommendation", *British Journal of Educational Studies*, 2009, (191) 195-196).

[98] A. PASVENSKIENĖ, *A legal justification of academic freedom as a fundamental right: charting vagueness for more clarity*, Doctoral Dissertation Vytautas Magnus University, 2017, 136; J. VRIELINK, P. LEMMENS, K. LEMMENS and S. PARMENTIER, "Challenges to academic freedom as a fundamental right", League of European Research Universities (LERU), Advice Paper No. 31, 2023, 12; T. KARRAN, "Academic Freedom in

consensus allows for this dissertation to rely on the definition of academic freedom provided for by UNESCO for both the Canadian legal system and the European legal systems under scrutiny.

PART 2. TWO CONFLICTING DIMENSIONS

2.2.1 INDIVIDUAL ACADEMIC FREEDOM

31. DEFINITION – The UNESCO Recommendation defines individual academic freedom as *"the right, without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express freely their opinion about the institution or system in which they work, freedom from institutional censorship and freedom to participate in professional or representative academic bodies".*[99] According to this definition, the right to individual academic freedom comprises several complementary sub-rights that belong to academics.[100] The most essential sub-rights are the freedom of research, the freedom of publication, the freedom of teaching, the freedom of academic expression and the right to shared governance regarding academic matters.[101]

32. FREEDOM OF RESEARCH – The freedom of research entails the freedom to determine the subject matter of the research, guided by professional standards. It also encompasses the freedom to set the research methods, the research purposes, the mode of analysis and the right to draw conclusions from the research results. Academics also have the prerogative to select research collaborators.[102] Institutional autonomy may, however,

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Europe: Reviewing Unesco's Recommendation", *British Journal of Educational Studies*, 2009, (191) 195-196; G. KOVATS and Z. RONAY, *How academic freedom is monitored: Overview of methods and procedures*, 2023, Panel for the Future of Science and Technology (STOA), available at https://www.europarl.europa.eu/RegData/etudes/STUD/2023/740228/EPRS_STU(2023)740228_EN.pdf, 7-8.

[99] Paragraph 26 Recommendation concerning the Status of Higher-Education Teaching Personnel of the General Conference of UNESCO (11 November 1997), available at https://en.unesco.org/about-us/legal-affairs/recommendation-concerning-status-higher-education-teaching-personnel.

[100] For a recent and complete overview and discussion of the different sub-rights, scope and meaning of academic freedom, see: J. VRIELINK, P. LEMMENS, K. LEMMENS and S. PARMENTIER, "Challenges to academic freedom as a fundamental right", League of European Research Universities (LERU), Advice Paper No. 31, 2023, 36.

[101] J. VRIELINK, P. LEMMENS, K. LEMMENS and S. PARMENTIER, "Challenges to academic freedom as a fundamental right", League of European Research Universities (LERU), Advice Paper No. 31, 2023, 29.

[102] J. VRIELINK, P. LEMMENS, K. LEMMENS and S. PARMENTIER, "Challenges to academic freedom as a fundamental right", League of European Research Universities (LERU), Advice Paper No. 31, 2023, 17; G. KOVATS and Z. RONAY, *How academic freedom is monitored: Overview of methods and procedures*, 2023, Panel for the Future of Science and Technology (STOA), available at https://www.europarl.europa.eu/RegData/etudes/STUD/2023/740228/EPRS_STU(2023)740228_EN.pdf, 13.

limit the freedom of research in the sense that academic leaders may determine requirements related to each of the elements above.[103]

33. FREEDOM OF PUBLICATION – This freedom entails the dissemination of research findings through various forms and platforms, including scholarly publications and educational activities. Academics retain the right to decide where and how their research is published.[104] Additionally, the freedom of publication encompasses intellectual property rights associated with research outcomes. Moreover, the freedom of publication protects academic expression[105], not to be confused with the general freedom of expression.[106] Freedom of academic expression can be divided into speech within the academic context and extramural expression.[107] Speech within the academic context implies utterances that are expressed on campus or in other university-related places. Extra-mural speech, on the other hand, is academic speech that takes place in the media or during debates with the general public for example.[108] On the other hand, there is an overlapping distinction between pure academic speech and off-topic speech.[109] The former notion implies expert opinions that fall within the field of expertise of the academic and that are meant to benefit teaching and research, whereas the latter implies speech by academics on general or political topics. Whether off-topic expression is protected by academic freedom, is a contested question in legal scholarship, but the majority view holds that it does not.[110]

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[103] J. VRIELINK, P. LEMMENS, K. LEMMENS and S. PARMENTIER, "Challenges to academic freedom as a fundamental right", League of European Research Universities (LERU), Advice Paper No. 31, 2023, 17.

[104] Bonn Declaration on Freedom of Scientific Research (20 October 2020), available at https://www.bmbf.de/bmbf/shareddocs/downloads/files/_drp-efr-bonner_erklaerung_en_with-signatures_maerz_2021.pdf?__blob=publicationFile&v=1; J. VRIELINK, P. LEMMENS, K. LEMMENS and S. PARMENTIER, "Challenges to academic freedom as a fundamental right", League of European Research Universities (LERU), Advice Paper No. 31, 2023, 19.

[105] J. VRIELINK, P. LEMMENS, K. LEMMENS and S. PARMENTIER, "Challenges to academic freedom as a fundamental right", League of European Research Universities (LERU), Advice Paper No. 31, 2023, 17.

[106] In essence, academic freedom of expression grants broader protection to academics than to other employees in the sense that they are protected from dismissal and discipline. On the other hand, the scope of protection of academic freedom of speech is more restricted than that of freedom of expression because academic freedom imposes certain responsibilities on academics. Their opinions must conform to professional standards, including a scientific basis (A. DE BAETS, "Het verschil tussen vrije meningsuiting en academische vrijheid", *THEMA, Tijdschrift voor Hoger Onderwijs en Management*, 2021, (12) 12-17).

[107] J. VRIELINK, P. LEMMENS, K. LEMMENS and S. PARMENTIER, "Challenges to academic freedom as a fundamental right", League of European Research Universities (LERU), Advice Paper No. 31, 2023, 20-21; Note that E. BARENDT uses the term extra-mural expression to refer to off-topic speech (E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 270).

[108] J. VRIELINK, P. LEMMENS, K. LEMMENS and S. PARMENTIER, "Challenges to academic freedom as a fundamental right", League of European Research Universities (LERU), Advice Paper No. 31, 2023, 20-21.

[109] *Ibid*, 21.

[110] E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 270; J. VRIELINK, P. LEMMENS, K. LEMMENS and S. PARMENTIER, "Challenges to academic freedom as a fundamental right", League of European Research Universities (LERU), Advice Paper No. 31, 2023, 21 and 23;

Freedom of academic speech is far from unlimited, as only opinions expressed in an appropriate academic manner, i.e. based on reasoning and evidence, are protected.[111]

34. FREEDOM OF TEACHING – Professors possess the autonomy to determine the content of a course based on their expertise, allowing for the inclusion of controversial topics relevant to the subject matter. Furthermore, freedom of teaching covers the choice of didactic methods of teaching.[112] However, institutional academic freedom may impose constraints on these choices by defining general course content and academic responsibilities.[113] Nevertheless, teachers should have a significant role in shaping curricula.[114]

35. RIGHT TO SELF-GOVERNANCE – This right empowers academic staff to actively participate in academic decision-making processes, expressing their views on institutional norms and operations. Academics should have opportunities to serve as elected representatives in university decision-making bodies. Collegial decision-making, as advocated by the UNESCO Recommendation, is perceived as an ideal governance model that minimises interference with academic freedom.[115]

See however: K. WHITTINGTON, "Academic freedom and the scope of protections for extramural speech", *Academe*, 105(1), 2019, (20) 22.

[111] J. VRIELINK, P. LEMMENS, K. LEMMENS and S. PARMENTIER, "Challenges to academic freedom as a fundamental right", League of European Research Universities (LERU), Advice Paper No. 31, 2023, 19.

[112] J. VRIELINK, P. LEMMENS, K. LEMMENS and S. PARMENTIER, "Challenges to academic freedom as a fundamental right", League of European Research Universities (LERU), Advice Paper No. 31, 2023, 16-17; G. KOVATS and Z. RONAY, *How academic freedom is monitored: Overview of methods and procedures*, 2023, Panel for the Future of Science and Technology (STOA), 12-13, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2023/740228/EPRS_STU(2023)740228_EN.pdf.

[113] For an outline of the limits on the freedom of teaching, see: J. VRIELINK, P. LEMMENS, K. LEMMENS and S. PARMENTIER, "Challenges to academic freedom as a fundamental right", League of European Research Universities (LERU), Advice Paper No. 31, 2023, 16-17.

[114] Paragraph 28 Recommendation concerning the Status of Higher-Education Teaching Personnel of the General Conference of UNESCO (11 November 1997), available at https://en.unesco.org/about-us/legal-affairs/recommendation-concerning-status-higher-education-teaching-personnel.

[115] Paragraph 31 Recommendation concerning the Status of Higher-Education Teaching Personnel of the General Conference of UNESCO (11 November 1997), available at https://en.unesco.org/about-us/legal-affairs/recommendation-concerning-status-higher-education-teaching-personnel; G. KOVATS and Z. RONAY, *How academic freedom is monitored: Overview of methods and procedures*, 2023, Panel for the Future of Science and Technology (STOA), 14, available at https://www.europarl.europa.eu/RegData/etudes/STUD/2023/740228/EPRS_STU(2023)740228_EN.pdf.

2.2.2 INSTITUTIONAL ACADEMIC FREEDOM

36. DEFINITION – Institutional autonomy or institutional academic freedom is the institutional counterpart of individual academic freedom.[116] The UNESCO recommendation defines institutional autonomy as *"that degree of self-governance necessary for effective decision making by institutions of higher education regarding their academic work, standards, management and related activities consistent with systems of public accountability."*[117]

37. CONTENT – In essence, institutional academic freedom pertains to the university's autonomy in managing internal and external affairs while upholding academic freedom.[118] It guarantees the university's independence from external control and enables it to carry out its academic mission.[119] Institutional academic freedom grants universities the right to decide on the selection of faculty members, to set the admission requirements for students, to determine the curriculum, to allocate the budgets, to set out student policies, to decide on academic program reforms etc.[120] This right ensures that universities have the autonomy to make decisions pertaining to the implementation of individual academic freedom sub-rights within the institutional decision-making framework.[121]

38. INSTITUTIONAL ACADEMIC FREEDOM IN THE EUROPEAN UNION – The acknowledgement of institutional academic freedom as a dimension of academic freedom, rather than merely another related right, has been a subject of debate in legal literature.[122] Clarity on this matter has emerged more prominently on the European side, particularly evident in a recent case, *Commission v. Hungary*, decided by the Court of Justice of the European Union. In this case, the Court clarified the multifaceted nature of academic freedom as enshrined in Article 13 of the EU Charter of Fundamental Rights, according to

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[116] Paragraph 18 Recommendation concerning the Status of Higher-Education Teaching Personnel of the General Conference of UNESCO (11 November 1997), available at https://en.unesco.org/about-us/legal-affairs/recommendation-concerning-status-higher-education-teaching-personnel.
[117] Paragraph 17 Recommendation concerning the Status of Higher-Education Teaching Personnel of the General Conference of UNESCO (11 November 1997), available at https://en.unesco.org/about-us/legal-affairs/recommendation-concerning-status-higher-education-teaching-personnel.
[118] J. VRIELINK, P. LEMMENS, K. LEMMENS and S. PARMENTIER, "Challenges to academic freedom as a fundamental right", League of European Research Universities (LERU), Advice Paper No. 31, 2023, 29.
[119] A. PASVENSKIENĖ, *A legal justification of academic freedom as a fundamental right: charting vagueness for more clarity*, Doctoral Dissertation Vytautas Magnus University, 2017, 72.
[120] M. LYNK, "Academic Freedom, Canadian Labour Law and the Scope of Intra-Mural Expression The Campus Speech Issue", *Constitutional Forum* 2020, (45) 48.
[121] A. PASVENSKIENĖ, *A legal justification of academic freedom as a fundamental right: charting vagueness for more clarity*, Doctoral Dissertation Vytautas Magnus University, 2017, 72.
[122] *Ibid.*, 71.

which "*Academic freedom shall be respected*."[123] The court emphasized that *"academic freedom also incorporates an institutional and organisational dimension, a link to an organisational structure being an essential prerequisite for teaching and research activities."*[124] This expansive interpretation[125] by the Court of Justice was somewhat unexpected, especially considering that the European Court of Human Rights has up to now only explicitly recognised individual academic freedom.[126] According to article 52(3) of the EU Charter of Fundamental Rights, the rights enshrined in the Charter must correspond to the rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms. However, it is worth noting that the Council of Europe Recommendation from 2006 had already linked individual academic freedom with institutional freedom, indicating a precedent for this broader understanding of academic freedom.[127]

39. INSTITUTIONAL ACADEMIC FREEDOM IN CANADA – In Canada, both courts and legal scholars have acknowledged the dual nature of academic freedom.[128] An explicit affirmation of the dual nature of academic freedom can also be found in the jurisprudence of the Canadian Supreme Court.[129] In its landmark judgment *McKinney v. University of Guelph*, the Canadian Supreme Court explicitly affirmed the institutional dimension of academic freedom by stating that *"The legal autonomy of the universities is fully buttressed by their traditional position in society. Any attempt by government to influence university decisions, especially decisions regarding appointment, tenure and dismissal of academic*

[123] Court of Justice of the European Union 6 October 2020, nr. C 66/18, ECLI:EU:C:2020:792, Commission v. Hungary, 227.
[124] *Ibid*.
[125] *Ibid.*, 226.
[126] The Court's interpretation of academic freedom is as follows: *"academic freedom in research and in teaching should guarantee freedom of expression and of action, freedom to disseminate information and freedom to conduct research and to distribute knowledge and truth without restriction, although it should be made clear that that freedom is not restricted to academic or scientific research, but that it also extends to academics' freedom to express freely their views and opinions"* (ECtHR, 27 May 2014, nr. 346/04 and 39779/04, ELCI:CE:ECHR:2014:0527JUD000034604, Mustafa Erdoğan and Others v. Turkey, § 40.)
[127] Paragraph 2 Recom. 1762 on Academics Freedom and University Autonomy, Parliamentary Assembly, Council of Europe, 2006, https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17469&lang=en.
[128] Court of Appeal of Alberta 9 May 2012, nr. 1001-0298-AC, Pridgen v. University of Calgary, *ABCA*, 139, https://www.canlii.org/en/; C. GILLIN, "The Bog-like Ground on Which We Tread: Arbitrating Academic Freedom in Canada", *Canadian Review of Sociology/Revue canadienne de sociologie*, 2002, (301) 306.
[129] C. GILLIN, "The Bog-like Ground on Which We Tread: Arbitrating Academic Freedom in Canada", *Canadian Review of Sociology/Revue canadienne de sociologie* 2002, (301) 306.

staff, would be strenuously resisted by the universities on the basis that this could lead to breaches of academic freedom."[130]

2.2.3 RELATION BETWEEN INDIVIDUAL AND INSTITUTIONAL ACADEMIC FREEDOM

40. CONFLICTS BETWEEN INDIVIDUAL AND INSTITUTIONAL ACADEMIC FREEDOM – Institutional and individual academic freedom often overlap, leading to potential conflicts between these dimensions.[131] When resolving such conflicts, a dispute settlement body must strive to find a proper balance.[132]

[130] Supreme Court of Canada 6 December 1990, nr. 20747, Mckinney v. University of Guelph, *SCR*, Volume 3, 229, https://www.canlii.org/en/.
[131] A. BRALEY-RATTAI and K. BENZANSON, "Un-Chartered Waters: Ontario's Campus Speech Directive and the Intersections of Academic Freedom, Expressive Freedom, and Institutional Autonomy", *Constitutional Forum* 2020, (65) 73.
[132] E. TIMBERMONT, "Academische vrijheid: een onderzoek naar de juridische draagwijdte en een aantal arbeidsrechtelijke implicaties van het begrip.", *T.O.R.B.* 2014-2015/1-2, 2014, (56) 63.

CHAPTER 3. PROCEDURAL DESIGN FOR THE LEGAL AND JUDICIAL PROTECTION OF ACADEMIC FREEDOM

PART 1. INTRODUCTION

41. PROCEDURAL FRAMEWORK TO ENFORCE ACADEMIC FREEDOM – In a scenario where an academic perceives a violation of his or her individual academic freedom rights by the university, he or she would seek to assert those rights by initiating a claim before a dispute resolution body. Several questions emerge concerning the enforcement of individual academic freedom: firstly, whether there exists a provision that can be enforced to protect individual academic freedom; secondly, which dispute resolution body is accessible to the academic for lodging their claim; and thirdly, what remedies are accessible if the dispute resolution body finds a violation.

PART 2. LEGAL BASIS FOR INDIVIDUAL ACADEMIC FREEDOM

42. ENFORCEABLE LEGAL PROVISION PROTECTING INDIVIDUAL ACADEMIC FREEDOM – In this first part of the chapter, my focus lies on determining whether there exists a legal provision within the legal system enabling individual academics to assert claims against the university. Particularly, I examine whether such a provision safeguards the individual facet of academic freedom and whether it is intended to create an enforceable right for individual academics. The research question to be addressed in this section of the dissertation is: What legal basis do academics in the selected European systems and Canada rely on to assert individual academic freedom claims when they allege violations by the university?

3.2.1 EUROPE

43. HISTORY – Historically, academic freedom has emerged as a constitutional and human right, with its roots in the development of the research university model in Germany in the 19th century. This model played a significant role in establishing academic freedom as a fundamental principle within universities. Due to the recognition of academic freedom as a key condition for democratic societies and the rule of law, academic freedom evolved

into a legally acknowledged freedom.[133] Academic freedom first appeared in national constitutions in the 19th and 20th centuries, with Germany being one of the pioneers.[134] These constitutional provisions served as an inspiration for international and supranational treaties and recommendations enshrining academic freedom.[135] Key amongst these are the EU Charter of Fundamental Rights, the European Convention of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights and the UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel.[136] Moreover, European bodies are lobbying for a robust legal basis for academic freedom.[137] For instance, a leading recommendation of 2006 of the Assembly of the Council of Europe on academic freedom and institutional autonomy emphasised that "*these principles should also be reaffirmed and guaranteed by law, preferably in the constitution.*"[138] Nowadays, the right to academic freedom in European states is typically safeguarded by national constitutions and higher education laws.[139]

3.2.2 The Charter of Fundamental Rights of the EU

44. ACADEMIC FREEDOM AS A FUNDAMENTAL RIGHT – Article 13 of the EU Charter stipulates that "*The arts and scientific research shall be free of constraint. Academic freedom shall be respected*." [140] The Explanations relating to the Charter of

[133] P. MAASSEN, D. MARTINSEN, M. ELKEN, J. JUNGBLUT and E. DACKNER, *State of play of academic freedom in the EU member states: Overview of de facto trends and developments*, 2023, Panel for the Future of Science and Technology (STOA), available at https://www.europarl.europa.eu/stoa/en/document/EPRS_STU(2023)740231, 4.

[134] J. BAERT, "Academische vrijheid, juridisch bekeken" in R. VERSTEGEN, (ed.), *Ad amicissimum amici scripsimus. Vriendenboek Raf Verstegen*, Brugge, 2004, 19; J. VRIELINK, P. LEMMENS, K. LEMMENS and S. PARMENTIER, "Challenges to academic freedom as a fundamental right", League of European Research Universities (LERU), Advice Paper No. 31, 2023, 8.

[135] J. BAERT, "Academische vrijheid, juridisch bekeken" in R. VERSTEGEN, (ed.), *Ad amicissimum amici scripsimus. Vriendenboek Raf Verstegen*, Brugge, 2004, 19-20.

[136] J. VRIELINK, P. LEMMENS, K. LEMMENS and S. PARMENTIER, "Challenges to academic freedom as a fundamental right", League of European Research Universities (LERU), Advice Paper No. 31, 2023, 8-13.

[137] K. BEITER and T. KARRAN, "Academic Freedom and Its Protection in the Law of European States: Measuring an International Human Right*", European Journal of Comparative Law and Governance* 2016, (254) 260; T. KARRAN, "Academic Freedom in Europe: Reviewing unesco's Recommendation," *British Journal of Educational Studies* 57(2), 2009, (191) 194.

[138] Paragraph 7, Recom. 1762 on Academic Freedom and University Autonomy, Parliamentary Assembly, Council of Europe, 2006, https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17469&lang=en.

[139] J. DE GROOF, "Omtrent de academische vrijheid. Het 'Palladium' van de Universiteit?" in F. FLEERACKERS and R. VAN RANSBEECK (eds.), *Recht en onafhankelijkheid. De onafhankelijkheid van de rechtswetenschap*, Brussel, Larcier, 2011, (5) 53-55; K. BEITER and T. KARRAN, "Academic Freedom and Its Protection in the Law of European States: Measuring an International Human Right*", European Journal of Comparative Law and Governance* 2016, (254) 256.

[140] Article 13 Charter of Fundamental Rights of the European Union 1 December 2009, *OJ* 18 December 2000.

Fundamental Rights provide additional context, indicating that the freedom of arts and science primarily stems from the freedom of thought (Article 10 EU Charter) and the freedom of expression (Article 11 EU Charter).[141] However, there remains debate regarding whether Article 13 introduces new fundamental rights beyond those already outlined in Articles 10 and 11 of the EU Charter.[142] Apart from the brief explanation of the relationship between academic freedom and freedom of expression in the Explanations relating to the Charter of Fundamental Rights, European legislation lacks further legal guidance on the specifics of academic freedom.

45. THE WORDING OF ARTICLE 13 – The enforceability of the rights outlined in Article 13 of the EU Charter has been a topic of discussion. The House of Lords European Union Committee addressed this issue in its 2008 report, noting that Article 13 does not explicitly use the term "*right*." Instead, it states that "*The arts and scientific research shall be free from constraint. Academic freedom shall be respected*." This wording has led to debate over whether the provisions in Article 13 constitute enforceable rights or are merely guiding principles.[143]

46. COMMISSION V. HUNGARY – Although the wording of Article 13 of the EU Charter may raise doubts about its enforceable nature, the Court's ruling in *Commission v. Hungary* suggests otherwise.[144] Despite the lack of extensive case law specifically addressing academic freedom, the case *Commission v. Hungary* provides valuable insights. In this case, the European Court of Justice affirmed that academic freedom is not only a right for individual academics but also encompasses an institutional dimension. The fact that the university in question was deemed to have an enforceable right to academic freedom suggests, in my opinion, that individual academics may also have enforceable rights under Article 13 of the EU Charter.[145]

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[141] Explanations (Praesidium of the Convention) relating to the Charter of Fundamental Rights, *OJ* 14 December 2007, 2007/C 303/02.
[142] See: HOUSE OF LORDS EUROPEAN UNION COMMITTEE, *The Treaty of Lisbon: an impact assessment. Volume I: Report.*, The European Union Committee, 2008, available at http://www.publications.parliament.uk/pa/ld200708/ldselect/ldeucom/62/62.pdf, 93.
[143] *Ibid.*, 94.
[144] Court of Justice of the European Union 6 October 2020, nr. C 66/18, ECLI:EU:C:2020:792, Commission v. Hungary, 227.
[145] *Ibid.*

3.2.3 Belgium

47. RECOGNITION BY THE CONSTITUTIONAL COURT – In Belgium, academic freedom is afforded a limited framework within the legal system.[146] Although there is no explicit provision in the Belgian Constitution specifically protecting individual academic freedom,[147] constitutional guarantees exist through indirect means. The Belgian Constitutional Court has played a crucial role in establishing the constitutional status of academic freedom.[148] In its landmark case of November 23, 2005,[149] the court pronounced for the first time on the constitutional status of the right to academic freedom. According to its ruling, academic freedom is not explicitly outlined in the Constitution but is considered an aspect of two other constitutional rights: *"Academic freedom is therefore an aspect of the freedom of expression, guaranteed in both article 19 of the Constitution and Article 10 of the European Convention on Human Rights; she is part of the freedom of education, guaranteed by Article 24, § 1 of the Constitution."*[150]

48. ENFORCEABILITY FOR INDIVIDUAL ACADEMICS – From the definition of academic freedom given by the Belgian Constitutional Court, it can be inferred that the Court intended to protect its individual component. This is evident from the explicit reference made by the Court to the holders of academic freedom, namely teachers and researchers. The court says that *"academic freedom entails the principle according to which the teachers and the researchers, in the importance of the development of knowledge and of the diversity of opinions, a very great freedom should enjoy doing research and being in the to express their opinions in the performance of their functions."*[151]

49. LEGISLATIVE GUARANTEES – A second layer of legal protection, in addition to the constitutional safeguard of the right to individual academic freedom, can be found in different Flemish legislative acts on higher education.[152] To begin with, the Decision of the

[146] J. BAERT, "Academische vrijheid, juridisch bekeken" in R. VERSTEGEN, (ed.), *Ad amicissimum amici scripsimus. Vriendenboek Raf Verstegen*, Brugge, 2004, 20.
[147] E. TIMBERMONT, *De rechtspositie van het onderwijspersoneel in de Vlaamse Gemeenschap*, Brussel, Intersentia, 2021, 732.
[148] Previously, academic freedom could not be considered a fundamental right in the domestic legal order, at least not to the extent that it could be considered a freedom separate from the freedom of education and the freedom of expression (J. BAERT, "Academische vrijheid, juridisch bekeken" in R. VERSTEGEN, (ed.), *Ad amicissimum amici scripsimus. Vriendenboek Raf Verstegen*, Brugge, 2004, 20).
[149] Belgian Constitutional Court 23 November 2005, nr. 167/2006, *C.D.P.K.*, 2006/3, 664-672.
[150] Own translation; Belgian Constitutional Court 23 November 2005, nr. 167/2006, *C.D.P.K.*, 2006/3, 670, B.18.1.
[151] Own translation; Belgian Constitutional Court 23 November 2005, nr. 167/2006, *C.D.P.K.*, 2006/3, 670, B.18.1.
[152] J. BAERT, "Academische vrijheid, juridisch bekeken" in R. VERSTEGEN, (ed.), *Ad amicissimum amici scripsimus. Vriendenboek Raf Verstegen*, Brugge, 2004, 20.

Flemish Government of 1 December 1998 states that *"the disciplinary regulations may not harm academic freedom"*. In the context where a university formulates disciplinary regulations for its academic staff, the Flemish universities are prohibited from infringing upon the individual rights of academics.[153] Furthermore, the legal protection of individual academic freedom in Flanders can also be inferred indirectly. Article II.18 of the Code on Higher Education governs the mission of universities, asserting that higher education institutions are engaged in scientific research and education.[154] According to J. DE GROOF, individual academic freedom is implicitly safeguarded in this provision, implying that both government and university regulations must uphold academic freedom.[155]

50. ENFORCEABLE LEGISLATION? – It is debatable whether the Decision of the Flemish Government of 1998 is intended to confer a legally enforceable right on academic staff. E. TIMBERMONT contends that the provision stipulating that academic freedom rights of academic staff may not be impeded by disciplinary regulations adds little to the constitutional protection of academic freedom.[156] Similarly, one might question whether the provision regarding the mission of the university in the Code on Higher Education is intended to grant academic staff an enforceable legal right. To date, no jurisprudence in Belgium has been found to demonstrate that the aforementioned provisions can be enforced to the benefit of academic staff. In my opinion, these provisions, at best, reinforce the idea that academic freedom is a principle that influences university and government regulations, rather than providing academic staff with an enforceable right.

3.2.4 Netherlands

51. CONSTITUTIONAL GUARANTEE – Academic freedom is not explicitly referred to in the Dutch Constitution.[157] However, this absence does not imply a lack of constitutional

[153] Article 1, §3 Decision of the Flemish Government 1 December 1998 establishing the regulations regarding absences, discipline, administrative positions, leave, termination of mandate, examination of physical fitness and medical supervision for academic staff at universities in the Flemish Community, *BS* 13 October 1999.
[154] Art. II.18 Code on Higher Education 11 October 2013, *BS* 27 February 2014.
[155] J. DE GROOF, "Omtrent de academische vrijheid. Het 'Palladium' van de Universiteit?" in F. FLEERACKERS and R. VAN RANSBEECK (eds.), *Recht en onafhankelijkheid. De onafhankelijkheid van de rechtswetenschap*, Brussel, Larcier, 2011, (5) 47.
[156] E. TIMBERMONT, *De rechtspositie van het onderwijspersoneel in de Vlaamse Gemeenschap*, Brussel, Intersentia, 2021, 743.
[157] P. MAASSEN, D. MARTINSEN, M. ELKEN, J. JUNGBLUT and E. DACKNER, *State of play of academic freedom in the EU member states: Overview of de facto trends and developments*, 2023, Panel for the Future of Science and Technology (STOA), 129, available at https://www.europarl.europa.eu/stoa/en/document/EPRS_STU(2023)740231.

protection for academic freedom in the Netherlands.[158] The parliamentary draft of the Higher Education Act (*Infra* 52) refers to freedom of expression and freedom of education as indicators of the protected subject matter of academic freedom.[159] Similarly, academic freedom is associated with these same two fundamental rights in scholarly literature.[160]

52. ARTICLE 1.6 HIGHER EDUCATION ACT – There is an explicit provision on academic freedom in the Higher Education Act, which is a formal law. Article 1.6 states that "*Academic freedom is respected at the institutions*."[161] However, the provision is vaguely worded, leaving uncertainty about who holds academic freedom.[162] The parliamentary draft clarifies that academic freedom belongs to individual teachers, researchers and students.[163] Furthermore, the draft specifies that academic freedom entails the freedom of researchers to initiate and contribute to research subjects, the freedom to conduct research according to their own insights, the freedom of teachers to hold scientific views they believe to be correct, and the authority to determine the content and method of education they provide. Additionally, academic freedom includes the freedom to follow one's scientific insights without being constrained by political, philosophical, or scientific theoretical views.[164]

53. ENFORCEABLE CHARACTER OF ARTICLE 1.6 HIGHER EDUCATION ACT – In my opinion, the enforceable character of article 1.6 of the Higher Education Act can quite clearly be deducted from the parliamentary draft of the Higher Education Act. The draft states that the purpose of the law is, among other things, to protect the interests of academic staff. The draft goes on to explain that academic freedom is an unwritten and traditionally defined principle that shapes university governance, despite the fact that it has not yet been enshrined in law. The draft clarifies the substantive meaning of academic freedom, using the following wording: "*We see academic freedom as a right [...].*"[165] I

[158] F. VAN LUNTEREN believes - too bluntly, in my opinion - that the Dutch constitution does not recognise the concept of academic freedom and that it is only anchored in formal law (F. VAN LUNTEREN, "Academische vrijheid en het universitair grootbedrijf" in K. VAN BERKEL and C. VAN BRUGGEN, *Academische vrijheid. Geschiedenis en actualiteit*, Amsterdam, Boom, 2020, (87) 88-89).
[159] Memorie van toelichting wet op het wetenschappelijk onderwijs 1981, Kamerstukken 1980/81, nr. 16802, 49.
[160] P. ZOONTJENS, *Vrijheid van wetenschap: Juridische beschouwingen over wetenschapsbeleid en hoger onderwijs*, *Zwolle*, W.E.J. Tjeenk Willink, 1993, 38-48.
[161] Own translation; Article 1.6 Act of 8 October 1992 containing provisions relating to higher education and scientific research, *Staatsblad* 26 November 1992.
[162] J. GROEN, *Academische vrijheid: een juridische verkenning*, 2017, Rotterdam, Erasmus University Rotterdam, 78.
[163] Explanatory Memorandum of the Law on Scientific Education 1981, Kamerstukken 1980/81, nr. 16802, 8.
[164] *Ibid*, 49-50.
[165] *Ibid.*, 49.

disagree with J. GROEN that it can be concluded from this draft that academic freedom is only a principle and not an enforceable right.[166] The draft indicates that academic freedom was a principle before, but suggests that it is now legally binding by being enshrined in law. If the enforceable nature is not entirely clear, the word 'right' makes it all the more certain. *A fortiori*, academic freedom is dealt with in the draft under the heading of "legal protection".[167]

3.2.5 Germany

54. A KEY CONCEPT IN GERMAN HIGHER EDUCATION LAW – Germany has a longstanding tradition of constitutional protection of academic freedom. In contrast to Belgium and the Netherlands, the principle of academic freedom is deeply rooted in national law and legal doctrine.[168] The German system of higher education traces its origins to the Humboldtian model, formulated by Wilhelm von Humboldt, which emphasises research, teaching, a close-knit scholarly community, and, importantly, individual and institutional academic freedom.[169]

55. ARTICLE 5(3) GERMAN CONSTITUTION AND THE HOCHSCHULURTEIL – In Germany, academic freedom, or *Wissenshaftsfreiheit*, finds protection through article 5(3) of the German Constitution. The provision states that "*Art and science, research and teaching, shall be free. Freedom of teaching shall not absolve from loyalty to the constitution.*"[170] In addition to this seemingly straightforward provision, the case law of the German Constitutional Court addressed significant issues regarding the interpretation of academic freedom over the years. In its most notable ruling regarding academic freedom,

[166] J. GROEN, *Academische vrijheid: een juridische verkenning*, 2017, Rotterdam, Erasmus University Rotterdam, 79.
[167] Explanatory Memorandum of the Law on Scientific Education 1981, *Kamerstukken* 1980/81, nr. 16802, 47.
[168] E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 117; H. TRUTE, *Die Forschung zwischen grundrechtlicher Freiheit und staatlicher Institutionalisierung*, Tübingen, Mohr Siebeck, 1994, 13.
[169] B. KEHM, "Higher Education Systems and Institutions, Germany", *Encyclopedia of International Higher Education Systems and Institutions*, 2018, 1; M. MAY, "Kunst- und Wissenschaftsfreiheit" in R. BROCKHAUS, A. ECK, A. GUNKEL, A. HOFFMANN, B. HOFFMANN, L. KATHKE, U., KNOKE, D. LECHTERMANN, J. MAIWALD, M. MAY, J. SCHACHEL, K. SCHMIEMANN, J. TIEDEMANN, S. WERRES (eds.), *Beamtenrecht des Bundes und der Länder – Kommentar*, München, R. v. Decker, (Vorbemerkungen §120) para. 7.
[170] Art. 5 §3 German Constitution 23 May 1949, https://www.gesetze-im-internet.de/gg/; C. STARCK, "Freedom of Scientific Research and its Restrictions in German Constitutional Law", *Israel law review*, Vol.39 (2), 2006, (110) 110; I am using the translation of E. BARENDT (E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 117).

known as the *Hochschulurteil*, the court clarified several key aspects.[171] The Court explained that "science" means "*all scientific activity, i.e. to everything that is to be regarded as a serious planned attempt to ascertain the truth in terms of content and form*."[172] With regard to the scope of research, the Court stated that it encompasses "*intellectual activity directed towards the acquisition of new knowledge in a methodical, systematic and verifiable manner*."[173] The Court further emphasised that research includes "*the question and the principles of methodology as well as the evaluation of the research result and its dissemination*."[174] There is consensus in the case law and the legal literature that the German concept of academic freedom encompasses not only university-related research by academics, but also every form of scientific research, including that conducted by other research institutions and industry.[175] Consequently, the term *Wissenshaftsfreiheit* is broader in scope than academic freedom in Belgium and the Netherlands. Moreover, according to the Court, teaching is essentially linked to research in the sense that the scientific discussion taking place in teaching stimulates scientific research.[176] Teaching also encompasses determining content, methodology and includes the right to express scientific doctrine."[177]

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[171] German Constitutional Court 29 May 1973, nr. BvR 424/71 en 325/72, *NJW* 1973, 1176; E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 118.

[172] German Constitutional Court 29 May 1973, nr. BvR 424/71 en 325/72, *NJW* 1973, 1176, para. 92; In a later decision the Court clarified this statement and said that scientific freedom also protects minority views and even wrong research findings, as long as they are reached in the course of a serious attempt to discover the truth (German Constitutional Court 11 January 1994, nr. 1 BvR 434/87, ECLI:DE:BVerfG:1994:rs19940111.1bvr043487, https://www.bundesverfassungsgericht.de/DE/Homepage/homepage_node.html, para. 42; See also E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 127 and W. LÖWER, "Freiheit wissenschaftlicher Forschung und Lehre" in D. MERTEN and H. PAPIER (eds.), *Handbuch der Grundrechte in Deutschland und Europa*, Heidelberg, C.F. Müller, (699) 710-712.

[173] Own translation; German Constitutional Court 29 May 1973, nr. BvR 424/71 en 325/72, *NJW* 1973, 1176, para. 93.

[174] Own translation; German Constitutional Court 29 May 1973, nr. BvR 424/71 en 325/72, *NJW* 1973, 1176, para. 94.

[175] German Constitutional Court 29 May 1973, nr. BvR 424/71 en 325/72, *NJW* 1973, 1176, para. 91; E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 119; H. TRUTE, *Die Forschung zwischen grundrechtlicher Freiheit und staatlicher Institutionalisierung*, Tübingen, Mohr Siebeck, 1994, 96-109; I. PERNICE, "Artikel 5 [Meinings-, Pressefreiheit, Rundfunk; Freiheit der Kunst un Wissenschaft]" in H. DREIER (ed.), *Grundgesetz-Kommentar*, Tübingen, Mohr Siebeck, 2004, (715) 734; W. LÖWER, "Freiheit wissenschaftlicher Forschung und Lehre" in D. MERTEN and H. PAPIER (eds.), *Handbuch der Grundrechte in Deutschland und Europa*, Heidelberg, C.F. Müller, (699) 716; M. MAY, "Kunst- und Wissenschaftsfreiheit" in R. BROCKHAUS, A. ECK, A. GUNKEL, A. HOFFMANN, B. HOFFMANN, L. KATHKE, U., KNOKE, D. LECHTERMANN, J. MAIWALD, M. MAY, J. SCHACHEL, K. SCHMIEMANN, J. TIEDEMANN, S. WERRES (eds.), *Beamtenrecht des Bundes und der Länder – Kommentar*, München, R. v. Decker, (Vorbemerkungen §120) para. 7.

[176] German Constitutional Court 29 May 1973, nr. BvR 424/71 en 325/72, *NJW* 1973, 1176, para. 93; E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 127.

[177] German Constitutional Court 29 May 1973, nr. BvR 424/71 en 325/72, *NJW* 1973, 1176, para. 94.

56. ENFORCEABILITY CONFIRMED BY THE FEDERAL CONSTITUTIONAL COURT – In its most important ruling regarding academic freedom, i.e. the *Hochschulurteil*, the court clarified that academic freedom is a defensive right for individual academics (*Infra* 98), confirming its enforceability for individual academics.[178]

3.2.6 CANADA

57. HISTORY – The legal right to academic freedom in Canada holds a unique legal status, primarily deriving from collective bargaining agreements governing academic employment in universities.[179] The pivotal case of Harry Crowe of 1958 marked a significant milestone[180] in establishing academic freedom as a legally enforceable right. Professor Crowe's abrupt dismissal by the principal, following his critical comments on religious influence within the university, triggered widespread debate and scrutiny regarding the protection of academic freedom in Canada. The emergence of the Canadian Association of University Teachers (CAUT), an overarching organisation charged with defending the interests of the Canadian professoriate, proved instrumental in reshaping the landscape of academic freedom protection.[181] Following the Crowe incident, CAUT initiated an investigation and formed an *ad hoc* committee, which produced a seminal report highlighting the precarious legal status of academic freedom. This report, along with CAUT's authoritative policy on academic freedom, laid the foundation for defining and defending academic freedom principles in Canada (Annex 2).[182] Subsequent cases in Canadian universities highlighted the challenges faced by academics in litigating violations of academic freedom, often due to a lack of enforceable rights.[183] These developments

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[178] Constitutional Court 29 May 1973, nr. BvR 424/71 en 325/72, *NJW* 1973, 1176; Federal Administrative Court 11 December 1996, nr. 6 C 5/95, *NJW* 1997, 1996; E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 118.

[179] D. ROBINSON, "Academic freedom in Canada: a labor law right", *Academe*, Vol. 105(4), 2019, (22) 24; M. LYNK, "Academic Freedom, Canadian Labour Law and the Scope of Intra-Mural Expression The Campus Speech Issue", *Constitutional Forum* 2020, (45) 47.

[180] In this limited research, I only highlight this case as a starting point in the Canadian history of academic freedom because it accelerated the development of academic freedom as a legal right and arguably had the most direct influence. However, there have been other influences in Canadian history in the development of academic freedom in Canada. For the most comprehensive discussion of the history of academic freedom in Canada, see M. HORN, M., *Academic Freedom in Canada: A History*, Toronto, University of Toronto Press, 1999, 434p.

[181] M. HORN, *Academic Freedom in Canada: A History*, Toronto, University of Toronto Press, 1999, 10.

[182] D. ROBINSON, "ACADEMIC FREEDOM IN CANADA: A LABOR LAW RIGHT", *Academe*, Vol. 105(4), 2019, (22) 23; CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS, *Academic Freedom: CAUT Policy Statement*, https://www.caut.ca/about-us/caut-policy/lists/caut-policy-statements/policy-statement-on-academic-freedom, 2019, (consulted on 21 December 2023).

[183] M. LYNK, *Academic Freedom and the Law in Canada: An Introduction* [PowerPoint-slides], Academic freedom and the law conference, Harry Crowe Foundation, 2022, https://www.crowefoundation.ca/sites/default/files/2_lynk.s_en.pdf (consulted on 21 December 2023).

spurred the formation of academic staff associations beginning in the 1970s, as academics sought collective representation to protect their academic freedom.[184] Since its foundation in 1951, CAUT has been a steadfast defender of academic freedom, advocating for collective bargaining rights and legal protections to safeguard academic freedom in Canada. Through lobbying and policy advocacy, CAUT has played a pivotal role in advancing academic freedom as a legal right and ensuring its robust protection in Canada's higher education landscape.[185]

58. COLLECTIVE BARGAINING AGREEMENTS – In Canada, the university sector is one of the most densely unionised sectors. Consequently, collective bargaining and collective agreements play a major role in protecting academic freedom for academics.[186] Almost all[187] academics in Canadian universities are part of academic staff unions.[188] These academics are represented by certified bargaining agents under Canadian labour legislation and the universities are affiliated with certified unions.[189] The CAUT serves as the national faculty voice.[190]

Concretely, faculty unions and university administrators negotiate the specific provisions on academic freedom within the collective agreement.[191] Thus, legal protection

[184] C. GILLIN, "The Bog-like Ground on Which We Tread: Arbitrating Academic Freedom in Canada", *Canadian Review of Sociology/Revue canadienne de sociologie* 2002, (301) 304; D. ROBINSON, "Academic freedom in Canada: a labor law right", *Academe*, Vol. 105(4), 2019, (22) 24; V. SMALLMAN, "Academic Labor: The Canadian Context", *Cinema Journal*, 45(4), 2006, (108) 110.
[185] V. SMALLMAN, "Academic Labor: The Canadian Context*", Cinema Journal*, 45(4), (108) 111; CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS, *About Us*, https://www.caut.ca/about-us (consulted on 28 Januari 2024).
[186] S. ROSS, L. SAVAGE and J. WATSON, "Sessional Contract Faculty, Unionization, and Academic Freedom", *Canadian Journal of Higher Education*, 2021, (57) 59.
[187] There are exceptions. The Universities of Toronto, Waterloo, McMaster and McGill do not belong to certified unions (M. LYNK, "Academic Freedom, Canadian Labour Law and the Scope of Intra-Mural Expression The Campus Speech Issue", *Constitutional Forum*, 2020, (45) 47). These few exceptions, however, also engage in collective bargaining with their employers (V. SMALLMAN, "Academic Labor: The Canadian Context*", Cinema Journal*, 45(4), (108) 111.
[188] D. ROBINSON, "Academic freedom in Canada: a labor law right", *Academe*, Vol. 105(4), 2019, (22) 24; M. LYNK, "Academic Freedom, Canadian Labour Law and the Scope of Intra-Mural Expression The Campus Speech Issue", *Constitutional Forum* 2020, (45) 47; V. SMALLMAN, "Academic Labor: The Canadian Context", *Cinema Journal*, 45(4), 2006, (108) 110.
[189] C. GILLIN, "The Bog-like Ground on Which We Tread: Arbitrating Academic Freedom in Canada", *Canadian Review of Sociology/Revue canadienne de sociologie*, 2002, (301) 314; D. ROBINSON, "ACADEMIC FREEDOM IN CANADA: A LABOR LAW RIGHT", *Academe*, Vol. 105(4), 2019, (22) 24; V. SMALLMAN, "Academic Labor: The Canadian Context", *Cinema Journal*, 45(4), 2006, (108) 110.
[190] CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS, *About Us*, https://www.caut.ca/about-us (consulted on 28 Januari 2024).
[191] C. GILLIN, "The Bog-like Ground on Which We Tread: Arbitrating Academic Freedom in Canada", *Canadian Review of Sociology/Revue canadienne de sociologie* 2002, (301) 314; M. LYNK, "Academic Freedom, Canadian Labour Law and the Scope of Intra-Mural Expression The Campus Speech Issue", *Constitutional Forum* 2020, (45) 47.

in Canada is at its core grounded in the language of the agreement.[192] The scope, limits and content of academic freedom are determined by the very professionals, albeit represented by faculty unions, to whom these rights apply.[193] The procedural design of legal protection in Canada places great responsibility on faculty unions to protect the academic freedom rights of their members.[194] C. GILLIN notes that "*faculty associations are an institutionalized form of collegiality and an anchor for academic freedom.*"[195] Consequently, academic freedom in Canada is primarily a negotiated right.[196]

There are various bargaining unions in Canada[197] and every university has its own collective agreement (Annex 1).[198] Research on Canadian universities' collective agreements has shown that nearly all agreements between Canadian universities and faculty associations contain specific provisions on academic freedom, outlining the content and scope of individual academic freedom rights.[199] However, some universities do not include academic freedom protections in their collective agreements.[200] The variety of collective agreements results in differences in the substance of academic freedom and the scope of legal protection from one university to another (Annex 1). This variation is

[192] A. BRALEY-RATTAI and K. BENZANSON, "Un-Chartered Waters: Ontario's Campus Speech Directive and the Intersections of Academic Freedom, Expressive Freedom, and Institutional Autonomy", *Constitutional Forum* 2020, (65) 75.
[193] *Ibid*.
[194] C. GILLIN, "The Bog-like Ground on Which We Tread: Arbitrating Academic Freedom in Canada", *Canadian Review of Sociology/Revue canadienne de sociologie*, 2002, (301) 313; L. ROSE-KRASNOR and M. WEBBER, "Freedom with limits? The role faculty associations play protecting the speech rights of their members", *Academic Matters* 2018, 18p.
[195] C. GILLIN, "The Bog-like Ground on Which We Tread: Arbitrating Academic Freedom in Canada", *Canadian Review of Sociology/Revue canadienne de sociologie*, 2002, (301) 313.
[196] M. LYNK, "Academic Freedom, Canadian Labour Law and the Scope of Intra-Mural Expression The Campus Speech Issue", *Constitutional Forum*, 2020, (45) 47; S. ROSS, L. SAVAGE and J. WATSON, "Sessional Contract Faculty, Unionization, and Academic Freedom", *Canadian Journal of Higher Education* 2021, (57) 59.
[197] S. ROSS, L. SAVAGE and J. WATSON, "Sessional Contract Faculty, Unionization, and Academic Freedom", *Canadian Journal of Higher Education* 2021, (57) 63-64.
[198] M. LYNK, "Academic Freedom, Canadian Labour Law and the Scope of Intra-Mural Expression The Campus Speech Issue", *Constitutional Forum* 2020, (45) 47.
[199] See for example the Faculty Collective Agreement between The University of Western Ontario and The University of Western Ontario Faculty Association, available at https://www.uwo.ca/facultyrelations/pdf/collective_agreements/faculty.pdf; M. LYNK, "Academic Freedom, Canadian Labour Law and the Scope of Intra-Mural Expression The Campus Speech Issue", *Constitutional Forum* 2020, (45) 47.
[200] A recent report from the University of Ottawa demonstrated that only 4 percent of the universities do not have a collective agreement explicitly protecting academic freedom. These universities do however recognise academic freedom in other agreements with faculty associations. Moreover, 3 percent of universities recognise academic freedom only in a general university policy, without any form of contractual rights (M. BASTARACHE, *Report of the Committee on Academic Freedom*, 2021, 15, https://www.uottawa.ca/about-us/sites/g/files/bhrskd336/files/2021-11/report_committee_academic_freedom_en_final_v9.pdf).

somewhat mitigated by the CAUT Policy Statement (*Supra* 58 and *Infra* 110),[201] which plays a significant[202] role in shaping the scope and content of academic freedom. The definition of academic freedom in the Policy Statement serves as a model clause in nearly all collective agreements.[203] In essence, the Policy Statement defines academic freedom as the freedom of teachers, without restriction by prescribed doctrine and free from institutional censorship, to carry out research and publish the results thereof, to teach and discuss, and to criticise the university.[204] Despite most universities providing a specific definition of academic freedom and the provisions being quite similar due to the authoritative CAUT Policy Statement, legal scholarship asserts that there is no generally accepted definition of academic freedom in Canada.[205] Differences between collective agreements are particularly evident in relation to academics' criticism of the university.[206]

59. GENERAL LACK OF NATIONAL LEGISLATION – Canada does not have a specific legal doctrine on academic freedom embedded in legislation.[207] Higher education legislation and other statutes in Canada largely remain silent on academic freedom.[208] Canadian legislation does not recognise academic freedom as a legal principle, nor is it explicitly embodied as a constitutional right in the Charter of Rights and Freedoms or other

[201] CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS, *Academic Freedom: CAUT Policy Statement*, https://www.caut.ca/about-us/caut-policy/lists/caut-policy-statements/policy-statement-on-academic-freedom (consulted on 21 December 2023).
[202] The definition of academic freedom of the CAUT of course does not render enforceable individual rights to academics, as the CAUT Policy statement does not carry any legal weight (M. BASTARACHE, *Report of the Committee on Academic Freedom*, 2021, 14, https://www.uottawa.ca/about-us/sites/g/files/bhrskd336/files/2021-11/report_committee_academic_freedom_en_final_v9.pdf.)
[203] D. ROBINSON, "Academic freedom in Canada: a labor law right", *Academe*, Vol. 105(4), 2019, (22) 2; M. LYNK, "Academic Freedom, Canadian Labour Law and the Scope of Intra-Mural Expression The Campus Speech Issue", *Constitutional Forum* 2020, (45) 49; 4.s
[204] CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS, *Academic Freedom: CAUT Policy Statement*, https://www.caut.ca/about-us/caut-policy/lists/caut-policy-statements/policy-statement-on-academic-freedom (consulted on 21 December 2023); M. BASTARACHE, *Report of the Committee on Academic Freedom*, 2021, 15, https://www.uottawa.ca/about-us/sites/g/files/bhrskd336/files/2021-11/report_committee_academic_freedom_en_final_v9.pdf).
[205] C. PAUL and W. KEITH, "Does "Civility" Threaten Academic Freedom at Canadian Universities?", *Education law journal*, Vol.30 (1), 2021, (1) 5.
[206] M. LYNK, "Academic Freedom, Canadian Labour Law and the Scope of Intra-Mural Expression The Campus Speech Issue", *Constitutional Forum* 2020, (45) 47-48 and 50.
[207] D. NEWMAN, "Application of the Charter to Universites' Limitation of Expression", *Revue de Droit de l'Université de Sherbrooke* 2015, (133) 148.
[208] D. NEWMAN, "Application of the Charter to Universites' Limitation of Expression", *Revue de Droit de l'Université de Sherbrooke* 2015, (133) 148; D. ROBINSON, "Academic freedom in Canada: a labor law right", *Academe*, Vol. 105(4), 2019, (22) 22; M. LYNK, "Academic Freedom, Canadian Labour Law and the Scope of Intra-Mural Expression The Campus Speech Issue", *Constitutional Forum*, 2020, (45) 48; University of Manitoba Faculty Association and University of Manitoba, 1991 CanLII 13023 (MB LA), <https://canlii.ca/t/jbgl2>, retrieved on 2024-01-27.

human rights legislation.[209] In its judgment *McKinney v. University of Guelph* – one of the few judicial judgments addressing academic freedom – the Canadian Supreme Court acknowledged academic freedom, stating it is "*essential to our continuance as a lively democracy*."[210] However, the Court did not confer any specific legal force on academic freedom.[211] Today, Canadian courts recognise academic freedom as a legal but contractual right.[212]

60. BILL 32 – A mentionable exception to the general rule is the recent enactment of *Bill 32, An Act respecting academic freedom in the university sector*, a legislative act enacted by the government of Quebec, which entered into force on the 7th of June 2022.[213] This act is the first piece of legislation regulating academic freedom in Canada.[214] It was proposed following recent controversy in Quebec regarding academic freedom, prompting the government to issue a report calling for legislative action.[215] By passing Bill 32, the government aims to regulate the protection of academic freedom, a responsibility that had previously been managed by universities and labour unions.[216] Many legal scholars and the CAUT were opposed to the enactment of Bill 32, claiming that although academic freedom

[209] M. LYNK, *Academic Freedom and the Law in Canada: An Introduction* [PowerPoint-slides], Academic freedom and the law conference, Harry Crowe Foundation, 2022, https://www.crowefoundation.ca/sites/default/files/2_lynk.s_en.pdf (consulted on 21 December 2023).
[210] Supreme Court of Canada 6 December 1990, nr. 20747, Mckinney v. University of Guelph, *SCR*, Volume 3, 229, https://www.canlii.org/en/; C. GILLIN, "The Bog-like Ground on Which We Tread: Arbitrating Academic Freedom in Canada", *Canadian Review of Sociology/Revue canadienne de sociologie* 2002, (301) 306.
[211] D. NEWMAN, "Application of the Charter to Universites' Limitation of Expression", *Revue de Droit de l'Université de Sherbrooke* 2015, (133) 149.
[212] For example, in the famous *Pridgen v. University of Calgary* case, in which the court had to answer whether the Charter applied to the University of Calgary's student discipline process, the court held that academic freedom is *"the freedom to put forward new ideas and unpopular opinions without placing him or herself in jeopardy within the institution* (Court of Appeal for British Columbia 1 October 1998, nr. CA024985, O'Connell v. McIndoe, *DLR*, Volume 166, 653, https://www.canlii.org/en/; C. FEASBY, "Failing Students by Taking a Pass on the Charter in Pridgen v University of Calgary", *Constitutional Forum* 2013, (19) 19).
[213] Bill 32 An Act respecting academic freedom in the university sector 7 June 2022, *Québec Official Publisher* 7 June 2022.
[214] P. IVES, "What is Québec's Bill 32 on academic freedom, and why does it matter?", *Academic Matters*, 2022, 11 p.
[215] S. MARIN, *Quebec announces committee to examine academic freedom, censorship*, The Gazette, 2021, https://montrealgazette.com/news/local-news/quebec-announces-committee-to-examine-academic-freedom-censorship (consulted on 17 March 2024); A. CLOUTIER, *Rapport de la Commission scientifique et technique indépendante sur la reconnaissance de la liberté académique dans le milieu universitaire*, Ministère de l'Enseignement supérieur, 2021, 62-63 https://cdn-contenu.quebec.ca/cdn-contenu/adm/min/education/publications-adm/enseignement-superieur/organismes-lies/Rapport-complet-Web.pdf?1639494244.
[216] Bill 32 An Act respecting academic freedom in the university sector 7 June 2022, *Québec Official Publisher* 7 June 2022.

requires robust legal protection, state intervention in university policy through regulation is inappropriate.[217] Bill 32 is not considered in the remainder of this dissertation.

61. CHARTER OF RIGHTS AND FREEDOMS – The Canadian Supreme Court has not, to date, interpreted academic freedom as being included within the provision on freedom of expression in Section 2 of the Canadian Charter of Rights and Freedoms.[218] In fact, the constitutional right to freedom of expression from the Charter of Rights and Freedoms is not applicable to the university setting. In Canada, the Charter of Rights and Freedoms generally[219] does not apply to universities because the Charter only binds government actions, and universities are not considered government entities.[220] Consequently, academics cannot base their academic freedom claims on the right to freedom of expression when their actions are directed against the university.[221]

62. DEBATE ON THE CHARTER APPLICABILITY – Without delving too deeply into this debate, it is worth noting that the application of the Charter in the university context is a contentious issue. Canadian legal scholarship has criticised the inapplicability of the Charter in relation to academic freedom matters.[222] Various legal scholars contend that universities often restrict expressions that are central to the mission of universities due to the current situation in which the Charter is not applicable. According to these scholars,

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[217] P. IVES, "What is Québec's Bill 32 on academic freedom, and why does it matter?", *Academic Matters*, 2022, 11p; CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS, *NewsWire: Highlights from CAUT's 92nd Council meeting*, 2022, https://www.caut.ca/node/11501 (consulted on 17 March 2024).

[218] Canadian Charter of Rights and Freedoms of 1982; C. GILLIN, "The Bog-like Ground on Which We Tread: Arbitrating Academic Freedom in Canada", *Canadian Review of Sociology/Revue canadienne de sociologie*, 2002, (301) 305.

[219] Recently, some Canadian legal scholars, however, contend that recent case law has overturned this strict doctrine when universities are performing government tasks. Restricting freedom of expression could, according to them fall into the category of government action (D. NEWMAN, "Application of the Charter to Universites' Limitation of Expression", *Revue de Droit de l'Université de Sherbrooke* 2015, (133) 136 and 145; F. SILLETTA, "Revisiting Charter Application to Universities", *Appeal: Review of Current Law and Law Reform*, 2015, (79) 86-90.

[220] Supreme Court of Canada 6 December 1990, nr. 20747, Mckinney v. University of Guelph, *SCR*, Volume 3, 229, https://www.canlii.org/en/; A. BRALEY-RATTAI and K. BENZANSON, "Un-Chartered Waters: Ontario's Campus Speech Directive and the Intersections of Academic Freedom, Expressive Freedom, and Institutional Autonomy", *Constitutional Forum* 2020, (65) 68; F. SILLETTA, "Revisiting Charter Application to Universities", *Appeal: Review of Current Law and Law Reform*, 2015, (79) 82; D. NEWMAN, "Application of the Charter to Universites' Limitation of Expression", *Revue de Droit de l'Université de Sherbrooke* 2015, (133) 135.

[221] A. BRALEY-RATTAI and K. BENZANSON, "Un-Chartered Waters: Ontario's Campus Speech Directive and the Intersections of Academic Freedom, Expressive Freedom, and Institutional Autonomy", *Constitutional Forum* 2020, (65) 68.

[222] D. NEWMAN, "Application of the Charter to Universites' Limitation of Expression", *Revue de Droit de l'Université de Sherbrooke* 2015, (133) 149-150; H. COOK, "Charter Applicability to Universities and the Regulation of On-Campus Expression", *Alberta Law Review Society* 2021, (957) 971; F. SILLETTA, "Revisiting Charter Application to Universities", *Appeal: Review of Current Law and Law Reform* 2015, (79) 80; L. MCKAY-PANOS, "Universities and Freedom of Expression: When Should the Charter Apply?", *Canadian Journal of Human Rights* 2016, (59) 59.

applying the Charter could, conversely, further the academic mission by protecting opinions that support it. They advocate for a constitutional approach to academic freedom, similar to that of European countries.[223] C. GILLIN argues that if the Supreme Court of Canada were to link academic freedom to the freedom of expression, the Court would provide more robust protection for academics in Canada.[224] On the other hand, Canadian universities are reluctant to see the Charter apply to the university setting. Universities argue that they should remain outside the Charter's sphere of application because applying the Charter to universities would interfere with their institutional autonomy, which is an important protection for individual academic freedom.[225]

3.2.7 COMPARISON

63. LEGISLATION VERSUS COLLECTIVE AGREEMENTS – The chosen European systems and the Canadian legal system differ completely in their procedural design when it comes to the legal instrument embodying individual academic freedom as a legal right. In the chosen European countries, academic freedom is protected as a legislative and/or constitutional right. For Belgium, the Constitutional Court has strengthened and confirmed the constitutional character of academic freedom. I argued that Flemish legislation does not provide for enforceable provisions. For that reason, I consider it more appropriate as an academic to rely on the Constitution. As far as the Netherlands is concerned, which has no constitutional court to confirm the constitutional character, the matter is somewhat more delicate. However, I argued that the constitutionally protected character can be deduced from the parliamentary preparation of the Higher Education Act. Moreover, I argued that the Higher Education Act is in any case enforceable, and furthermore, Article 13 of the European Charter is part of the domestic legal order. For Germany, the answer is straightforward; the constitutional concept of academic freedom is well-anchored in the German legal order.

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[223] D. NEWMAN, "Application of the Charter to Universites' Limitation of Expression", *Revue de Droit de l'Université de Sherbrooke*, 2015, (133) 149-150; F. SILLETTA, "Revisiting Charter Application to Universities", *Appeal: Review of Current Law and Law Reform* 2015, (79) 98; J. TURK, "Universities, the Charter, Doug Ford, and Campus Free Speech", *Constitutional Forum* 2020, (31) 42-44; M. MARIN, "Should the Charter Apply to Universities?", National Journal of Constitutional Law 2015, (29) 56.

[224] C. GILLIN, "The Bog-like Ground on Which We Tread: Arbitrating Academic Freedom in Canada", *Canadian Review of Sociology/Revue canadienne de sociologie*, 2002, (301) 305.

[225] D. NEWMAN, "Application of the Charter to Universites' Limitation of Expression", *Revue de Droit de l'Université de Sherbrooke*, 2015, (133) 148; F. SILLETTA, "Revisiting Charter Application to Universities", *Appeal: Review of Current Law and Law Reform*, 2015, (79) 81; L. MCKAY-PANOS, "Universities and Freedom of Expression: When Should the Charter Apply?", *Canadian Journal of Human Rights* 2016, (59) 94.

In contrast, Canada has a unique legal doctrine on academic freedom. This legal right is not found in legislation – with the nuance of Bill 32 – nor in the Canadian Charter of Rights and Freedoms. Academic freedom is a contractual matter between academics and their universities. The right to individual academic freedom is embedded in the collective agreements between Canadian universities and faculty unions, rendering academic freedom a contractual right. The university sector in Canada is highly unionized, whereas this is not the case in the selected European systems. Despite the differences, all the legal systems examined have legal provisions on academic freedom that provide enforceable rights for individual academics.

PART 3. DISPUTE SETLLEMENT BODY

64. ENFORCEMENT OF THE LEGAL PROVISION BEFORE A DISPUTE SETTLEMENT BODY – In an earlier chapter, the research showed that each of the legal systems studied has enforceable provisions protecting individual academic freedom, despite their different designs. In this part of the thesis, the focus will be on identifying the dispute resolution bodies before which the individual academic freedom provisions can be enforced by academics in the selected European systems and in Canada.

3.3.1 EUROPE

7.3.1.1 Belgium

65. DIFFERENCE IN JUDICIAL PROTECTION AVAILABLE – In Flanders, there are three public universities and two private universities.[226] The two private universities; however, receive public funding for their education and research activities.[227] The Flemish legislator has blurred the distinction between private and public universities.[228] Nevertheless, some differences persist, particularly with regard to the qualification of the

[226] The private universities are the Catholic University of Leuven (KU Leuven) and the Free University of Brussels (VUB). The public universities are Ghent University (UGent), Hasselt University (UHasselt) and University of Antwerp (UAntwerpen). (J. DE GROOF and K. WILLEMS, "Higher Education Systems and Institutions, Belgium", *Encyclopedia of International Higher Education Systems and Institutions*, 2018, (1) 2).
[227] J. DE GROOF and K. WILLEMS, "Higher Education Systems and Institutions, Belgium", *Encyclopedia of International Higher Education Systems and Institutions*, 2018, (1) 2; R. VERSTEGEN, "De rol van de rechter in de uitbouw van het onderwijsrecht. Een overzicht.", *Tijdschrift voor Onderwijsrecht en Onderwijsbeleid* 2006, (105) 106.
[228] J. DE GROOF and K. WILLEMS, "Higher Education Systems and Institutions, Belgium", *Encyclopedia of International Higher Education Systems and Institutions*, 2018, (1) 3 and 5-6.

employment relationship and the available judicial protection.[229] In terms of the nature of the employment relationship,[230] academic staff at private universities are appointed on the basis of a contractual employment relationship,[231] whereas academic staff at public universities are appointed on the basis of a statutory, unilateral employment relationship.[232] This difference in the qualification of the employment relationship leads to a difference in the competent court to settle disputes between academic staff and the educational institution.[233] The Council of State has jurisdiction for public universities and the academic staff appointed by them,[234] while the labour court handles disputes involving private universities and contract staff.[235]

7.3.1.2 The Netherlands

66. CIVIL COURTS – For a long time, there existed a disparity in legal protection between public and private education institutions in the Netherlands due to the different legal status of professors, depending on the type of institution.[236] Today, the difference in legal

[229] E. TIMBERMONT, *De rechtspositie van het onderwijspersoneel in de Vlaamse Gemeenschap*, Brussel, Intersentia, 2021, 597-609; R. VERSTEGEN, "De rol van de rechter in de uitbouw van het onderwijsrecht. Een overzicht.", *Tijdschrift voor Onderwijsrecht en Onderwijsbeleid* 2006, (105) 108.

[230] The qualification of the employment relationship in private universities has long been the subject of debate. For an account of the debate on this, see: E. TIMBERMONT, *De rechtspositie van het onderwijspersoneel in de Vlaamse Gemeenschap*, Brussel, Intersentia, 2021, 597-604 en R. VERSTEGEN, "De rol van de rechter in de uitbouw van het onderwijsrecht. Een overzicht.", *Tijdschrift voor Onderwijsrecht en Onderwijsbeleid* 2006, (105) 106-108.

[231] E. TIMBERMONT, *De rechtspositie van het onderwijspersoneel in de Vlaamse Gemeenschap*, Brussel, Intersentia, 2021, 601; R. VERSTEGEN, "De rol van de rechter in de uitbouw van het onderwijsrecht. Een overzicht.", *Tijdschrift voor Onderwijsrecht en Onderwijsbeleid* 2006, (105) 106.

[232] E. TIMBERMONT, *De rechtspositie van het onderwijspersoneel in de Vlaamse Gemeenschap*, Brussel, Intersentia, 2021, 599-600.

[233] *Ibid*., 604.

[234] *Ibid.*, 604.

[235] E. TIMBERMONT, *De rechtspositie van het onderwijspersoneel in de Vlaamse Gemeenschap*, Brussel, Intersentia, 2021, 604; For a long time, there was uncertainty about the judicial authority for personnel matters in private education. For an explanation of the discussion about this, see R. VERSTEGEN, "Wanneer treden privaatrechtelijke (onderwijs)instellingen op als administratieve overheid?", *Rechtskundig Weekblad* 2003, 801-814.

[236] In essence, employees of public institutions were appointed based on a unilateral legal act. They had to seek legal protection from the administrative courts and particularly the Central Court of Appeal, in accordance with civil service law. On the contrary, employees of private universities were, and still are, appointed based on a contractual relationship. They must seek legal protection from the regular civil courts. (A. BELINFANTE and J. DE REEDE, *Beginselen van het Nederlands staatsrecht*, Deventer, Kluwer, 2020, 232; J. GROEN, *Academische vrijheid: een juridische verkenning*, 2017, Rotterdam, Erasmus University Rotterdam, 80; J. DIJKGRAAF, "Eén rechtspositie voor de sector onderwijs" in A. VAN MEER, *Het nieuwe ambtenarenrecht*, Deventer, Kluwer, 2019, (165) 166-167; J. DIJKGRAAF, "Eén rechtspositie voor de sector onderwijs" in A. VAN MEER, *Het nieuwe ambtenarenrecht*, Deventer, Kluwer, 2019, (165) 165-166; M. VAN DEN HOVE and S. PHILIPSEN, "Promotieonderzoek van gebrekkige kwaliteit", *NTOR* 2022, (161) 161.). However, the *Wet normalisering rechtspositie ambtenaren*, which amended the *Wet Ambtenaren*, came into force on 1 January 2020. The latter applied to educational staff in public institutions. As a result of the amendment, as of 1 January 2020 educational personnel will be appointed on the basis of an employment contract and labour law will apply to them. (Law containing general rules of administrative law 4 June 1992, Staatsblad 30 June 1992; Act amending the Civil

protection between public[237] and private[238] educational institutions has been eliminated.[239] Both public and private educational institutions now appoint their staff based on employment contracts. Consequently, labour law applies uniformly across the entire educational sector. Hence, higher education staff must pursue legal recourse through the civil courts.[240] In labour law matters specifically, the cantonal judge is the competent judge.[241]

7.3.1.3 Germany

67. DIFFERENCE IN LEGAL PROTECTION AVAILABLE – Similar to Belgium and the Netherlands, Germany exhibits a diverse higher education landscape.[242] In principle,[243] there is a monopoly of state universities, but there are also some private non-state universities that are recognised by the government.[244] In Germany, public universities are part of the state structure,[245] while private universities are not publicly funded.[246] As a rule,

Servants Act and certain other Acts in connection with the alignment of the legal position of civil servants with that of employees with a civil law employment contract 9 March 2017, Staatsblad 28 March 2017; E. VAN VLIET, "De ontslagbescherming van onderwijzend personeel", *TvO* 2019, (97) 97).

[237] The public institutions are: Leiden, Groningen, Amsterdam, Utrecht, Delft, Wageningen, Eindhoven, Enschede, Rotterdam, Maastricht (Appendix to the Act of 8 October 1992 containing provisions relating to higher education and scientific research, *Staatsblad* 26 November 1992).

[238] The private institutions are: Amsterdam, based on the Association for Christian higher education, scientific research and patient care, Nijmegen, based on the Foundation Radboud University, Tilburg, based on the Foundation Catholic University Brabant (Appendix to the Act of 8 October 1992 containing provisions relating to higher education and scientific research, *Staatsblad* 26 November 1992).

[239] E. VAN VLIET, "De ontslagbescherming van onderwijzend personeel", *TvO* 2019, (97) 97.

[240] E. VAN VLIET, "De ontslagbescherming van onderwijzend personeel", *TvO* 2019, (97) 97 and 101-102; J. DIJKGRAAF, "Eén rechtspositie voor de sector onderwijs" in A. VAN MEER, *Het nieuwe ambtenarenrecht*, Deventer, Kluwer, 2019, (165) 166; J. GROEN, *Academische vrijheid: een juridische verkenning*, 2017, Rotterdam, Erasmus University Rotterdam, 80.

[241] Art. 93(c) Code of Civil Procedure, https://wetten.overheid.nl/BWBR0001827/2024-01-01.

[242] B. KEHM, "Higher Education Systems and Institutions, Germany", *Encyclopedia of International Higher Education Systems and Institutions*, 2018, 1; T. SCHRÖDER, *Leistungsorientierte Ressourcensteuerung und Anreizstrukturen im deutschen Hochschulsystem: ein nationaler Vergleich*, Berlin, Duncker und Humblot, 2003, 100.

[243] An exception to the monopoly of state universities, for example, are Christian universities (E. GEIS, "Art. 138. Hochschulen" in T. MEDER and W. BRECHMANN (eds.), *Die Verfassung des Freistaates Bayern*, Stuttgart, Boorberg, 2020, (1269) 1273).

[244] E. GEIS, "Art. 138. Hochschulen" in T. MEDER and W. BRECHMANN (eds.), *Die Verfassung des Freistaates Bayern*, Stuttgart, Boorberg, 2020, (1269) 1271.

[245] T. SCHRÖDER, *Leistungsorientierte Ressourcensteuerung und Anreizstrukturen im deutschen Hochschulsystem: ein nationaler Vergleich*, Berlin, Duncker und Humblot, 2003, 102; At the same time, the university is a self-governing body under public law (E. GEIS, "Art. 138. Hochschulen" in T. MEDER and W. BRECHMANN (eds.), *Die Verfassung des Freistaates Bayern*, Stuttgart, Boorberg, 2020, (1269) 1272-1273).

[246] E. GEIS, "Art. 138. Hochschulen" in T. MEDER and W. BRECHMANN (eds.), *Die Verfassung des Freistaates Bayern*, Stuttgart, Boorberg, 2020, (1269) 1274.

professors at public universities are civil servants[247] with permanent contracts.[248] As civil servants, they can either be appointed unilaterally or have a contractual legal status.[249] Professors in private universities are employed on a contract basis.[250] Regarding judicial protection, conflicts between public universities and their staff fall under the jurisdiction of the legal protection framework for civil servants, namely the administrative courts. In contrast, conflicts between private universities and contract staff are subject to the jurisdiction of civil courts.[251]

3.3.2 CANADA

3.3.2.1 Extra-judicial proceedings

68. ARBITRATION – All collective agreements contain an arbitration clause (*Infra* 69).[252] When internal procedures fail to resolve a conflict, the matter goes to an independent arbitrator who makes a binding decision for the parties. The arbitration constitutes an external dispute resolution process.[253] During the arbitration process, the labour

[247] B. KEHM, "Higher Education Systems and Institutions, Germany", *Encyclopedia of International Higher Education Systems and Institutions*, 2018, 5; G. ATES and A. BRECHELMACHER, "Academic Career Paths" in U. TEICHLER and E. HÖHLE (eds.), *The work situation of the academic profession in Europe: Findings of a survey in twelve countries*, Dordrecht, Springer, 2013, (13) 25; M. MAY, "Kunst- und Wissenschaftsfreiheit" in R. BROCKHAUS, A. ECK, A. GUNKEL, A. HOFFMANN, B. HOFFMANN, L. KATHKE, U. KNOKE, D. LECHTERMANN, J. MAIWALD, M. MAY, J. SCHACHEL, K. SCHMIEMANN, J. TIEDEMANN, S. WERRES (eds.), *Beamtenrecht des Bundes und der Länder – Kommentar*, München, R. v. Decker, Vorbemerkungen (§120) nr. 43 and 85; R. BROCKHAUS, A. ECK, A. GUNKEL, A. HOFFMANN, B. HOFFMANN, L. KATHKE, U. KNOKE, D. LECHTERMANN, J. MAIWALD, M. MAY, J. SCHACHEL, K. SCHMIEMANN, J. TIEDEMANN, S. WERRES (eds.), *Beamtenrecht des Bundes und der Länder – Kommentar*, München, R. v. Decker, Teil 1 Rechtsstellung, Aufgaben, Finanzierung und Steuerung der Hochschulen, §2.

[248] G. ATES and A. BRECHELMACHER, "Academic Career Paths" in U. TEICHLER and E. HÖHLE (eds.), *The work situation of the academic profession in Europe: Findings of a survey in twelve countries*, Dordrecht, Springer, 2013, (13) 25.

[249] W. LÖWER, "Freiheit wissenschaftlicher Forschung und Lehre" in D. MERTEN and H. PAPIER (eds.), *Handbuch der Grundrechte in Deutschland und Europa*, Heidelberg, C.F. Müller, (699) 719.

[250] D. HOHENLOHE, "Private Higher Education and Academic Freedom" in M. SECKELMANN, L. VIOLINI, C. FRAENKEL-HAEBERLE, G. RAGONE (eds.), *Academic Freedom Under Pressure?*, Cham, Springer, 2021, (165) 167.

[251] Bavarian Constitutional Court 28 September 2016, nr. Vf. 20-VII-15, *NVwZ-RR* 2016, 962; German Constitutional Court 14 January 2020, nr. 2 BvR 2055/16, ECLI:DE:BVerfG:2020:rs20200114.2bvr205516, https://www.bundesverfassungsgericht.de/DE/Homepage/homepage_node.html.

[252] R. CAMPBELL, "Tenure and Tenure Review in Canadian Universities", *McGill Law Journal* 1981, (362) 378.

[253] A. BRALEY-RATTAI and K. BENZANSON, "Un-Chartered Waters: Ontario's Campus Speech Directive and the Intersections of Academic Freedom, Expressive Freedom, and Institutional Autonomy", *Constitutional Forum*, 2020, (65) 74; C. GILLIN, "The Bog-like Ground on Which We Tread: Arbitrating Academic Freedom in Canada", *Canadian Review of Sociology/Revue canadienne de sociologie*, 2002, (301) 306; R. CAMPBELL, "Tenure and Tenure Review in Canadian Universities", *McGill Law Journal*, 1981, (362) 375 and 378; Non-unionised universities also make use arbitration boards, so in that sense the adjudication of academic freedom resembles that of unionised universities (C. GILLIN, "The Bog-like Ground on Which We Tread: Arbitrating Academic Freedom in Canada", *Canadian Review of Sociology/Revue canadienne de sociologie*, 2002, (301) 304).

[253] C. GILLIN, "The Bog-like Ground on Which We Tread: Arbitrating Academic Freedom in Canada", *Canadian Review of Sociology/Revue canadienne de sociologie*, 2002, (301) 306.

grievances[254] that are formulated by the faculty unions are adjudicated.[255] Faculty associations defend academic freedom principles outlined in the contract against the academic freedom claims of managerial powers during the arbitration process. The parties involved in the dispute are therefore the faculty unions representing academics and the university.[256]

Some scholars are rather critical of arbitration in educational matters, especially within universities where the principle of self-governance is arguably paramount. According to R. CAMPBELL, arbitral review may disrupt internal university processes based on self-governance, where academics share decision-making authority with the institution. However, he also recognises the benefits of having an objective third party resolve disputes. According to R. CAMPBELL, this potential tension regarding arbitration can be addressed by limiting the scope of the arbitrator's jurisdiction to specific mandated procedures (*Infra* 69) or by restricting remedies for contractual violations (*Infra* 79).[257]

69. MANDATE OF THE ARBITRATOR – For an arbitrator to have jurisdiction and issue a binding decision, the collective agreement must contain an arbitration clause.[258] This clause defines the basis and limits of the arbitrator's authority, as it outlines the legal framework for adjudicating academic freedom grievances based on the rights and obligations set forth in the collective agreement.[259] For example, the parties may contractually agree that the arbitrator's review is limited to procedural matters. However,

[254] The academic freedom rights laid down in the collective bargaining agreements are in the first instance legally enforceable through labour grievance and mediation, for which a legal basis must be foreseen in the collective agreement. The collective agreement also defines what constitutes a grievance. This grievance and mediation process is a purely internal way of resolving a conflict over academic freedom rights. In practice, the faculty association files a grievance on behalf of the academic asserting his academic freedom is violated. In an internal meeting between the faculty association and the university, the parties aim to settle the dispute (C. GILLIN, "The Bog-like Ground on Which We Tread: Arbitrating Academic Freedom in Canada", *Canadian Review of Sociology/Revue canadienne de sociologie*, 2002, (301) 306 and 309; D. ROBINSON, "Academic freedom in Canada: a labor law right", *Academe*, Vol. 105(4), 2019, (22) 24; R. CAMPBELL, "Tenure and Tenure Review in Canadian Universities", *McGill Law Journal*, 1981, (362) 377).

[255] C. GILLIN, "The Bog-like Ground on Which We Tread: Arbitrating Academic Freedom in Canada", *Canadian Review of Sociology/Revue canadienne de sociologie* 2002, (301) 304.

[256] *Ibid.,* 314.

[257] R. CAMPBELL, "Tenure and Tenure Review in Canadian Universities", *McGill Law Journal* 1981, (362) 375-377.

[258] *Ibid.,* 378.

[259] C. GILLIN, "The Bog-like Ground on Which We Tread: Arbitrating Academic Freedom in Canada", *Canadian Review of Sociology/Revue canadienne de sociologie* 2002, (301) 314; R. CAMPBELL, "Tenure and Tenure Review in Canadian Universities", *McGill Law Journal* 1981, (362) 376.

in cases involving violations of academic freedom provisions, the arbitrator's jurisdiction often extends to reviewing the merits of the case.[260]

In practice, the arbitrator hears academic freedom disputes when they arise under the collective agreement. This means that the collective agreement must govern the rights or obligations allegedly breached by one of the parties. The arbitrator must therefore *prima facie* analyse the facts in light of the collective agreement and interpret its provisions to determine if the grievance falls within its scope. In the well-known 1995 case of *Mount Allison University v. Mount Allison Faculty Association* case, the appellate court explicitly affirmed that arbitrators have the authority to determine the arbitrability of an issue, demonstrating judicial deference to the arbitrator's interpretation of the contract. Moreover, when the dispute in fact arises under the collective agreement, the arbitrator has exclusive jurisdiction and courts cannot hear the dispute.[261] However, this does not preclude Canadian courts from exercising jurisdiction over academic freedom matters (*Infra* 72).

70. CHOICE OF ARBITRATOR – When a conflict arises requiring arbitration, arbitrators are typically appointed through a joint decision by the university and the faculty union.[262] Arbitrators are often selected for their expertise not only in workplace matters but also in the specific context of universities, enabling them to understand the unique dynamics of academic environments.[263] Many collective agreements outline procedures for selecting arbitrators, which may involve choosing from predetermined lists in the collective agreements requiring arbitrators to possess academic experience. According to R. CAMPBELL, such measures help alleviate tensions surrounding external arbitration in university matters (*Supra* 68).[264]

3.3.2.2 Court proceedings

71. LACK OF PRACTICE – The prevalence of arbitration in resolving disputes over academic freedom in Canada does not preclude courts from handling such cases. However,

[260] R. CAMPBELL, "Tenure and Tenure Review in Canadian Universities", *McGill Law Journal* 1981, (362) 376.
[261] Court of Appeal of New Brunswick 25 October 1995, Mount Allison University v. Mount Allison Faculty Association, *NBR*, Volume 196, 1, https://www.canlii.org/en/; C. GILLIN, "The Bog-like Ground on Which We Tread: Arbitrating Academic Freedom in Canada", *Canadian Review of Sociology/Revue canadienne de sociologie*, 2002, (301) 313.
[262] A. BRALEY-RATTAI and K. BENZANSON, "Un-Chartered Waters: Ontario's Campus Speech Directive and the Intersections of Academic Freedom, Expressive Freedom, and Institutional Autonomy", *Constitutional Forum* 2020, (65) 75.
[263] *Ibid*.
[264] R. CAMPBELL, "Tenure and Tenure Review in Canadian Universities", *McGill Law Journal* 1981, (362) 378.

there is scant evidence in the case law of the Supreme Court of Canada or other judicial bodies.[265] Canadian literature suggests that courts rarely address academic freedom cases due to the high level of faculty unionization.[266] Before unionization in the 1970s, Canadian academics turned to the judicial system to assert their alleged[267] academic freedom rights.[268] For example, in the 1970 case of *Wheeldon v. Simon Fraser University*, a professor argued before the Supreme Court of British Columbia that the statement of academic freedom adopted by the university's Board of Governors was part of her employment contract and thus created enforceable rights. The court disagreed and held the view that *"in approving the statement the Board of Governors did not intend that any legal consequences should flow from such approval."*[269] This case illustrates that academics have taken academic freedom issues to court before unionisation and that courts have jurisdiction to hear such matters. This case illustrates academics' recourse to the courts pre-unionisation, although academic freedom claims often failed due to the lack of legal recognition of the right at that time. Following unionisation, labour arbitration became the primary means of adjudication.[270]

72. JURISDICTION – The question arises, then, as to the nature of disputes that courts adjudicate when it comes to matters of academic freedom today. As previously mentioned, if a collective agreement includes an arbitration clause, parties must resort to arbitration and are bound by the arbitrator's decision.[271] *A contrario*, a party may turn to the court if the collective agreement either excludes or fails to regulate arbitral review. Legal literature suggests that such cases will be rare in the context of academic freedom matters.[272]

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[265] A. BRALEY-RATTAI and K. BENZANSON, "Un-Chartered Waters: Ontario's Campus Speech Directive and the Intersections of Academic Freedom, Expressive Freedom, and Institutional Autonomy", *Constitutional Forum* 2020, (65) 74.

[266] D. ROBINSON, "Academic freedom in Canada: a labor law right", *Academe*, Vol. 105(4), 2019, (22) 24; M. LYNK, "Academic Freedom, Canadian Labour Law and the Scope of Intra-Mural Expression The Campus Speech Issue", *Constitutional Forum* 2020, (45) 47-48.

[267] Prior to the existence of the collective agreements, academic freedom was not recognised as a legal right (M. LYNK, *Academic Freedom and the Law in Canada: An Introduction* [PowerPoint-slides], Academic freedom and the law conference, Harry Crowe Foundation, 2022, https://www.crowefoundation.ca/sites/default/files/2_lynk.s_en.pdf (consulted on 21 December 2023), 6.

[268] M. LYNK, *Academic Freedom and the Law in Canada: An Introduction* [PowerPoint-slides], Academic freedom and the law conference, Harry Crowe Foundation, 2022, https://www.crowefoundation.ca/sites/default/files/2_lynk.s_en.pdf (consulted on 21 December 2023), 6.

[269] Supreme Court of British Columbia 18 June 1970, Wheeldon v. Simon Fraser University, *DLR*, Volume 15, 641, https://www.canlii.org/en/.

[270] M. LYNK, *Academic Freedom and the Law in Canada: An Introduction* [PowerPoint-slides], Academic freedom and the law conference, Harry Crowe Foundation, 2022, https://www.crowefoundation.ca/sites/default/files/2_lynk.s_en.pdf (consulted on 21 December 2023), 6.

[271] R. CAMPBELL, "Tenure and Tenure Review in Canadian Universities", *McGill Law Journal* 1981, (362) 378.

[272] *Ibid.*, 376 and 378.

Moreover, it is possible that the issue may not fall under the collective agreement if not provided for in the agreement (*Infra* 122 and 127).[273]

Most of the time, however, when cases of academic freedom do reach the courts, it is as a form of judicial review of the arbitration process.[274] It is very uncommon for academic freedom cases to end up in court as original proceedings.[275] C. GILLIN notes that where academic freedom issues end up in court as a form of judicial review, courts tend to be reluctant to overturn university decisions.[276] Furthermore, some cases simply underscore the significance of academic freedom without involving a conflict between the academic's claim to academic freedom and that of the university. In the *Mckinney v. University of Guelph* case, the Canadian Supreme Court was faced with the question of whether the mandatory retirement age of university teachers violated equality rights under the Canadian Charter of Rights and Freedoms. The Canadian Supreme Court recognised the fundamental importance of academic freedom in as a fundamental value underlying the university and society as a whole.[277] Moreover, in the *Connell v. University of British Columbia* case, the court recognised that *"the essence of a university is academic freedom".*[278]

3.3.3 COMPARISON

73. JUDICIAL SYSTEM VERSUS A SPECIAL ARBITRAL PROCEDURE – In Europe, academics typically rely on the judicial system of each country to seek protection for alleged violations of academic freedom. However, there are variations in judicial protection

[273] Court of Appeal of New Brunswick 25 October 1995, Mount Allison University v. Mount Allison Faculty Association, *NBR*, Volume 196, 1, https://www.canlii.org/en/.
[274] For a more detailed account of the possibility of a judicial review of an arbitral award in the context of a collective bargaining agreement, see: R. CAMPBELL, "Tenure and Tenure Review in Canadian Universities", *McGill Law Journal* 1981, (362) 378-380.
[275] M. LYNK, *Academic Freedom and the Law in Canada: An Introduction* [PowerPoint-slides], Academic freedom and the law conference, Harry Crowe Foundation, 2022, https://www.crowefoundation.ca/sites/default/files/2_lynk.s_en.pdf (consulted on 21 December 2023).
[276] C. GILLIN, "The Bog-like Ground on Which We Tread: Arbitrating Academic Freedom in Canada", *Canadian Review of Sociology/Revue canadienne de sociologie* 2002, (301) 306; A famous example of judicial review concerns the case of *Mount Allison University v. Mount Allison Faculty Association*, where university sought judicial review of the arbitrator's decision on the basis of the arbitrator's alleged lack of jurisdiction. The issue to be resolved is whether the dispute arose under the collective agreement, which the appellate court decided in favour of the faculty union (Court of Appeal of New Brunswick 25 October 1995, Mount Allison University v. Mount Allison Faculty Association, *NBR*, Volume 196, 1, https://www.canlii.org/en/; C. GILLIN, "The Bog-like Ground on Which We Tread: Arbitrating Academic Freedom in Canada", *Canadian Review of Sociology/Revue canadienne de sociologie* 2002, (301) 313.
[277] Supreme Court of Canada 6 December 1990, nr. 20747, Mckinney v. University of Guelph, *SCR*, Volume 3, 229, https://www.canlii.org/en/; C. GILLIN, "The Bog-like Ground on Which We Tread: Arbitrating Academic Freedom in Canada", *Canadian Review of Sociology/Revue canadienne de sociologie* 2002, (301) 306.
[278] Court of Appeal for British Columbia 6 January 1988, nr. CA006388, Connell v. University of British Columbia, *DLR*, Volume 49, 687, https://www.canlii.org/en/.

based on the employment relationship, particularly in Belgium and Germany, where differences exist depending on whether an academic is employed by a private or public university. In contrast, Canada has a specific procedure for handling academic freedom disputes, which is outlined in the collective agreements of each university. This procedure involves arbitration, providing a legal framework for academics to address alleged violations of their rights. Unlike in Europe, this system applies uniformly across private and public universities in Canada, as contracts cross the boundaries between private and public universities. It's important to note that while courts in Canada are not generally precluded from hearing academic freedom disputes, the prevalence of unionisation in universities means that arbitration has become the predominant method for resolving such conflicts in practice.

PART 4. LEGAL REMEDIES

3.4.1 INTRODUCTION

74. REMEDIES – In this section of the chapter, the focus shifts to the labour law sanctions that universities may impose on professors who exercise their academic freedom in a manner that conflicts with the institution's academic freedom rights. Sanctions, however minimal,[279] imposed on academics exercising their academic freedom can have a chilling effect.[280] Therefore, it is important to consider what remedies are available if a dispute resolution body finds that a university's decision has unjustifiably[281] infringed on an individual's academic freedom. The study examines the remedies that can be sought specifically in cases of dismissal, which is arguably the most severe sanction against academic freedom.

[279] In Kula v. Turkey, the ECtHR considered that sanctions such as a reprimand, which is a disciplinary action in the form of a written notification of professional or personal misconduct, are sufficient to cause a chilling effect on the exercise of academic freedom (ECtHR 19 June 2018, nr. 20233/06, ECLI:CE:ECHR:2018:0619JUD002023306, Kula v. Turkey, §25 and §39).

[280] This is especially true for academic speech and freedom of expression. See: ECtHR 19 June 2018, nr. 20233/06, ECLI:CE:ECHR:2018:0619JUD002023306, Kula v. Turkey, §39; ECtHR 15 May 2023, nr. 45581/15, ECLI:CE:ECHR:2023:0515JUD004558115, Sanchez v. France, §184 and 205.

[281] Although the academic community believes that academic freedom should be broadly protected from a normative point of view, the right is not absolute. Therefore, violations of academic freedom may occur. However, violations of academic freedom must be justified. More specifically, the university's actions may be justified if the individual academic behaves in a way that falls outside the scope of the protection of academic freedom (W. LÖWER, "Freiheit wissenschaftlicher Forschung und Lehre" in D. MERTEN and H. PAPIER (eds.), *Handbuch der Grundrechte in Deutschland und Europa*, Heidelberg, C.F. Müller, (699) 723).

3.4.2 EUROPEAN LEGAL SYSTEMS

3.4.2.1 Belgium

75. "EQUAL JUDICIAL PROTECTION" – In Belgium, disputes between academics and their institution can be adjudicated either by the Council of State or the labour courts, depending on the type of appointment (*Supra* 65).[282] The Council of State has asserted in its jurisprudence that both judicial instances provide "*not the same, but equivalent legal protection*."[283] The Belgian Constitutional Court has also ruled on this issue, affirming that the varying nature of the employment relationship and the consequent difference in legal protection does not contravene the Constitution.[284]

76. *DE FACTO* DIFFERENCE IN JUDICIAL PROTECTION – In Belgium, there are concerns regarding the equivalence of the *de facto* legal protection for contractually and statutorily employed academic staff.[285] The labour courts, typically where conflicts over academic freedom are adjudicated, have full discretionary authority to assess disputes brought before them, but lack the power to substitute themselves for the university - the employer - and annul its actions. The labour court can only award damages if it finds that a manifestly unreasonable decision is unlawful. The labour court's recourse is limited to awarding damages if it deems a decision to be manifestly unreasonable and unlawful. Since Belgium lacks a specific sanction mechanism for the educational context, civil law must be invoked.[286] In contrast, the Council of State holds the authority to annul an employer's action.[287]

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[282] E. TIMBERMONT, *De rechtspositie van het onderwijspersoneel in de Vlaamse Gemeenschap*, Brussel, Intersentia, 2021, 604.
[283] Own translation; State Council 13 March 2001, nr. 93.944, http://www.raadvst-consetat.be.
[284] Belgian Constitutional Court 1 June 2005, nr. 97/2005, https://www.const-court.be/nl/; E. TIMBERMONT, *De rechtspositie van het onderwijspersoneel in de Vlaamse Gemeenschap*, Brussel, Intersentia, 2021, 607; This was a controversial decision. For a discussion of this decision, see Draft decree regarding universities in the Flemish Community of 2 May 1991, *Parl.St.* 1990-1991, nr. 502/1, 185 and E. TIMBERMONT, *De rechtspositie van het onderwijspersoneel in de Vlaamse Gemeenschap*, Brussel, Intersentia, 2021, 606-608 en R. VERSTEGEN, "De rol van de rechter in de uitbouw van het onderwijsrecht. Een overzicht.", *Tijdschrift voor Onderwijsrecht en Onderwijsbeleid* 2006, (105) 108.
[285] E. TIMBERMONT, *De rechtspositie van het onderwijspersoneel in de Vlaamse Gemeenschap*, Brussel, Intersentia, 2021, 584.
[286] *Ibid*.
[287] *Ibid*.

3.4.2.2 The Netherlands

77. DIFFERENCE IN LEGAL PROTECTION ELIMINATED SINCE 1 JANUARY 2020 – In the Netherlands, there has long been a difference in legal protection due to the different legal statuses in education (*Supra* 66).[288] The situation was therefore similar to that in Belgium. As of 1 January 2020, however, this difference will be abolished for appointments in the education sector.[289] From that date, all educational staff will be subject to the general labour law on dismissal.[290] Unlike in Belgium, the Dutch cantonal judge – who has jurisdiction in labour matters, including dismissal[291] – has the power to annul an immediate dismissal. As a result, the employment relationship is revived. As an equivalent measure, the cantonal judge can also grant financial compensation.[292] Therefore, unlike in Belgium, there is no *de facto* difference in the legal protection in terms of available remedies in public and private education in the Netherlands.

3.4.2.3 Germany

78. SIMILAR LEGAL REMEDIES AVAILABLE – Civil servants, the legal status of professors in German public universities, can appeal administratively against dismissal to the administrative courts. The administrative courts have the authority to annul an unfair dismissal.[293] In Germany, academic staff at private universities take their disputes with their employer to the labour court. If the labour court decides that a dismissal was unlawful, it will overturn the dismissal as a rule. While the *law in the books* suggests that it is rare for an employee to be dismissed with compensation, in practice this is the most common outcome, based on a settlement between the employer and the employee.[294]

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[288] J. DIJKGRAAF, "Eén rechtspositie voor de sector onderwijs" in A. VAN MEER, *Het nieuwe ambtenarenrecht*, Deventer, Kluwer, 2019, (165) 167.
[289] Act amending the Civil Servants Act and certain other Acts in connection with the alignment of the legal position of civil servants with that of employees with a civil law employment contract 9 March 2017, *Staatsblad* 28 March 2017; E. VAN VLIET, "De ontslagbescherming van onderwijzend personeel", *TvO* 2019, 97-103.
[290] Act amending the Civil Servants Act and certain other Acts in connection with the alignment of the legal position of civil servants with that of employees with a civil law employment contract 9 March 2017, *Staatsblad* 28 March 2017; E. VAN VLIET, "De ontslagbescherming van onderwijzend personeel", *TvO* 2019, 97-103.
[291] Art. 93(c) Code of Civil Procedure, https://wetten.overheid.nl/BWBR0001827/2024-01-01.
[292] S. SAGEL and M. KERKHOF, "Het ontslag op staande voet" in F. PENNINGS and L. SPRENGERS (eds.), *Ontslagrecht in hoofdlijnen*, Deventer, Kluwer, 2021, (149) 156-169; G. DIEBELS, *De Kleine Gids voor het Nederlandse Arbeidsrecht*, Deventer, Kluwer, 2022, 227-229.
[293] D. LECHTERMANN, "Beamtenrechtliche Regelungen" in B. FABER, E. GRAUNE, B. HOFFMANN, M. KLEIN, D. LECHTERMANN, M. RESCH, H.-W. SCHLEICHER, B. WITTMANN (eds.), *Lexikon Personalvertretungsrecht*, Heidelberg, Rehm Verlag, 2021, 1.3 Entlassung durch Verwaltungsakt nach § 23 BeamtStG; T. ROETTEKEN and C. TORHLÄNDER, *Beamtenstatusgesetz*, München, R. v. Decker, 2023, § 54 Verwaltungsrechtsweg.
[294] R. ZIMMER, "Protection Against Unfair Dismissal in Germany", *King's Law Journal*, 2022, (169) 186-187.

3.4.3 CANADA

79. CONTRACTUAL REGULATION OF REMEDIES – In Canada, the parties are free in their collective agreement to provide remedies for a breach of contractual provisions, such as academic freedom provisions.[295] Accordingly, the arbitrator is strictly bound by those remedies and would exceed its jurisdiction if it deviates from the collective agreement.[296] The Canadian literature cites some advantages of this approach. First, the contractual determination of remedies can facilitate the role of the arbitrator. In addition, it allows the parties to fashion the outcome of a dispute in a way that is acceptable to both parties. Also, unrestricted arbitral review allows a greater onus to be placed on arbitrators facing a subjective decision.[297]

80. EXAMPLE – By way of example, consider the case *University College of the North and Manitoba Government and General Employees' Union* case, where the university dismissed a professor for severely criticising the university president's policies. The president of the university rejected a prospective lecturer, prompting the professor to express displeasure via emails to the candidate and the academic community, constituting intramural speech. The arbitrator determined that the seriousness of the professor's utterances and disloyal behaviour exceeded the limits of academic freedom. However, the arbitrator deemed the university's response inappropriate, resulting in partial approval of the professor's grievance.

The arbitrator then addressed the determination of remedies. The Collective Agreement between University College of the North and Manitoba Government and General Employees' Union stipulates: "*Where the arbitration board determines that an employee has been dismissed or otherwise disciplined by the Employer for just cause, the arbitration board may substitute such other penalty or remedy in lieu of dismissal or the disciplinary action as the board deems just and reasonable under the circumstances*."[298] The arbitrator considered the relationship between the employer and employee not irreparably damaged. Moreover, dismissal would have too far-reaching an impact on the professor's career. The

[295] R. CAMPBELL, "Tenure and Tenure Review in Canadian Universities", *McGill Law Journal* 1981, (362) 377 and 388.
[296] *Ibid.*, 388.
[297] *Ibid.*, 377.
[298] Own emphasis; Artikel 47 'Arbitration Procedure', 47:02, (l) Collective Agreement between University College of the North and Manitoba Government and General Employees' Union, 1 April 2018 to 31 March 2022, available at https://www.mgeu.ca/uploads/documents/ucn_april_1_2018_to_march_31_2022.pdf (consulted on 13 May 2024).

arbitrator believed the professor's actions were serious but argued that a lesser form of discipline could have restored the relationship between the employer and employee. Consequently, the arbitrator decided to "*rescind the termination and substitute a two month suspension pay*."[299]

3.4.4 COMPARISON

81. A PRIMARY FINDING RELATING TO EFFECTIVE LEGAL PROTECTION – The comparison focuses on a primary finding relating to effective legal protection, specifically in cases of dismissal. I noted that in some legal systems, dismissal cannot be overturned by a court, as is the case for the Belgian labour court. In the Netherlands, on the other hand, the labour court can overturn a dismissal and restore the employment relationship.

In contrast to the European legal systems, in Canada, remedies for violations of clauses—such as those protecting academic freedom—are specified within the collective agreement. Unlike in European legal systems, the parties themselves are involved in selecting the remedies that an arbitrator can impose. This is exemplified by the arbitrator's power to substitute a different sanction or to reduce the sanction imposed by the employer, a power that is not available in any of the European jurisdictions.

[299] Labour Arbitration Award Manitoba 12 December 2011, nr. 0831, 'University College of the North v. Manitoba Government and General Employees' Union, https://www.canlii.org/en/.

CHAPTER 4. ENFORCEABILITY OF INDIVIDUAL ACADEMIC FREEDOM AGAINST THE INSTITUTION

PART 1. INTRODUCTION

82. ENFORCEABILITY OF INDIVIDUAL ACADEMIC FREEDOM – In this part of the thesis, I will elaborate on the enforceable dimension of academic freedom. I will examine how both the Canadian and the selected European legal protection mechanisms relate to the enforceability of individual academic freedom when it conflicts with institutional academic freedom. Specifically, the research assesses whether the academic freedom provision is binding on the university. Secondly, I will evaluate how the defensive function of academic freedom operates in practice.

83. ENFORCEABLE PROVISIONS IN ALL LEGAL SYSTEMS UNDER SCRUTINY – This chapter builds on the findings of the previous chapter, which demonstrated that the legal systems examined have enforceable provisions regarding academic freedom. In Belgium, the Netherlands, and Germany, there are enforceable constitutional provisions that individual academics can invoke. Additionally, for the Netherlands, I argued that there is an enforceable statutory provision. In the Canadian system, the collective agreements between the university and academics include enforceable academic freedom rights. Since this dissertation focuses on disputes between universities and academics, the next essential question is whether the legal provisions guaranteeing academic freedom are also enforceable against the university.

PART 2. BINDING EFFECT ON THE UNIVERSITY

4.2.1 EUROPEAN LEGAL SYSTEMS

84. AN UNDEREXAMINED ASPECT IN THE LITERATURE – Academic freedom is much-trumpeted in European literature,[300] but scholars seem to pay little to no attention to the practical problems that can arise when an academic seeks to assert his or her academic

[300] E. TIMBERMONT, "Academische vrijheid: een onderzoek naar de juridische draagwijdte en een aantal arbeidsrechterlijke implicaties van het begrip.", *T.O.R.B.* 2014-2015/1-2, 2014, (56) 63; J. DE GROOF, "Omtrent de academische vrijheid. Het 'Palladium' van de Universiteit?" in F. FLEERACKERS and R. VAN RANSBEECK (eds.), *Recht en onafhankelijkheid. De onafhankelijkheid van de rechtswetenschap*, Brussel, Larcier, 2011, (5) 34-35; E. BREWAEYS, 'Academische vrijheid, uitingsvrijheid van de academicus en wetenschappelijke kritiek' in W. DEBEUCKELAERE (ed.), *Ontmoetingen met Koen Raes*, Brugge, die Keure / la Charte, 2012, 76.

freedom against the university before a dispute settlement body. In my view, this indicates that the dispute between the academic and the university is underexplored and insufficiently examined.

The aim of this section is to provide more insight into the procedural issues that may cause problems in practice when one seeks to enforce academic freedom. From my analysis below, it appears that enforcing academic freedom in a dispute against the university is not straightforward in European systems. Indeed, the question arises as to how fundamental rights enter the internal legal order and affect the relationship between private actors, which is the case in disputes between academics and their universities. This leads us to the problematic doctrine of the horizontal effect of fundamental rights. However, there is no doubt that in negotiating the UNESCO Recommendation, the member states certainly intended to make academic freedom binding on universities by explicitly stating that *"autonomy should not be used by higher education institutions as a pretext to limit the rights of higher-education teaching personnel provided for in this Recommendation."*[301]

7.1.1 European Union

85. HORIZONTAL EFFECT OF ARTICLE 13 – The question of whether the European concept of academic freedom is binding on universities leads us to the question of the horizontal effect of EU Charter rights i.e. whether the Charter rights apply in private relations. The horizontality doctrine regarding the EU Charter remains an open question in legal doctrine.[302] In principle, the EU Charter can be invoked in horizontal relations, because legal rights that are enshrined in EU primary law extend to private relations and have direct effect.[303] However K. LENAERTS has argued that the EU Charter rights cannot be applied horizontally. He claims that article 51(1) of the EU Charter, which determines the field of application of the EU Charter, stipulates that *"The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union"* and does not

[301] Paragraph 20 Recommendation concerning the Status of Higher-Education Teaching Personnel of the General Conference of UNESCO (11 November 1997), available at https://en.unesco.org/about-us/legal-affairs/recommendation-concerning-status-higher-education-teaching-personnel.
[302] E. FRANTZIOU, "The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality*" European Law Journal: Review of European Law in Context*, 21(5), 2015, (657) 657.
[303] Court of Justice of the European Union 8 April 1976, nr. Case 43-75, ECLI:EU:C:1976:56, Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena, 39 and 42.

refer to private parties.[304] However, another strand of legal doctrine holds that the EU Charter is nonetheless horizontally applicable because the EU Charter does not exclude such effect, the Court of Justice's practice regarding horizontal effect of fundamental rights does not support such conclusion and the nature of the rights of the EU Charter allow for horizontality.[305]

7.1.2 Belgium

86. HORIZONTAL EFFECT OF CONSTITUTIONAL RIGHTS – A first observation in Belgium is that the above research question has not been explicitly addressed in the Belgian literature. However, authors generally assume that academic freedom rights may be claimed against institutions by recognizing that conflicts may arise between individual and institutional academic freedom, leading to mutual claims.[306] . This dissertation, therefore, seeks to answer the question of whether universities in Belgium are obliged to respect academic freedom, which brings us to the doctrine of the horizontal effect of constitutional rights, and more specifically, the direct horizontal effect.[307]

Traditionally, fundamental rights in the Belgian constitution only bind the government.[308] However, the exclusive vertical effect of fundamental rights is a doctrine that no longer holds today. In recent decades, the doctrine of the horizontal effect of

[304] Article 51(1) Charter of Fundamental Rights of the European Union 1 December 2009, *OJ* 18 December 2000; K. LENAERTS, "Exploring the Limits of the EU Charter of Fundamental Rights", *European Constitutional Law Review* 2012, (375) 377, footnote 11.

[305] E. FRANTZIOU, "The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality*" European Law Journal: Review of European Law in Context*, 21(5), 2015, (657) 659-660.

[306] E. BREWAEYS, 'Academische vrijheid, uitingsvrijheid van de academicus en wetenschappelijke kritiek' in W. DEBEUCKELAERE (ed.), *Ontmoetingen met Koen Raes*, Brugge, die Keure / la Charte, 2012, 76; E. TIMBERMONT, "Academische vrijheid: een onderzoek naar de juridische draagwijdte en een aantal arbeidsrechterlijke implicaties van het begrip.", *T.O.R.B.* 2014-2015/1-2, 2014, (56) 63; J. DE GROOF, "Omtrent de academische vrijheid. Het 'Palladium' van de Universiteit?" in F. FLEERACKERS and R. VAN RANSBEECK (eds.), *Recht en onafhankelijkheid. De onafhankelijkheid van de rechtswetenschap*, Brussel, Larcier, 2011, (5) 34-35.

[307] The third-party effect or horizontal effect of fundamental rights concerns the application of fundamental rights by national courts in a concrete dispute between individuals. There are two forms of horizontal effect. First, there is the direct horizontal effect, where fundamental rights are invoked *an sich* in the relationship between private actors. Thus, the court directly invokes fundamental rights in the concrete dispute. Theoretically, the fundamental right can be invoked as a defensive right against the private actor and can impose an obligation on the private actor. On the other hand, there is the indirect horizontal effect of fundamental rights, where fundamental rights serve to interpret private law norms (J. VANWIJNGAERDEN, "De werking van grondrechten tussen particulieren", *Jura Falconis*, 2007, (217) 229). The latter theory is less applicable in this thesis.

[308] W. VERRIJDT, "De betekenis van de grondrechten voor de verhouding tussen publiek- en privaatrecht" in L. F. WIGGERS-RUST and S. LIERMAN (eds.), *Canon van publiek- en privaatrecht in dialoog: een tweeluik vanuit Nederland en België*, Zutphen, Uitgeverij Paris, 2023, (29) 29; S. SOTTIAUX, *Grondwettelijk recht*, Mortsel, Intersentia, 2021, 310.

fundamental rights has been increasingly recognised by scholars and courts, meaning that fundamental rights also permeate private relationships between citizens and private actors.[309] The direct horizontal effect, however, is severely criticised in Belgian legal literature, with the indirect horizontal effect being preferred option.[310]

87. HORIZONTALITY APPLIED TO UNIVERSITIES – The Belgian Constitutional Court stated in its ruling from February 12, 2012, that the decisive criterion for horizontal effect is the *de facto* or *de jure* dominant position that a private person has towards another private person and thus which enables the former to infringe fundamental rights of the latter in de subordinate position.[311] Universities are capable of performing such a position of dominance.[312] Another argument from legal scholarship for the horizontal effect is that some instances perform government functions, which would justify them being bound by fundamental norms.[313] However, applied to the Belgian context, this argument will most likely only apply to public universities.

The question of whether individual academics can invoke the constitutionally guaranteed concept of academic freedom when they believe that their fundamental rights have been violated by private educational institutions is more complex. This uncertainty is reflected in Belgian legal doctrine.[314] There are, however, some arguments that might support such conclusion. Firstly, by analogy with the recognition in case law of the freedom

[309] S. SOTTIAUX, *Grondwettelijk recht*, Mortsel, Intersentia, 2021, 311; W. VERRIJDT, "De betekenis van de grondrechten voor de verhouding tussen publiek- en privaatrecht" in L. F., WIGGERS-RUST and S. LIERMAN (eds.), *Canon van publiek- en privaatrecht in dialoog: een tweeluik vanuit Nederland en België*, Zutphen, Uitgeverij Paris, 2023, (29) 30-31.
[310] S. SOTTIAUX, *Grondwettelijk recht*, Mortsel, Intersentia, 2021, 312; J. VANWIJNGAERDEN, "De werking van grondrechten tussen particulieren", *Jura Falconis* 2007, (217) 236-242; K. RIMANQUE and P. PEETERS, "De toepasselijkheid van grondrechten in de betrekkingen tussen private personen – algemene probleemstelling", in K. RIMANQUE (ed.), *De toepasselijkheid van de grondrechten in private verhoudingen*, Antwerpen, Kluwer, 1982, (1) 11-14; W. VERRIJDT, "De betekenis van de grondrechten voor de verhouding tussen publiek- en privaatrecht" in L. F., WIGGERS-RUST and S. LIERMAN (eds.), *Canon van publiek- en privaatrecht in dialoog: een tweeluik vanuit Nederland en België*, Zutphen, Uitgeverij Paris, 2023, (29) 32.
[311] Belgian Constitutional Court 12 February 2009, ECLI:BE:GHCC:2009:ARR.017, B.10.4.
[312] S. SOTTIAUX, *Grondwettelijk recht*, Mortsel, Intersentia, 2021, 311.
[313] *Ibid*.
[314] B. STEEN, "Doorwerking van internationaal recht in het (Vlaamse) onderwijsrecht", in J. WOUTERS and D. VAN EECKHOUTTE (eds.), *De doorwerking van het internationaal recht in de Belgische rechtsorde – Recente ontwikkelingen in een rechtstakoverschrijdend perspectief*, Antwerpen, Intersentia, 2006, (521) 531; K. RIMANQUE and P. PEETERS, "De toepasselijkheid van grondrechten in de betrekkingen tussen private personen – algemene probleemstelling", in K. RIMANQUE, (ed.), *De toepasselijkheid van de grondrechten in private verhoudingen*, Antwerpen, Kluwer, 1982, (1) 11; N. VAN LEUVEN, "Derdenwerking van mensenrechten in de Belgische rechtsorde", in J. WOUTERS and D. VAN EECKHOUTTE (eds.), *De doorwerking van het internationaal recht in de Belgische rechtsorde – Recente ontwikkelingen in een rechtstakoverschrijdend perspectief*, Antwerpen, Intersentia, 2006, (167) 175-176.

of religion in private secondary schools[315] and the freedom of education in private secondary schools[316], one could argue that academic freedom as a constitutional concept could also apply to private universities. In addition, the recognition of the horizontal effect of international law in free subsidised secondary education[317], which has already been accepted in case law,[318] strengthens, in my view, the horizontal effect of fundamental rights in private universities. This study examines another argument that could bolster the application of the doctrine of the horizontal effect of constitutional rights to private universities. To this end, a brief excursion is made into the doctrine of the principles of good administration, which traditionally does not apply to private institutions. However, there are voices in legal doctrine arguing that the principles of good administration should also be applied to private institutions that are largely financed by public funds, as Belgian private universities are subsidised.[319] This could be an argument applicable *mutatis mutandis* to the horizontal effect in private universities, but this research found that there is no Belgian legal doctrine that supports such an argument to date.

7.1.3 The Netherlands

88. HORIZONTAL EFFECT OF CONSTITUTIONAL RIGHTS – In the Netherlands, as in Belgium, there is very little debate about the horizontal effect of constitutional rights[320] and the question does not arise in treatises on academic freedom. However, the literature invariably assumes that there are possible conflicts between the university and the academic which may lead to mutual claims.[321] Moreover, the direct horizontal effect finds little support in Dutch legal doctrine.[322] In the Netherlands, as in Belgium, indirect effect

[315] Summary proceedings Court of Ghent 25 March 1994, *T.G.R.* 1994, 71.
[316] Civil court Antwerp 22 October 1992, *RW* 1992-93, 541, noot E. DIRIX.
[317] B. STEEN, "Doorwerking van internationaal recht in het (Vlaamse) onderwijsrecht", in J. WOUTERS and D. VAN EECKHOUTTE (eds.), *De doorwerking van het internationaal recht in de Belgische rechtsorde – Recente ontwikkelingen in een rechtstakoverschrijdend perspectief*, Antwerpen, Intersentia, 2006, (521) 531.
[318] Court of Appeal Brussels 21 Februari 1996, *RW* 1996-97, 260, noot.
[319] F. VANDENDRIESSCHE, "Het toepassingsgebied van de beginselen van behoorlijk bestuur" in Beginselen van behoorlijk bestuur, I. OPDEBEEK and M. VAN DAMME (eds.), Brugge, Die Keure, 2006, 45; See, however, E. TIMBERMONT, *De rechtspositie van het onderwijspersoneel in de Vlaamse Gemeenschap*, Brussel, Intersentia, 2021, 575-576.
[320] B. VOS, *Horizontale werking van grondrechten. Een kritiek*, Appeldoorn, Maklu, 2010, 84.
[321] R. VAN GESTEL, "Wie beschermt de academische vrijheid?", *Regelmaat* 2023, (141) 144-149; R. VAN GESTEL, "Academische vrijheid onder druk", *NJB* 2024, (§1) §3.
[322] B. VOS, *Horizontale werking van grondrechten. Een kritiek*, Appeldoorn, Maklu, 2010, 65-66, 84 and 88; J. SMITS, "Constitutionalisering van het vermogensrecht" in Preadviezen uitgebracht voor de Nederlandse Vereniging voor Rechtsvergelijking 2003, Deventer, Kluwer 2003, (1) 13; C. MAK, *Fundamental rights in European contract law: a comparison of the impact of fundamental rights on contractual relationships in Germany, the Netherlands, Italy and England*, Alphen aan den Rijn, Kluwer law international, 2008, 16; C. MAK, "De meerwaarde van grondrechten in het privaatrecht", *NTBR* 2004, (124) 125; E. HONDIUS, "Freedom of

is overwhelmingly[323] preferred by legal scholars.[324] In the explanatory memorandum to the draft new Constitution, the Dutch government states its position against horizontal effect. The government seems to recognise both direct and indirect horizontal effect,[325] but continues by stating the following: "*The question of horizontal effect does not need to be answered uniformly for each article of the Constitution*."[326] According to J. SMITS and C. MAK, this position amounts to saying that it is up to the courts to decide on a case-by-case basis whether the Constitution has a horizontal effect on private relations between citizens. The development of the doctrine is thus largely left to the judges, which illustrates the uncertainty and reluctance in the Netherlands towards the doctrine of horizontal effect.[327]

89. ARTICLE 1.6 HIGHER EDUCATION ACT – Although, in my opinion, the law provides little clarity on this point, it can be deduced from the literature that article 1.6 of the Higher Education Act was intended to govern the relationship between academics and universities.[328] The Higher Education Act, moreover, applies to both public and private law bodies.[329]

Contract and Constitutional Law in the Netherlands", in A. RABELLO and P. SARCEVIC (eds.), *Freedom of Contract and Constitutional Law*, Jerusalem, Harry and Michael Sacher Institute for Legislative Research and Comparative Law, Hebrew University of Jerusalem, 1998, (201) 204.

[323] See however: E. HONDIUS, "Freedom of Contract and Constitutional Law in the Netherlands", in A. RABELLO and P. SARCEVIC (eds.), *Freedom of Contract and Constitutional Law*, Jerusalem, Harry and Michael Sacher Institute for Legislative Research and Comparative Law, Hebrew University of Jerusalem, 1998, (201) 206-207.

[324] B. VOS, *Horizontale werking van grondrechten. Een kritiek*, Appeldoorn, Maklu, 2010, 108; J. SMITS, "Constitutionalisering van het vermogensrecht" in Preadviezen uitgebracht voor de Nederlandse Vereniging voor Rechtsvergelijking 2003, Deventer, Kluwer 2003, (1) 13 en 20-26; C. MAK, "De meerwaarde van grondrechten in het privaatrecht", *NTBR*, 2004, (124) 125; C. MAK, *Fundamental rights in European contract law: a comparison of the impact of fundamental rights on contractual relationships in Germany, the Netherlands, Italy and England*, Alphen aan den Rijn, Kluwer law international, 2008, 16.

[325] A. BELINFANTE and J. DE REEDE, *Beginselen van het Nederlands staatsrecht*, Deventer, Kluwer, 2020, 249-250.

[326] Own translation; Explanatory memorandum regarding the declaration that there are grounds to consider a proposal to change provisions on fundamental rights in the Constitution 2 April 1976, *TK* 1975-1976, nr. 13872, 15-16.

[327] C. MAK, *Fundamental rights in European contract law: a comparison of the impact of fundamental rights on contractual relationships in Germany, the Netherlands, Italy and England*, Alphen aan den Rijn, Kluwer law international, 2008, 16; J. SMITS, "Constitutionalisering van het vermogensrecht" in Preadviezen uitgebracht voor de Nederlandse Vereniging voor Rechtsvergelijking 2003, Deventer, Kluwer 2003, (1) 12.

[328] P. ZOONTJENS, *Vrijheid van wetenschap: Juridische beschouwingen over wetenschapsbeleid en hoger onderwijs, Zwolle*, W.E.J. Tjeenk Willink, 1993, 188; J. GROEN, *Academische vrijheid: een juridische verkenning*, 2017, Rotterdam, Erasmus University Rotterdam, 78.

[329] Article 1(h), 1(i), 1(6) Law of 8 October 1992 containing provisions relating to higher education and scientific research, *Staatsblad* 26 November 1992.

7.1.4 Germany

90. DISCUSSION IN THE LITERATURE – In Germany, unlike in Belgium and the Netherlands, the question of whether the university is bound by academic freedom seems to be considered in legal doctrine, albeit to a limited extent. However, in my opinion, the discussion does not entirely reassure the judicial protection of individual academic freedom.

91. PUBLIC UNIVERSITIES – Concerning public universities, the answer to whether universities are bound to respect academic freedom rights of individual academics is quite straightforward. In Germany, public universities are not only holders of academic freedom rights but are also directly bound by article 5(3) of the German Constitution. Therefore, they are obliged to respect the rights of individual academics.[330] The German Constitutional Court has explicitly recognised the above in its *Hochschulurteil*, stating that academic freedom must be protected from university interference.[331] In the case of public universities, the enforceability of individual academic freedom claims thus seems to cause no practical or theoretical problems.[332]

92. PRIVATE UNIVERSITIES – The question becomes more difficult for private universities in Germany. What is certain is that individual employees and private universities can both claim academic freedom when the state infringes their academic freedom rights,[333] as confirmed by the German Constitutional Court in 1992.[334] However, individual academics nor private institutions can claim academic freedom against each other in case of a dispute regarding academic freedom claims equivalent to those applicable to public universities and academics – being civil servants – working for them. The reason

[330] E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 132; I. PERNICE, "Artikel 5 [Meinings-, Pressefreiheit, Rundfunk; Freiheit der Kunst un Wissenschaft]" in H. DREIER (ed.), *Grundgesetz-Kommentar*, Tübingen, Mohr Siebeck, 2004, (715) 734; M. STACHOWAIK-KUDLA, S. WESTA, C. BOTELHO and I. BARTHA, "Academic Freedom as a Defensive Right", *Hague Journal on the Rule of Law*, 2023, (161) 175.
[331] German Constitutional Court 29 May 1973, nr. BvR 424/71 en 325/72, *NJW* 1973, 1176.
[332] E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 157.
[333] W. LÖWER, "Freiheit wissenschaftlicher Forschung und Lehre" in D. MERTEN and H. PAPIER (eds.), *Handbuch der Grundrechte in Deutschland und Europa*, Heidelberg, C.F. Müller, (699) 722; E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 157; D. HOHENLOHE, "Private Higher Education and Academic Freedom" in M. SECKELMANN, L. VIOLINI, C. FRAENKEL-HAEBERLE, G. RAGONE (eds.), *Academic Freedom Under Pressure?*, Cham, Springer, 2021, (165) 167; I. PERNICE, "Artikel 5 [Meinings-, Pressefreiheit, Rundfunk; Freiheit der Kunst un Wissenschaft]" in H. DREIER (ed.), *Grundgesetz-Kommentar*, Tübingen, Mohr Siebeck, 2004, (715) 734.
[334] E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 155-156.

for this is that, in principle, private universities are simply not directly bound by article 5(3) of the German Constitution or other provisions of the German Constitution.[335]

However, the doctrine of the horizontal effect of fundamental rights, or *Drittwirkung*, is widely accepted in German doctrine.[336] Nevertheless, the way in which fundamental rights would permeate private law relations leads to more legal uncertainty and debate. While indirect horizontal effect is generally accepted, direct horizontal effect causes much debate.[337] The German Constitutional Court has so far not recognised a doctrine of direct horizontal effect, but it does recognise indirect horizontal effect:[338] "*According to established case law, fundamental rights can be effective in such disputes through indirect third-party effects. According to this principle, fundamental rights are not directly binding between individuals*."[339] D. HOHENLOHE argues that there is little scope for a horizontal effect of academic freedom because of the contractually secured management powers of private universities as employers.[340] I. PERNICE believes that professors cannot invoke their own right to academic freedom against the institution, leading to the loss of a

[335] D. HOHENLOHE, "Private Higher Education and Academic Freedom" in M. SECKELMANN, L. VIOLINI, C. FRAENKEL-HAEBERLE, G. RAGONE (eds.), *Academic Freedom Under Pressure?*, Cham, Springer, 2021, (165) 167; E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 157; I. PERNICE, "Artikel 5 [Meinings-, Pressefreiheit, Rundfunk; Freiheit der Kunst un Wissenschaft]" in H. DREIER (ed.), *Grundgesetz-Kommentar*, Tübingen, Mohr Siebeck, 2004, (715) 736.

[336] C. STARCK, "Human rights and private law in German Constitutional Development and in the Jurisdiction of the Federal Constitutional Court" in D. FRIEDMANN and D. BARAK-EREZ (eds.), *Human rights in private law*, Oxford, Hart publishing, 2003, 97; N. VAN LEUVEN, "Derdenwerking van mensenrechten in de Belgische rechtsorde", in J. WOUTERS and D. VAN EECKHOUTTE (eds.), *De doorwerking van het internationaal recht in de Belgische rechtsorde – Recente ontwikkelingen in een rechtstakoverschrijdend perspectief*, Antwerpen, Intersentia, 2006, (167) 171.

[337] H. LISA, M. PETRAS, D. VALENTINER and N. WIENFORT, *Grundrechte*, Berlin, Walter de Gruyter GmbH, 2022, 104; K. RIMANQUE and P. PEETERS, "De toepasselijkheid van grondrechten in de betrekkingen tussen private personen – algemene probleemstelling", in K. RIMANQUE (ed.), *De toepasselijkheid van de grondrechten in private verhoudingen*, Antwerpen, Kluwer, 1982, (1) 16 and 19; T. MAUNZ, G. DÜRIG, P. BADURA, U. DI FABIO, M. HERDEGEN, R. HERZOG, F. KIRCHHOF, P. KIRCHHOF, H. KLEIN, H. KUBE, C. LANGENFELD, H. PAPIER, R. SCHOLZ, *Grundgesetz: Kommentar*, München, Verlag C. H. Beck. oHG, 2024, nr. 79; T. HOCHMANN and J. REINHARDT*, L'effet horizontal des droits fondamentaux*, Paris, Pedone, 2018, 8.

[338] German Constitutional Court of Germany 15 January 1951, nr. 1 BvR 400/51, https://www.bundesverfassungsgericht.de/DE/Homepage/homepage_node.html; Constitutional Court 11 April 2018, nr. 1 BvR 3080/09, ECLI:DE:BVerfG:2018:rs20180411.1bvr308009, https://www.bundesverfassungsgericht.de/DE/Homepage/homepage_node.html, para. 32; Constitutional Court 18 July 2015, nr. 1 BvQ 25/15, ECLI:DE:BVerfG:2015:qk20150718.1bvq002515, https://www.bundesverfassungsgericht.de/DE/Homepage/homepage_node.html, para. 5-6; H. LISA, M. PETRAS, D. VALENTINER and N. WIENFORT, *Grundrechte*, Berlin, Walter de Gruyter GmbH, 2022, 104.

[339] Own translation; Constitutional Court 11 April 2018, nr. 1 BvR 3080/09, ECLI:DE:BVerfG:2018:rs20180411.1bvr308009, https://www.bundesverfassungsgericht.de/DE/Homepage/homepage_node.html, para. 32.

[340] D. HOHENLOHE, "Private Higher Education and Academic Freedom" in M. SECKELMANN, L. VIOLINI, C. FRAENKEL-HAEBERLE, G. RAGONE (eds.), *Academic Freedom Under Pressure?*, Cham, Springer, 2021, (165) 167.

subjective claims to a fundamental right in the event of a violation by the university. According to him, the right to individual academic freedom at the university should be guaranteed by organisational measures taken by the university itself.[341] W. LÖWER, on the other hand, favours the direct applicability of Article 5(3) of the Constitution to academics at private universities.[342] Although there is a strong consensus in the academic literature that the (indirect) horizontal effect is generally applicable[343] and although scholars have affirmed this doctrine for academic freedom rights in particular,[344] I believe we are faced with an alarming conclusion for academics at private universities.

4.2.2 CANADA

93. BINDING AGREEMENT – The answer to the question whether the university is bound by academic freedom provisions is straightforward in the case of Canada. As described above, academic freedom in Canada can be seen as a contractual right embedded in collective agreements. These collective agreements outline the rights and obligations of both academic staff and the university. Given that universities are parties to these collective agreements, they are bound by the academic freedom provisions negotiated within them.[345] Contract law does not differentiate between public and private universities in this regard.[346] However, it is important to note that the legal protection of academic freedom provisions in collective agreements only applies to academics who are members of the bargaining unit.[347] Additionally, while the majority of faculty in Canada are unionized, there are some universities without collective agreements to protect the academic freedom rights of academic staff.[348] This raises the question of whether academic freedom, which has no

[341] I. PERNICE, "Artikel 5 [Meinings-, Pressefreiheit, Rundfunk; Freiheit der Kunst un Wissenschaft]" in H. DREIER (ed.), *Grundgesetz-Kommentar*, Tübingen, Mohr Siebeck, 2004, (715) 734.
[342] W. LÖWER, "Freiheit wissenschaftlicher Forschung und Lehre" in D. MERTEN and H. PAPIER (eds.), *Handbuch der Grundrechte in Deutschland und Europa*, Heidelberg, C.F. Müller, (699) 722.
[343] E. FRANTZIOU, "The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality*" European Law Journal: Review of European Law in Context*, 21(5), 2015, (657) 670; M. STACHOWAIK-KUDLA, S. WESTA, C. BOTELHO and I. BARTHA, "Academic Freedom as a Defensive Right", *Hague Journal on the Rule of Law* 2023, (161) 175; T. HOCHMANN and J. REINHARDT, *L'effet horizontal des droits fondamentaux*, Paris, Pedone, 2018, 8.
[344] E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 157.
[345] D. ROBINSON, "Academic freedom in Canada: a labor law right", *Academe*, Vol. 105(4), 2019, (22) 22.
[346] P. LEE, "A Contract Theory of Academic Freedom A Contract Theory of Academic Freedom", *Saint Louis University Law Journal Saint Louis University Law Journal* 2015, (460) 514.
[347] A. WEAVER and M.-E. DILL, *The Legal Protections of Academic Freedom in Canada: A Practitioner's Perspective* [PowerPoint-slides], Academic freedom and the law conference, Harry Crowe Foundation, 2022, 7, https://www.crowefoundation.ca/sites/default/files/2_lynk.s_en.pdf (consulted on 27 January 2024).
[348] D. ROBINSON, "Academic freedom in Canada: a labor law right", *Academe*, Vol. 105(4), 2019, (22) 24; M. LYNK, "Academic Freedom, Canadian Labour Law and the Scope of Intra-Mural Expression The Campus Speech Issue", *Constitutional Forum*, 2020, (45) 47.

legal guarantee beyond collective agreements, is at all enforceable against the university. Despite this nuance, it remains true that for academics covered by collective agreements, their university is bound by the individual academic freedom provisions negotiated within them.

4.2.3 COMPARISON AND EVALUATION

94. UNCERTAIN DOCTRINE OF INDIRECT HORIZONTAL EFFECT VERSUS CONTRACTUAL OBLIGATION – It is notable that the European legal doctrine, particularly in Belgium and the Netherlands, largely overlooks the question of whether academic freedom binds the university. This is surprising given that academic freedom inherently involves a conflict between individuals and institutions, and it is crucial for the judicial protection of individual academics to have enforceable claims against the university in such conflicts. Upon examining the possibilities of binding the university by individual academic freedom norms, European scholarship often seems to assume too readily that academic freedom is simply enforceable against the institution. However, in practice, one must rely on the uncertain doctrine of the direct horizontal effect of constitutional rights. The success of invoking this doctrine largely hinges on the state of development of legal doctrine and case law regarding the horizontal effect, which is a cause for concern in all three European countries under review, particularly for academics at private institutions. Moreover, whether academic freedom can be invoked by academics against the institution will largely depend on the willingness of the judge to accept the doctrine of direct horizontal effect, and potentially also on whether the lawyer makes the argument. This is rather worrisome in terms of the protection of individual academic freedom.

In contrast, in Canada, the fact that the university is bound by academic freedom is self-evident, as it explicitly agreed to be bound by the collective agreement. Therefore, the question of whether the university is bound by academic freedom is of little relevance. Additionally, in Belgium, the Netherlands, and Germany, the distinction between private and public universities affects the applicability of fundamental rights in the private sphere, placing academics in private universities in a more vulnerable situation. This issue does not seem to arise in Canada, as contract law does not differentiate between private and

public institutions.[349] In conclusion, the enforcement of academic freedom is more uncertain in practice and in theory in the European legal systems examined, while there is no such uncertainty in Canada.

PART 3. DEFENSIVE FUNCTION OF ACADEMIC FREEDOM

4.3.1 INTRODUCTION

95. DEFENSIVE RIGHT IN THEORY – Elaborating on the previous discussion, where the research established that academic freedom is an enforceable right for individual academics that can, in certain cases, be upheld against interference by universities, the focus now shifts to examining the function of academic freedom in disputes. It is argued in legal scholarship that one of the essential functions of individual academic freedom in the conflict between academics and their institutions is a defensive one.[350] Traditionally, legal scholarship views academic freedom as a 'shield',[351] safeguarding scientific and teaching activities against interference by the university.[352] This implies that disciplinary laws and sanctions should not encroach upon[353] this protected core.[354] Unlike previous research on the defensive function of academic freedom,[355] this research delves deeper into what this defensive function entails in the practical resolution of conflicts between individual and institutional academic freedom.

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[349] P. LEE, "A Contract Theory of Academic Freedom A Contract Theory of Academic Freedom", *Saint Louis University Law Journal Saint Louis University Law Journal* 2015, (460) 514.

[350] M. STACHOWAIK-KUDLA, S. WESTA, C. BOTELHO and I. BARTHA, "Academic Freedom as a Defensive Right", *Hague Journal on the Rule of Law* 2023, (161) 174

[351] W. LÖWER, "Freiheit wissenschaftlicher Forschung und Lehre" in D. MERTEN and H. PAPIER (eds.), *Handbuch der Grundrechte in Deutschland und Europa*, Heidelberg, C.F. Müller, (699) 723 and 740.

[352] I. PERNICE, "Artikel 5 [Meinings-, Pressefreiheit, Rundfunk; Freiheit der Kunst un Wissenschaft]" in H. DREIER (ed.), *Grundgesetz-Kommentar*, Tübingen, Mohr Siebeck, 2004, (715) 734; M. STACHOWAIK-KUDLA, S. WESTA, C. BOTELHO and I. BARTHA, "Academic Freedom as a Defensive Right", *Hague Journal on the Rule of Law*, 2023, (161) 174; M. STACHOWAIK-KUDLA, "Academic freedom as a source of rights' violations: a European perspective", *Higher Education* 2021, (1031) 1032.

[353] Of course, this does not mean - as has been said several times - that there are no limits to academic freedom.

[354] I. PERNICE, "Artikel 5 [Meinings-, Pressefreiheit, Rundfunk; Freiheit der Kunst un Wissenschaft]" in H. DREIER (ed.), *Grundgesetz-Kommentar*, Tübingen, Mohr Siebeck, 2004, (715) 734.

[355] The research is partly based on the theory of M. STACHOWAIK-KUDLA et al., claiming that academic freedom is a defensive right that protects research and teaching from university and state interference. Their research examines how the defensive function of academic freedom is understood by the constitutional courts of some European legal systems but remains limited to how the constitutional courts explicitly pronounce on the defensive function (M. STACHOWAIK-KUDLA, S. WESTA, C. BOTELHO and I. BARTHA, "Academic Freedom as a Defensive Right", *Hague Journal on the Rule of Law* 2023, 161-190).

96. A NOTABLE OBSERVATION FROM THE CASE LAW – An important observation from the case law prompted the legal inquiry in this chapter. During the compilation of a database for the research, intended for the substantive analysis in a subsequent chapter, it became apparent that Canadian jurisprudence on academic freedom features a notable prevalence of interim judgments.[356] At first glance, this suggests that Canadian arbitral jurisprudence favours quicker resolution of academic freedom disputes, providing interim relief to academics and avoiding lengthy litigation with employers. This leads me to question whether academic freedom in the Canadian system serves a function beyond a mere defensive one, or whether there is an alternative interpretation of its defensive function.

4.3.2 EUROPEAN LEGAL SYSTEMS

97. BELGIUM AND THE NETHERLANDS – In Belgium and the Netherlands, the academic literature does not delve into the concept of the defensive nature of academic freedom, nor have the courts in these legal systems provided rulings on this matter. Consequently, the research sought to analyse Dutch case law to explore the practical meaning of the defensive function. Within Dutch jurisprudence, academic freedom has only been cited as a defence subsequent to a professor's dismissal.[357] This suggests that, in practice, academic freedom is invoked only as an argument following the imposition of a severe disciplinary sanction, such as dismissal, against academics.

98. GERMANY – The German Constitutional Court has repeatedly affirmed that academic freedom is a defensive right that serves to protect individual academics from state interference.[358] Legal doctrine further asserts that it can also serve as a defensive right against intervention by other individual academics and by universities.[359] The German

[356] I used the search criteria "academic freedom AND interim" in the CanLii.org database to distinguish interim judgments from final judgments. Additionally, I selected only labour cases and limited my search to interim judgments from the provinces of British Columbia, Alberta, Saskatchewan, Manitoba, Newfoundland and Labrador, Ontario, and Quebec. This search generated 73 results.

[357] Civil Court Noord-Nederland 8 March 2023, nr. 10244518 AR VERZ 22-92, ECLI:NL:RBNNE:2023:854, Rechtspraak.nl., 2.1-2.59; Central Court of Appeal 26 July 2012, nr. 11-4708 AW and 11-4709 AW, ECLI:NL:CRVB:2012:BX2797, Rechtspraak.nl., 4.3; Civil Court Rotterdam 21 December 2022, nr. 10053419 VZ VERZ 22-10785, ECLI:NL:RBROT:2022:11606, Rechtspraak.nl., 2.3. and 4; Central Court of Appeal 10 January 2019, nr. 17/7992 AW, ECLI:NL:CRVB:2019:51, Rechtspraak.nl, 1.12.

[358] German Constitutional Court 29 May 1973, nr. BvR 424/71 en 325/72, *NJW* 1973, 1176, para. 92; German Constitutional Court 11 January 1994, nr. 1 BvR 434/87, ECLI:DE:BVerfG:1994:rs19940111.1bvr043487, https://www.bundesverfassungsgericht.de/DE/Homepage/homepage_node.html; para. 46.

[359] M. MAY, "Kunst- und Wissenschaftsfreiheit" in R. BROCKHAUS, A. ECK, A. GUNKEL, A. HOFFMANN, B. HOFFMANN, L. KATHKE, U., KNOKE, D. LECHTERMANN, J. MAIWALD, M. MAY, J. SCHACHEL, K. SCHMIEMANN, J. TIEDEMANN, S. WERRES (eds.), *Beamtenrecht des Bundes und der Länder* –

literature offers valuable insights into the meaning of the defensive function in practice. It reveals that the defensive function entails that a negative decision must first be made by the university, after which academic freedom becomes a protective shield enforceable in court. The meaning of such negative decisions for academic freedom appears to be broader than observed in Dutch practice.

Examples from legal doctrine illustrate various negative decisions by universities, prompting the invocation of academic freedom as a right of defence. These include decisions to make a scientific method subject to an approval procedure, the suppression of scientific research results if the university deems them ethically unacceptable,[360] the *de facto* obstruction of research because of the controversy surrounding the research in the context of a hierarchical position of the university,[361] a negative assessment of the research results by an ad hoc research committee of a university because it does not agree,[362] the prohibition of research or education, influencing research questions, influencing research methods, influencing the collection of sources, influencing the evaluation and dissemination of research results, controlling the content of research and influencing the educational process.[363] Analysis of case law indicates that the following can be understood as a negative decision: the exclusion of basic equipment for conducting research,[364] the imposition of a certain subject[365] or an educational method.[366] Overall, both literature and case law suggest that the concept of negative university decisions, leading to the invocation of academic freedom as a defence, is broadly understood in practice and encompasses more than just disciplinary sanctions.

Kommentar, München, R. v. Decker, (Vorbemerkungen §120) para. 23; W. LÖWER, "Freiheit wissenschaftlicher Forschung und Lehre" in D. MERTEN and H. PAPIER (eds.), *Handbuch der Grundrechte in Deutschland und Europa*, Heidelberg, C.F. Müller, (699) 720-721.

[360] *Ibid.*, 724.

[361] *Ibid.*, 725.

[362] German Constitutional Court 8 August 2000, nr. 1 BvR 653/97, ECLI:DE:BVerfG:2000:rk20000808.1bvr065397, https://www.bverfg.de/e/rk20000808_1bvr065397.html; Note, however, that this is a restriction on academic expression. If such a committee examines scientific results for plagiarism or falsification, there is no infringement (I. PERNICE, "Artikel 5 [Meinings-, Pressefreiheit, Rundfunk; Freiheit der Kunst un Wissenschaft]" in H. DREIER (ed.), *Grundgesetz-Kommentar*, Tübingen, Mohr Siebeck, 2004, (715) 755; W. LÖWER, "Freiheit wissenschaftlicher Forschung und Lehre" in D. MERTEN and H. PAPIER (eds.), *Handbuch der Grundrechte in Deutschland und Europa*, Heidelberg, C.F. Müller, (699) 725).

[363] I. PERNICE, "Artikel 5 [Meinings-, Pressefreiheit, Rundfunk; Freiheit der Kunst un Wissenschaft]" in H. DREIER (ed.), *Grundgesetz-Kommentar*, Tübingen, Mohr Siebeck, 2004, (715) 735.

[364] Administrative Court of Baden-Württemberg 9th Senate 29 January 1982, nr. 9 S 549/80, *DVBl* 1982, 454-457.

[365] German Constitutional Court 13 April 2010, nr. 1 BvR 216/07, ECLI:DE:BVerfG:2010:rs20100413.1bvr021607, *BVerfGE* 126, 1-29; Federal Administrative Court 26 September 2012, nr. 6 CN 1/11, *BVerwGE* 144, 195-211.

[366] High Administrative Court of Rijnland-Palts 9 May 1997, nr. 2A 10914/96, ECLI:DE:OVGRLP:1997:0509.2A10914.96.0A, *DVBl* 1997,1242, 1-2.

4.3.3 CANADA

99. DEFENSIVE FUNCTION IN ARBITRATION PRACTICE – In the Canadian academic freedom literature, there is no explicit mention of the defensive function of academic freedom, or any other function for that matter, in the context of dispute resolution practice. Consequently, this research examined case law to determine whether the defensive function holds the same meaning as in European legal systems.

Mentionable in this regard is the case *University of Manitoba Faculty Association and University of Manitoba*, where the arbitrator implicitly ruled on this issue. Although the arbitrator does not make an explicit comment on the defensive function, he highlights an important element of it in this case. The question was whether academic freedom could be violated even in the absence of disciplinary action. The arbitrator answered in the affirmative, drawing upon[367] the 1940 Statement of Principles on Academic Freedom and Tenure (Annex 4)[368] of the American Association of University Professors (AAUP)[369] which is a soft law instrument similar to the CAUT Policy Statement and which served as a source of inspiration for the CAUT Policy Statement.[370] On the basis of the AAUP statement, the arbitrator concluded that professors must be protected from institutional censorship and discipline. The arbitrator emphasised that "*an important part of academic freedom is the right to disseminate knowledge without fear of penalty or adverse employment action*." He emphasized that a significant aspect of academic freedom interferences involves actions taken against professors due to the views they express, which may not necessarily result in dismissal but can still exert pressure on academics to alter their views. The arbitrator says that there are other ways in which a university can pressure a professor to change his or her views, short of discipline. Institutional censorship, such as an expression of disapproval, is one such way. To hold otherwise would weaken the

[367] Labour Arbitration Award Ontario 27 January 2014, nr. 0911, 'University of Ottawa and Association of Professors of the University of Ottawa', https://www.canlii.org/en/; German Constitutional Court 3 September 2014, nr. 1 BvR 3048/13, ECLI:DE:BVerfG:2014:rk20140903.1bvr304813, https://www.bverfg.de/e/rk20140903_1bvr304813.html.
[368] AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *1940 Statement of Principles on Academic Freedom and Tenure*, https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure (consulted on 24 May 2024).
[369] The American Association of University Professors or AAUP is an association of faculty and other academic professionals. The AAUP has helped to shape American higher education by developing the standards and procedures that maintain quality in education and academic freedom (AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, *About the AAUP*, https://www.aaup.org/about-aaup (consulted on 7 June 2024).
[370] M. HORN, *Academic Freedom in Canada: A History*, Toronto, University of Toronto Press, 1999, 10-12.

doctrine of academic freedom, the arbitrator said. However, a concern about academic freedom that led to a grievance may not be trivial either.[371]

Moreover, the research's analysis of case law revealed a broad spectrum of negative decisions by universities that could trigger claims of academic freedom. These encompass actions like making critical statements in the media about professors' opinions,[372] placing letters of warning in the employment files of academic staff,[373] issuing letters of reprimand as a form of discipline,[374] dismissal,[375] altering a professor's grade[376] and revoking a university position as a disciplinary sanction.[377]

There is also the question of interim judgments, which are notably abundant in Canadian academic freedom case law. An examination of these interim judgments reveals that they do not indicate a different function of academic freedom than that outlined above. Instead, they typically address procedural issues, such as the use of expert evidence on academic freedom and conflicts over the arbitrator's mandate.[378]

4.3.4 COMPARISON AND EVALUTION

100. SIMILAR MEANING OF THE DEFENSIVE FUNCTION – This research has shown that the defensive function of academic freedom essentially means the same thing in the different legal systems studied. A review of the literature and the selected cases revealed that a negative decision by the university is necessary for academics to assert their

[371] Labour Arbitration Award Ontario 27 January 2014, nr. 0911, 'University of Ottawa and Association of Professors of the University of Ottawa', https://www.canlii.org/en/.
[372] Labour Arbitration Award Ontario 26 September 2007, nr. 0731, 'York University and York University Faculty Association', https://www.canlii.org/en/.
[373] Labour Arbitration Award Saskatchewan 6 May 2015, nr. 7580, 'University of Saskatchewan v University of Saskatchewan', https://www.canlii.org/en/.
[374] Labour Arbitration Award Québec 20 August 2007, nr. F-05-02 and F-05-03, 'Association of Professors of Bishop's University c. Bishop's University', https://www.canlii.org/en/; Labour Arbitration Award Ontario 25 June 2008, nr. 0788, 'University of Ottawa and Association of Professors of the University of Ottawa', https://www.canlii.org/en/; Labour Arbitration Award Manitoba 11 February 1991, nr. 0054, 'University of Manitoba Faculty Association and University of Manitoba', https://www.canlii.org/en/.
[375] Labour Arbitration Award Ontario 27 January 2014, nr. 0911, 'University of Ottawa and Association of Professors of the University of Ottawa', https://www.canlii.org/en/; Labour Arbitration Award Québec 12 February 2014, nr. AZ-51046719, 'Association des professeurs de l'université Concordia c L'université Concordia', https://www.canlii.org/en/.
[376] Labour Arbitration Award Ontario 13 April 2001, nr. 0607, 'University of Waterloo and Faculty Association of the University of Waterloo', https://www.canlii.org/en/; Labour Arbitration Award Newfoundland and Labrador 24 April 2007, nr. 0717, 'Memorial University of Newfoundland and Memorial University of Newfoundland Faculty Association', https://www.canlii.org/en/.
[377] Labour Arbitration Award Québec 20 December 1991, nr. 89H-873, 'Université du Québec à Montréal and Syndicat des professeurs de l'Université du Québec à Montréal', https://www.canlii.org/en/.
[378] See footnote 355.

academic freedom before a dispute resolution body. Although the scope of what constitutes a negative decision varies between legal systems, it is accepted in both Europe and Canada that a wide range of violations can justify invoking academic freedom. Therefore, it is not necessary for a disciplinary sanction to be imposed before professors can invoke academic freedom in practice. It is noteworthy that Dutch practice seems to imply otherwise. In my opinion, it is certainly positive that a negative decision for academic freedom is broadly applied in practice. If academic freedom is only invoked after an effective disciplinary sanction has been imposed – which is the case in the majority of instances – then I would argue, in line with Canadian case law, that some effective judicial protection of academic freedom would be lost.[379]

[379] Labour Arbitration Award Ontario 27 January 2014, nr. 0911, 'University of Ottawa and Association of Professors of the University of Ottawa', https://www.canlii.org/en/.

CHAPTER 5. LEGAL CERTAINTY REGARDING INDIVIDUAL ACADEMIC FREEDOM

PART 1. INTRODUCTION

101. RESEARCH QUESTIONS – In this chapter, I consider how the European and Canadian legal systems relate to the legal certainty regarding individual academic freedom. I recall that I assess legal certainty at two levels. First, I set out theoretically the extent to which there is legal certainty about the legal concept of academic freedom in both legal systems (Part 2).[380] Second, I discuss legal certainty at the level of its interpretation and application in case law (Part 3).[381]

PART 2. CLARITY OF THE CONCEPT OF INDIVIDUAL ACADEMIC FREEDOM

5.2.1 INTRODUCTION

102. LEGAL CERTAINTY ON THE LEVEL OF THE LEGAL PROVISION AND ENFORCEMENT OF INDIVIDUAL ACADEMIC FREEDOM – Understanding the legal scope of the concept of individual academic freedom is crucial to its enforceability.[382] While the academic community often refers to the concept of academic freedom,[383] an important prerequisite for invoking the concept in practice as a defence before a relevant authority is to understand its concrete scope. Indeed, academics cannot rely on a right without knowing its legal limits. They must be able to identify the scope of their rights and identify possible breaches thereof in order to take legal action.[384] This section therefore

[380] P. POPELIER, *Rechtszekerheid als beginsel voor behoorlijke regelgeving*, Antwerpen – Groningen, Intersentia, 1997, 139.
[381] *Ibid.,* 141.
[382] E. TIMBERMONT, "Academische vrijheid: een onderzoek naar de juridische draagwijdte en een aantal arbeidsrechterlijke implicaties van het begrip.", *T.O.R.B.* 2014-2015/1-2, 2014, (56) 56-57; M. STACHOWAIK-KUDLA, S. WESTA, C. BOTELHO and I. BARTHA, "Academic Freedom as a Defensive Right", *Hague Journal on the Rule of Law*, 2023, (161) 183.
[383] See for example H. ARTHURS, *Academic freedom; when and where?* [Notes for Panel Discussion], Annual Conference of AUCC, Halifax, 1995, 1, https://www.aunbt.ca/wp-content/uploads/2019/08/HWA-AcademicFreedom2.pdf.
[384] ; E. TIMBERMONT, "Academische vrijheid: een onderzoek naar de juridische draagwijdte en een aantal arbeidsrechterlijke implicaties van het begrip.", *T.O.R.B.* 2014-2015/1-2, 2014, (56) 56-57; M. STACHOWAIK-KUDLA, S. WESTA, C. BOTELHO and I. BARTHA, "Academic Freedom as a Defensive Right", *Hague Journal on the Rule of Law*, 2023, (161) 183.

examines the extent to which the legal frameworks for the protection of academic freedom in Canada and in the European legal systems provide legal certainty.

5.2.2 EUROPE

103. OPEN NORMS AND LEGAL UNCERTAINTY – As demonstrated in part one of this thesis, for individual academic freedom rights to be binding on the institution, academics will most probably have to invoke the doctrine of horizontal effect in the selected European legal systems. Because academics have to rely on the horizontal effect of constitutional rights, they are confronted with an open standard in court that requires further interpretation to apply to specific disputes.[385] Constitutional rights are typically formulated in broad and open terms,[386] arguably giving dispute resolution bodies a large margin to decide each case (*Infra* 103).[387]

104. BELGIUM – In the specific case of Belgium, the Constitutional Court has clearly stated that academic freedom includes the freedom of academic expression, freedom of research, and freedom of teaching. This definition remains broad and open-ended, requiring interpretation to have meaning in specific conflicts.[388] Other Belgian courts have not attempted to define academic freedom further, offering no additional legal guidance on its content and scope.[389] Definitions of constitutional rights may be vague and open-ended, but legal doctrine can provide clarity and guidance to fill in a concept. Although some Belgian legal scholars have attempted to provide guidance for the interpretation of academic freedom by defining individual academic freedom,[390] these attempts remain exceedingly scarce.[391] The academic literature reflects a general feeling of legal uncertainty

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[385] J.-S. VANWIJNGAERDEN, "De werking van grondrechten tussen particulieren", *Jura Falconis* 2007, (217) 239-240.
[386] S. SOTTIAUX, *Grondwettelijk recht*, Mortsel, Intersentia, 2021, 51.
[387] J.-S. VANWIJNGAERDEN, "De werking van grondrechten tussen particulieren", *Jura Falconis* 2007, (217) 239-240.
[388] Belgian Constitutional Court 23 November 2005, nr. 167/2006, *C.D.P.K.*, 2006/3, 670, B.18.1.; S. STACHOWAIK-KUDLA, "Academic freedom as a source of rights' violations: a European perspective", *Higher Education*, 2021, (1031) 1032.
[389] E. TIMBERMONT, "Academische vrijheid: een onderzoek naar de juridische draagwijdte en een aantal arbeidsrechterlijke implicaties van het begrip.", *T.O.R.B.* 2014-2015/1-2, 2014, (56) 57.
[390] E. BREWAEYS, "Academische vrijheid, uitingsvrijheid van de academicus en wetenschappelijke kritiek" in W. DEBEUCKELAERE (ed.), *Ontmoetingen met Koen Raes*, Brugge, die Keure / la Charte, 2012, 73; J. BAERT, "Academische vrijheid, juridisch bekeken" in R. VERSTEGEN, (ed.), *Ad amicissimum amici scripsimus. Vriendenboek Raf Verstegen*, Brugge, 2004, 18-22; L.-M. VENY, *De regelgeving op het academisch onderwijs. De rechtspositie van de Vlaamse universiteiten en hun personeel*, unpublished doctoral thesis, Vrije Universiteit Brussel, 1994, 1175.
[391] E. TIMBERMONT, "Academische vrijheid: een onderzoek naar de juridische draagwijdte en een aantal arbeidsrechterlijke implicaties van het begrip.", *T.O.R.B.* 2014-2015/1-2, 2014, (56) 58.

regarding the meaning and scope of academic freedom. E. TIMBERMONT notes that academic freedom in Belgium might remain too vague to be enforced by academics.[392] J. BAERT describes it as "*a rather vague and elusive concept*," which is "*not used unambiguously.*"[393]

105. THE NETHERLANDS – As in Belgium, there is very little legal literature on academic freedom in the Netherlands, and indeed hardly any that attempts to clarify the term.[394] In the literature that does exist, there is an atmosphere of legal uncertainty as to what the term actually means in the Netherlands and to what extent an academic can successfully invoke it to enforce his or her rights. R. VAN GESTEL, for example, argues that Article 1.6 of the Higher Education Act provides little legal certainty. Although the explanatory memorandum clarifies that academic freedom has a protective function, this rarely comes to fruition in practice. The author attributes this to the fact that the explanatory memorandum presents academic freedom as a principle that must be weighed against other principles, making courts reluctant to assess it.[395] This legal uncertainty is also reflected in the doctoral thesis of J. GROEN, who believes that academic freedom in the Netherlands may be practically meaningless in practice because it is weighed against other interests.[396] F. VAN LUNTEREN believes that "*it is not that clear what the legislator means by this freedom, who has to respect it, who can claim it and where the limits of this freedom lie. The law is silent on this point, and there is little case law in this area*."[397] This again highlights the legal uncertainty surrounding the concept in Dutch legal doctrine.

106. GERMANY – What concerns Germany, E. BARENDT notes that article 5(3) of the German Constitution is broadly formulated and essentially requires judicial interpretation.[398] The esteemed author H. TRUTE believes that academic freedom is a

[392] E. TIMBERMONT, "Academische vrijheid: een onderzoek naar de juridische draagwijdte en een aantal arbeidsrechterlijke implicaties van het begrip.", *T.O.R.B.* 2014-2015/1-2, 2014, (56) 56-57.
[393] Own translation; J. BAERT, "Academische vrijheid, juridisch bekeken" in R. VERSTEGEN, (ed.), *Ad amicissimum amici scripsimus. Vriendenboek Raf Verstegen*, Brugge, 2004, 18.
[394] This is also noted by legal scholars themselves. See for example F. VAN LUNTEREN, "Academische vrijheid en het universitair grootbedrijf" in K. VAN BERKEL and C. VAN BRUGGEN, *Academische vrijheid. Geschiedenis en actualiteit*, Amsterdam, Boom, 2020, (87) 89.
[395] R. VAN GESTEL, "Wettelijke bescherming van de academische vrijheid?", *RegelMaat* 2021, (330) 340.
[396] J. GROEN, *Academische vrijheid: een juridische verkenning*, 2017, Rotterdam, Erasmus University Rotterdam, 82.
[397] Own translation; F. VAN LUNTEREN, "Academische vrijheid en het universitair grootbedrijf" in K. VAN BERKEL and C. VAN BRUGGEN, *Academische vrijheid. Geschiedenis en actualiteit*, Amsterdam, Boom, 2020, (87) 89.
[398] C. STARCK, "Freedom of Scientific Research and its Restrictions in German Constitutional Law", *Israel law review*, Vol.39 (2), 2006, (110) 110; E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 117.

fundamental right encompassing a wide range of issues, the interpretation of which deserves significant attention due to its limited textual guidance.[399] However, the case law of the German Constitutional Court has provided more legal clarity on the meaning and scope of individual academic freedom[400] compared to other European systems under review (*Supra* 104 and 105). In theory, since academic freedom and its various sub-rights have legal definitions under German law, it should not be up to the court to determine the essence of the right to individual academic freedom when a dispute arises.[401] Nevertheless, the discussion on the terms of Article 5(3) in German legal scholarship indicates that there are still interpretative issues related to the sub-rights of academic freedom.[402] This is also indicated by scholars themselves. H. TRUTE argues that issues related to the delineation of academic freedom occupy a prominent place in the debate over the constitutional concept.[403]

In discussions about the interpretation of academic freedom, German legal doctrine regularly refers to the definitions of 'science', 'research' and 'teaching' as established by the Federal Constitutional Court in the *Hochschulurteil* (*Supra* 55).[404] This definition serves as a starting point. In my view, the consistency in the application of the term contributes to a certain degree of legal certainty regarding the concept. Some terms of the definition have been further elaborated upon in the literature. For example, 'teaching' includes the didactic and methodological processing of research other than one's own.[405] Freedom of teaching is

[399] H. TRUTE, *Die Forschung zwischen grundrechtlicher Freiheit und staatlicher Institutionalisierung*, Tübingen, Mohr Siebeck, 1994, 16.
[400] German Constitutional Court 29 May 1973, nr. BvR 424/71 en 325/72, *NJW* 1973, 1176.
[401] S. STACHOWAIK-KUDLA, "Academic freedom as a source of rights' violations: a European perspective", *Higher Education*, 2021, (1031) 1032.
[402] E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 125-127 and 277.
[403] H. TRUTE, *Die Forschung zwischen grundrechtlicher Freiheit und staatlicher Institutionalisierung*, Tübingen, Mohr Siebeck, 1994, 55.
[404] E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 125-127; I. PERNICE, "Artikel 5 [Meinings-, Pressefreiheit, Rundfunk; Freiheit der Kunst un Wissenschaft]" in H. DREIER (ed.), *Grundgesetz-Kommentar*, Tübingen, Mohr Siebeck, 2004, (715) 727-734; J. RUX, *Die pädagogische Freiheit des Lehrers: eine Untersuchung zur Reichweite und zu den Grenzen der Fachaufsicht im demokratischen Rechtsstaat*, Berlin, Duncker und Humblot, 2002, 88; M. MAY, "Kunst- und Wissenschaftsfreiheit" in R. BROCKHAUS, A. ECK, A. GUNKEL, A. HOFFMANN, B. HOFFMANN, L. KATHKE, U., KNOKE, D. LECHTERMANN, J. MAIWALD, M. MAY, J. SCHACHEL, K. SCHMIEMANN, J. TIEDEMANN, S. WERRES (eds.), *Beamtenrecht des Bundes und der Länder – Kommentar*, München, R. v. Decker, (Vorbemerkungen §120) para. 15-17; W. LÖWER, "Freiheit wissenschaftlicher Forschung und Lehre" in D. MERTEN and H. PAPIER (eds.), *Handbuch der Grundrechte in Deutschland und Europa*, Heidelberg, C.F. Müller, (699) 709-710.
[405] M. MAY, "Kunst- und Wissenschaftsfreiheit" in R. BROCKHAUS, A. ECK, A. GUNKEL, A. HOFFMANN, B. HOFFMANN, L. KATHKE, U., KNOKE, D. LECHTERMANN, J. MAIWALD, M. MAY, J. SCHACHEL, K. SCHMIEMANN, J. TIEDEMANN, S. WERRES (eds.), *Beamtenrecht des Bundes und der Länder* –

more controversial in German literature.[406] There is ongoing debate about the relationship between teaching and research, specifically whether teaching should be considered independent of the dissemination of research results.[407] In general, German legal doctrine advocates for a broad interpretation of the concept of academic freedom.[408]

107. LACK OF AUTHORITATIVE SOFT LAW INSTRUMENTS AND LACK OF OVERALL CONSENSUS IN THE LITERATURE – The discussion above highlights that the law in the selected European legal systems is somewhat unclear and broadly formulated, although this seems to be less prevalent in the German legal system. This leads to a perception of legal uncertainty regarding the concept of academic freedom in the academic literature of the selected European systems. Apart from the UNESCO Recommendation, which merely outlines some of the sub-rights of academic freedom without further defining them,[409] there are no authoritative soft law instruments for European legal systems that provide a clearer framework for the meaning of academic freedom. The most authoritative and comprehensive texts in the legal literature that can provide guidance on the meaning of academic freedom in Europe are those of J. VRIELINK et al. and T. KARRAN. However, the language used by these authors also reflects the continuing legal uncertainty regarding the meaning of academic freedom. T. KARRAN cautiously provides a working definition of academic freedom, stating that his definition only offers "*a preliminary foundation for this definitional process, and a stimulus to debate*."[410] Similarly, J. VRIELINK et al. state that "*We do not pretend to come*

Kommentar, München, R. v. Decker, (Vorbemerkungen §120) para. 17; E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 127.

[406] E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 127.

[407] See A. KAUFHOLD, "Die Lehrfreiheit - ein verlorenes Grundrecht?", *Archiv des öffentlichen Rechts* 2008, 119-124. The author argues that freedom to teach is an independent constitutional freedom, separate from freedom of research, and that there is no 'uniform' constitutional right to academic freedom. The consequence of the separation of the freedom of teaching and the freedom of research is that it is the intention to impart scientific content, but not the medium and place of teaching, that counts for constitutional protection of teaching activity. Therefore, there should be no institutional link between research and teaching, in the sense that teaching is protected even if it does not take place at a university. For the author, however, the separation does not extend to the point where the teaching activities of teachers at secondary schools are protected by Article 5(3) of the Constitution. This is covered by Article 7(1) of the Constitution. See also the reaction to this critical point of view by E. BARENDT: E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 127-128.

[408] I. PERNICE, "Artikel 5 [Meinings-, Pressefreiheit, Rundfunk; Freiheit der Kunst un Wissenschaft]" in H. DREIER (ed.), *Grundgesetz-Kommentar*, Tübingen, Mohr Siebeck, 2004, (715) 727-731.

[409] Paragraph 26 Recommendation concerning the Status of Higher-Education Teaching Personnel of the General Conference of UNESCO (11 November 1997), available at https://en.unesco.org/about-us/legal-affairs/recommendation-concerning-status-higher-education-teaching-personnel.

[410] T. KARRAN, "Academic Freedom in Europe: Time for a Magna Charta?", *Higher Education Policy* 2009, (163) 16

up with clear answers; rather we wish to draw the attention to these issues as a starting point for a mapping exercise."[411] At the very least, we can conclude from these texts, and from the discussion above, that there is still much to be discussed on the European side.

5.2.3 CANADA

108. OPTIMISM IN THE ACADEMIC LITERATURE – As outlined in a previous chapter, the most prominent form of legal protection of academic freedom in Canada is through the inclusion of specific contractual provisions within the collective agreement, which is the result of negotiations between the faculty union and the university.[412] The prevailing impression in the Canadian academic literature is that these contractual provisions contribute positively to legal certainty by enabling academics to understand the scope of their rights.[413]

109. COMPREHENSIVENESS OF THE CONTRACTUAL PROVISIONS – The comprehensive nature of contractual provisions concerning academic freedom can enhance legal certainty. A recent comparative legal study of collective agreements across Canadian universities has shown that most academic freedom provisions include both "expanding principles," which enumerate sub-rights of individual academic freedom, and "caveating principles," which outline the limits of these sub-rights.[414] It can be argued that a clear delineation of sub-rights and their boundaries can enhance legal certainty. Academics can deduce from these provisions which actions fall within the scope of academic freedom and which do not. However, while boundaries to academic freedom are established, it is still up to the arbitrator to interpret the extent of these boundaries.

The optimism expressed in the literature needs to be tempered with nuance. The legal certainty of academic freedom provisions in collective agreements largely depends on the clarity of the contract language negotiated by the faculty unions and the universities. The more precise the language regarding academic freedom, the greater the legal certainty and predictability for academics seeking to enforce their rights against the institution before a

[411] J. VRIELINK, P. LEMMENS, K. LEMMENS and S. PARMENTIER, "Challenges to academic freedom as a fundamental right", League of European Research Universities (LERU), Advice Paper No. 31, 2023, 5.
[412] D. ROBINSON, "Academic freedom in Canada: a labor law right", Academe, Vol. 105(4), 2019, (22) 22.
[413] M. LYNK, "Academic Freedom, Canadian Labour Law and the Scope of Intra-Mural Expression The Campus Speech Issue", *Constitutional Forum*, 2020, (45) 50; A. BRALEY-RATTAI and K. BENZANSON, "Un-Chartered Waters: Ontario's Campus Speech Directive and the Intersections of Academic Freedom, Expressive Freedom, and Institutional Autonomy", *Constitutional Forum* 2020, (65) 75.
[414] C. FORCESE, "The Expressive University the Legal Foundations of Free Expression and Academic Freedom on Canada's Campuses", *SSRN Scholarly Paper* 2018, 32-34.

dispute resolution body.[415] Therefore, the legal protection mechanism provided by collective agreements has the potential to offer specific and clear language on academic freedom, which is certainly a positive aspect. However, this places significant responsibility on faculty unions to advocate for robust academic freedom language.[416] Like any other collective bargaining negotiation, the bargaining power and leverage available to the faculty union will determine their ability to enhance academic freedom language during negotiations.[417]

110. ADDITIONAL SOFT LAW INSTRUMENTS – A second reason why academic freedom in Canada might be a well-understood concept is the presence of the authoritative CAUT Policy Statement (Annex 2), which outlines the basic principles of academic freedom in the country, including its scope and content.[418] The Policy Statement of the CAUT does not confer enforceable individual rights to academics, as the CAUT Policy statement does not carry any legal weight. Academics can thus not base academic freedom claims on this statement.[419] However, the definition of academic freedom that is laid down in the Policy Statement is incorporated in nearly all collective agreements and serves as a model clause in their drafting.[420] The Policy Statement arguably serves as a shared contractual basis across the country,[421] providing a legal basis for academics to demonstrate an infringement of their individual academic freedom by the institution.[422] In addition to its incorporation into collective agreements, the principles outlined in the CAUT Policy Statement frequently serve as interpretative guidelines for arbitrators to shape the contours

[415] P. LEE, "A Contract Theory of Academic Freedom A Contract Theory of Academic Freedom", *Saint Louis University Law Journal Saint Louis University Law Journal* 2015, (460) 514 and 526.
[416] C. GILLIN, "The Bog-like Ground on Which We Tread: Arbitrating Academic Freedom in Canada", *Canadian Review of Sociology/Revue canadienne de sociologie*, 2002, (301) 313; L. ROSE-KRASNOR and M. WEBBER, "Freedom with limits? The role faculty associations play protecting the speech rights of their members", *Academic Matters* 2018, 18p.
[417] A. WEAVER and M.-E. DILL, *The Legal Protections of Academic Freedom in Canada: A Practitioner's Perspective* [PowerPoint-slides], Academic freedom and the law conference, Harry Crowe Foundation, 2022, 7, https://www.crowefoundation.ca/sites/default/files/2_lynk.s_en.pdf (consulted on 27 January 2024).
[418] CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS, *Academic Freedom: CAUT Policy Statement*, https://www.caut.ca/about-us/caut-policy/lists/caut-policy-statements/policy-statement-on-academic-freedom (consulted on 21 December 2023.
[419] M. BASTARACHE, *Report of the Committee on Academic Freedom*, 2021, 14, https://www.uottawa.ca/about-us/sites/g/files/bhrskd336/files/2021-11/report_committee_academic_freedom_en_final_v9.pdf.
[420] M. LYNK, "Academic Freedom, Canadian Labour Law and the Scope of Intra-Mural Expression The Campus Speech Issue", *Constitutional Forum* 2020, (45) 49; D. ROBINSON, "Academic freedom in Canada: a labor law right", *Academe*, Vol. 105(4), 2019, (22) 24.
[421] P. LEE, "A Contract Theory of Academic Freedom A Contract Theory of Academic Freedom", *Saint Louis University Law Journal Saint Louis University Law Journal* 2015, (460) 527.
[422] M. BASTARACHE, *Report of the Committee on Academic Freedom*, 2021, 14, https://www.uottawa.ca/about-us/sites/g/files/bhrskd336/files/2021-11/report_committee_academic_freedom_en_final_v9.pdf.

of academic freedom in collective agreements (*Infra* 110). The authority of the CAUT's Policy Statement as interpretative guidance has been acknowledged by both legal scholars and arbitrators.[423]

5.2.4 COMPARISON AND EVALUATION

111. OPEN NORMS VERSUS CONTRACTUAL PROVISIONS – In the following discussion, I aim to highlight the theoretical differences in legal certainty between European and Canadian mechanisms for protecting individual academic freedom. First, academic freedom in European systems is protected by an open norm that leaves considerable room for interpretation. I believe that the examination of the Dutch and Belgian approaches above underlines that the open and vague standard of academic freedom, combined with a lack of national and, moreover, very limited authoritative European academic literature or soft law instruments, results in a norm of academic freedom that offers little legal certainty. This is somewhat mitigated in Germany, where the concept of academic freedom is firmly anchored in German law. Conversely, Canadian legal doctrine emphasises that contractual provisions tend to be comprehensive and carefully regulate the rights and obligations of the parties involved, leaving less room for ambiguity. This distinction, of course, arises at first sight from the difference between a fundamental right and a contractual provision. Nevertheless, the prevailing perception of legal uncertainty in European legal doctrine, albeit to a lesser extent in Germany, and the perceived legal certainty in the Canadian system confirms this theoretical difference.

It is also important to note that the specificity of contractual provisions in Canada can vary considerably depending on the collective agreement in force. Consequently, not all Canadian universities may have the same level of detail in their contractual arrangements. An exception is the existence of the CAUT Policy Statement, which serves to enhance legal certainty by providing a consistent point of reference in legal discussions and interpretations. This document provides an additional layer of clarity and guidance that is lacking in Europe, where there is no comparable instrument.

[423] University of Manitoba Faculty Association and University of Manitoba, 1991 CanLII 13023 (MB LA), <https://canlii.ca/t/jbgl2>, retrieved on 2024-01-27; P. LEE, "A Contract Theory of Academic Freedom A Contract Theory of Academic Freedom", *Saint Louis University Law Journal Saint Louis University Law Journal* 2015, (460) 527.

PART 3. INTERPRETATION AND APPLICATION OF THE ACADEMIC FREEDOM PROVISIONS BY THE DISPUTE RESOLUTION BODY

5.3.1 LEGAL CERTAINTY ON THE LEVEL OF THE APPLICATION IN THE CASE LAW

112. CASE LAW ANALYSIS – In the following section, this research explores how the Canadian and the selected European systems relate to legal certainty regarding the application of the academic freedom provisions in the case law of the competent dispute resolution body. This section is a necessary addition to the theoretical discussion on legal certainty outlined above. In what follows, I assess legal certainty in the sense that it is ensured by dispute resolution bodies defining and enforcing academics' rights.[424]

5.3.2 EUROPEAN LEGAL SYSTEMS

5.3.2.1 The Netherlands

113. INCONSISTENT APPLICATION AND INTERPRETATION OF ACADEMIC FREEDOM – In general, the Dutch case law demonstrates that the legal issues arise due to the absence of explicit legal text, leading to questions about whether certain behaviours are covered by the protection of academic freedom. In the Netherlands, the research observes inconsistency in the application of the legal provision on academic freedom in the case law. Furthermore, the research observes that the judge implicitly expresses considerable uncertainty regarding the content of academic freedom, grasping at its limits rather than discovering its content. These results are in line with the theoretical discussion set out above. In my view, this does not resolve the legal uncertainty surrounding the term; instead, it exacerbates it. Also note that when academic freedom is invoked in the cases below, the statutory concept is invoked, not a constitutionally guaranteed concept. In my opinion, this is either due to the problematic doctrine of the horizontal effect or the fact that the constitutional concept is inadequately established in the Dutch legal order.

114. INTRAMURAL SPEECH – The recent and controversial case involving the dismissal of Dr. Susanne Täuber is discussed first. A conflict emerged between the professor and the

[424] P. POPELIER, *Rechtszekerheid als beginsel voor behoorlijke regelgeving*, Antwerpen – Groningen, Intersentia, 1997, 141.

university when the university declined to grant her a promotion, despite her belief that she met the criteria. In response, she published an article titled "Undoing Gender in Academia: Personal Reflections on Equal Opportunity Arrangements," criticising her institution and highlighting discriminatory mechanisms disadvantaging women in academia. The university management deemed the article inappropriate and damaging to the institution, as well as harmful to the working relationship with the professor. Tensions between the university and the professor escalated over the following years, including attempts to relocate the professor within the university due to a breach of trust on both sides. Ultimately, the university decided to dismiss the professor, arguing that the employment relationship was irreparably disrupted regardless of the critical article, thereby claiming that academic freedom was not compromised.[425] In her defence, the professor invoked her right to individual academic freedom against the university, stating "*There is no fully-fledged ground for dismissal. According to [defendant party], the request for dissolution is not separate from her essay in the Journal of Management Studies and the fact that she has opposed the injustice done to her. The essay is protected by academic freedom and should never have led to a sanction."*[426] Although not explicitly stated in the judgment, it can be inferred that the underlying legal question for the defendant professor is whether her article, which was critical of the university's personnel policy, falls within the realm of academic freedom and thus warrants protection against dismissal.

What adds particular interest to the aforementioned case is that one of the parties explicitly invokes academic freedom as an argument, but academic freedom does not play a role in the judge's decision. The judge did not examine the content of academic freedom and the right to criticise the university, nor did the judge apply this right to the facts. This is notable because the judge acknowledges that the essay contributed to the deterioration of the relationship between the professor and the university: "*The judge considers that the employment relationship deteriorated further and seriously after the publication of the essay in the Journal of Management Studies.*"[427] Despite this acknowledgement, the judge dealt entirely with the legality of the dismissal from an employment law perspective, without academic freedom being one of his considerations. The case of Dr Susanne Täuber

[425] Civil court Noord-Nederland 8 March 2023, nr. 10244518 AR VERZ 22-92, ECLI:NL:RBNNE:2023:854, Rechtspraak.nl., 2.1-2.59.
[426] Own translation; Civil court Noord-Nederland 8 March 2023, nr. 10244518 AR VERZ 22-92, ECLI:NL:RBNNE:2023:854, Rechtspraak.nl., 4.1.
[427] Own translation; Civil court Noord-Nederland 8 March 2023, nr. 10244518 AR VERZ 22-92, ECLI:NL:RBNNE:2023:854, Rechtspraak.nl., 5.8.

illustrates the legal limitations of the right to academic freedom in the Netherlands. In my opinion, the non-application of the legal provisions on academic freedom is the result of an open norm that lacks substantial explanation in legislation, legal doctrine and case law.

115. RESEARCH – The same phenomenon occurred in another case from the Netherlands, where a professor was dismissed due to a low number of scientific publications. The professor wanted to focus on a few high-quality publications rather than quantity, and implicitly asked the judge whether this behaviour fell within the protection of academic freedom. The university, on the other hand, attributed the dismissal to incompetence and unsuitability for the position. In defence, the professor cited academic freedom. The judge, tasked with ruling on the legality of the dismissal, addressed the defence as follows: "*To the extent that the appellant has invoked academic freedom, it must be noted that this freedom does not mean that the functioning of a professor does not have to meet certain, generally accepted, measurable conditions.*"[428] The appeal to academic freedom failed, but more significantly, it received minimal attention from the judge. The judge did not explore the content of the right or apply it to the case's facts. However, the judge did seem to consider the limits of academic freedom, referring to "*certain, generally accepted, measurable conditions*". The judge filled this in on the basis of the responsibilities of professors, stating that "*someone of the appellant's level can be expected to try to achieve the objectives on his own, without any further guidance than assignments or instructions*."[429] The judge's reasoning is based solely on the limits of academic freedom, without exploring the content of the right. Once again, I attribute this inadequate application of individual academic freedom to the lack of clarity in its legal provisions, which complicates understanding and applying its content.

116. EXTRAMURAL AND OFF-TOPIC SPEECH? – Also of interest is a recent Dutch case where a professor was dismissed for expressing views deemed controversial by the university regarding COVID research in an interview outside the university context. The professor's opinions criticised COVID research conducted at the university, which he claimed to base on his own research to provide a scientific basis. However, virology was not within the professor's area of expertise. The university argued that he breached his

[428] Own translation; Central Court of Appeal 26 July 2012, nr. 11-4708 AW and 11-4709 AW, ECLI:NL:CRVB:2012:BX2797, Rechtspraak.nl., 4.3.
[429] Own translation; Central Court of Appeal 26 July 2012, nr. 11-4708 AW and 11-4709 AW, ECLI:NL:CRVB:2012:BX2797, Rechtspraak.nl., 4.4.

obligations of scientific integrity, leading to his dismissal.[430] This case clearly involves extramural and off-topic speech. However, it is not a dispute based on academic freedom, but solely on labour law. Neither party invoked academic freedom as an argument. This may suggest that academic freedom as a legal norm provides little legal certainty in practice. However, it should be noted that extramural speech and off-topic speech are controversial aspects of academic freedom (see Chapter 2), so it is arguably not obvious for parties to litigate based on these sub-rights.

117. FREEDOM OF TEACHING – Another case involved a professor who refused to adhere to the faculty's new teaching program, which integrated different subjects. He consistently expressed his desire to teach in his own manner and not conform to the new structure and content. He invoked his academic freedom to determine the content and method of his subject, arguing that his academic freedom would be violated if he had to comply with the new educational program.[431] The conflict resulted in the professor's dismissal.[432] The Central Board of Appeal examined the content of academic freedom in the Dutch legal system.[433] It stated that Article 1.6 of the Higher Education Act does not support the professor's position, interpreting the parliamentary explanation of the Higher Education Act. The judge referred to a specific paragraph: *"This right is not unlimited. The lecturer operates within the framework of a curriculum established by the faculty council and further specified by the department board."*[434] The Central Appeals Board ultimately ruled *"that academic freedom does not extend to the point where the appellant is not required to adhere to the curriculum established by the faculty in consultation and in a careful manner."*[435] The judge thoroughly applied the law to the case and explored the substantive meaning of the right, unlike in other Dutch cases.

[430] Civil Court Rotterdam 21 December 2022, nr. 10053419 VZ VERZ 22-10785, ECLI:NL:RBROT:2022:11606, Rechtspraak.nl., 2.3. and 4.
[431] Central Court of Appeal 10 January 2019, nr. 17/7992 AW, ECLI:NL:CRVB:2019:51, Rechtspraak.nl, 6.3.2; Civil Court Noord-Holland 2 November 2015, nr. AWB - 15 _ 4050ECLI:NL:RBNHO:2015:9468, Rechtspraak.nl, 3.
[432] Central Court of Appeal 10 January 2019, nr. 17/7992 AW, ECLI:NL:CRVB:2019:51, Rechtspraak.nl, 1.12.
[433] *Ibid.*, 6.3.2.
[434] Own translation; Explanatory Memorandum of the Law on Scientific Education 1981, *Kamerstukken* 1980/81, nr. 16802, 49.
[435] Central Court of Appeal 10 January 2019, nr. 17/7992 AW, ECLI:NL:CRVB:2019:51, Rechtspraak.nl., 6.3.2.

5.3.2.2 Germany

118. CONSISTENT APPLICATION BUT RATHER INCONSISTENT INTERPRETATION – The first thing to note from German case law is that the legal issues in disputes largely concern whether a particular situation is protected by academic freedom. German judges consistently argue on the basis of academic freedom, and their judgments often explore the meaning of this concept. This stands in sharp contrast to Dutch case law. This difference is not surprising. Academic freedom has a solid foundation in German law and is extensively supported by German legal doctrine (*Supra* 55). Therefore, it is not unexpected that German courts are able to engage with the concept and apply it effectively to cases. It is also noteworthy that judges consistently appeal to the constitutional concept of academic freedom, affirming the practical acceptance of its horizontal effect (*Supra* 91). However, the cases I examined did not involve private universities.

However, the application and interpretation of academic freedom are not always clear-cut. In cases concerning the freedom of teaching, there is a noticeable trend toward a consistent and strict interpretation when organisational interests are at stake. Legal scholarship acknowledges that education and research rely on institutional support, which can necessitate organisational measures that may infringe on academic freedom.[436] However, it is striking and somewhat counterintuitive. Despite calls for a broad interpretation of research and teaching in German legal scholarship, German judges often seem to prioritise institutional interests. In the German literature, some scholars have hinted at this point of concern, albeit without conducting an in-depth case law analysis.[437] While this may not be favourable to academics, the consistent strict interpretation does provide a degree of legal certainty with regard to the freedom of teaching. The literature asserts that the core of academic freedom should always remain inviolable and argues for strong protection of this core, which includes teaching.[438] The case law indicates that while the core area is indeed protected, it is defined quite narrowly. This approach contrasts with the treatment of extramural expression, which is not considered part of the core of academic

[436] I. PERNICE, "Artikel 5 [Meinings-, Pressefreiheit, Rundfunk; Freiheit der Kunst un Wissenschaft]" in H. DREIER (ed.), *Grundgesetz-Kommentar*, Tübingen, Mohr Siebeck, 2004, (715) 735.
[437] See: *Ibid.*, 727-734 and E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 141-144.
[438] M. MAY, "Kunst- und Wissenschaftsfreiheit" in R. BROCKHAUS, A. ECK, A. GUNKEL, A. HOFFMANN, B. HOFFMANN, L. KATHKE, U., KNOKE, D. LECHTERMANN, J. MAIWALD, M. MAY, J. SCHACHEL, K. SCHMIEMANN, J. TIEDEMANN, S. WERRES (eds.), *Beamtenrecht des Bundes und der Länder – Kommentar*, München, R. v. Decker, (Vorbemerkungen §120) para. 23-24 and 28.

freedom and is often controversial. In a case concerning extramural expression, a German court adopted a broad interpretation of academic freedom rights. Similarly, in cases involving the freedom of research, courts adopt a broader interpretation when academic speech is involved. Despite the rather inconsistent interpretation in the case law, it can at least be said that German case law provides more legal certainty than Dutch case law.

119. FREEDOM OF RESEARCH AND ACADEMIC SPEECH – In a landmark ruling on academic freedom in Germany, the Federal Administrative Court, and later the Constitutional Court, clarified the boundaries of individual academic freedom. In this case, the university established an ad hoc committee to investigate scientific misconduct in the research activities of professors. The professor argued that the university had violated his freedom of research as part of his individual academic freedom, because the dean had made demands on his research results based on the committee's findings, with the aim of influencing his scientific statements. The court had to decide on the limits of individual academic freedom. The court determined that academic freedom is not unlimited. According to the court, restrictions on academic freedom can only be derived from the constitution itself, requiring constitutional interpretation. The court believes that an alleged restriction in the present case does not stem from the constitution, but this does not mean that the university cannot establish such a committee. However, a review by the committee based on the results of the research violates the individual's academic freedom. According to the Court, the discussion of research results must always take place within a scientific discourse.[439] The court thus opted for a broad interpretation of individual academic freedom, to the detriment of institutional interests.

In contrast to the case above, a stricter approach can be seen in a ruling in which the judge was faced with the question of whether the right to research, as part of academic freedom, meant that professors had to be able to enjoy basic equipment such as teaching assistants. The court ruled against the professor, saying that a right to basic equipment could not be derived from Article 5 of the German Constitution on the basis of the self-assessed needs of the university lecturer. According to the court, the university has a margin of discretion in the allocation of basic equipment, which cannot be fully assessed by the

[439] Federal Administrative Court of Germany 11 December 1996, nr. 6 C 5/95, *NJW* 1997, 1996; German Constitutional Court 8 August 2000, nr. 1 BvR 653/97, ECLI:DE:BVerfG:2000:rk20000808.1bvr065397, https://www.bverfg.de/e/rk20000808_1bvr065397.html.

court.[440] In my opinion, the court is reluctant to grant professors broad rights of academic freedom when they affect the organisational interests of the university.

120. TEACHING – The next case involves a German professor who objected to a particular teaching method at the university, where the content of a course consisted of a practical part, a seminar and lectures given by different professors, and where the students were divided into different groups. He expressed his wish to teach according to his own teaching method, to the group of students of his choice, based on his academic freedom.[441] The Court had to assess the limits of the concept of academic freedom, in particular the sub-right of freedom of teaching.[442] Relying on established case law, the Court held that academic freedom is not unlimited and that it does not extend to "*the competence to determine the curriculum (subject) and the type (lecture, practical course, seminar) and scope (number of hours) of courses*".[443] The judge affirmed that the aforementioned points are essential components of the university's institutional autonomy, specifically encompassed within the study and examination regulations.[444]

The judge's interpretation is, in my view, again rather strict. While the essence of academic freedom theoretically includes the freedom to determine the content and method of one's teaching (*Supra* 55), the acceptance of restrictions on subjects, for example, constitutes a significant limitation of the same freedom. Two reasons can be deduced from the judge's reasoning for interpreting individual academic freedom in a restrictive way, in favour of institutional autonomy. First, measures concerning "*the curriculum (subject) and the type (lecture, practical course, seminar) and scope (number of hours) of courses*" are considered by the judge to be necessary organisational measures. The judge considered that "*without these measures, neither a proper organisation nor a collegial structure of university life would be conceivable.*"[445] The judge finds that such restrictions are a permissible way of defining the limits of teaching freedom.[446] He notes that the structure of the course, as organised by the university, contributes to the proper organisation of the

[440] Administrative Court of Baden-Württemberg 9th Senate 29 January 1982, nr. 9 S 549/80, *DVBl* 1982, 454-457.
[441] High Administrative Court of Rijnland-Palts 9 May 1997, nr. 2A 10914/96, ECLI:DE:OVGRLP:1997:0509.2A10914.96.0A, *DVBl* 1997,1242, 1-2.
[442] *Ibid.*, 20.
[443] *Ibid.*, 20.
[444] *Ibid.*, 20.
[445] Own translation; High Administrative Court of Rijnland-Palts 9 May 1997, nr. 2A 10914/96, ECLI:DE:OVGRLP:1997:0509.2A10914.96.0A, *DVBl* 1997,1242, 20.
[446] *Ibid.*, 20.

course.[447] For this reason, he considers that the professor must accept these conditions set by the university without being able to successfully invoke his freedom to teach. However, the freedom of teaching means that the professor can still determine the content and methodology within the framework of the courses regulated by the university.[448] Secondly, the court considers that there are doubts as to whether the professor's method adequately guarantees the quality of education. However, the judge does not address this point because he considers it to be a matter of "*pedagogical and scientific aspects of education*" and "*university-specific value judgments*", that "*must be discussed and decided within the responsibility of the university*". It is therefore not subject to judicial review.[449] In my view, it can again be inferred from this judgment that the Court is taking a cautious approach to granting broad individual academic freedom rights when the organisational interests of the university are at stake. Additionally, the judge seems hesitant, as he believes that the university, and not himself, holds the authority to decide on specific matters related to the institution.

In another case on the freedom of teaching, a professor was asked by the president of the university to teach a subject he considered unfamiliar and outside his official duties. The court had to assess the limits of the professor's freedom to teach. The court stated that the core of the freedom to teach is essentially the freedom of the professor to choose the content and method of the courses, and that assigning teaching duties outside the scope of the teaching mandate can undermine the freedom to teach. However, the Court also recognises limitations to the freedom to teach. Specifically, "*decisions by the competent university bodies on the coordination of the education to be provided by the university in terms of content, time and place, and on the distribution and assumption of teaching duties*" are permitted. The Court based this on the right of the faculty to continue to function properly through the coordination of teaching. In the court's view, the core of the freedom of teaching is not at stake.[450] In my view, the court is clearly favouring a restrictive interpretation of the core of academic freedom, particularly when the university makes decisions that benefit its organisational structure.

[447] *Ibid.*, 22-23
[448] *Ibid.*, 24.
[449] *Ibid.*, 26.
[450] Own translation; German Constitutional Court 13 April 2010, nr. 1 BvR 216/07, ECLI:DE:BVerfG:2010:rs20100413.1bvr021607, BVerfGE 126, 1-29.

In a like vein, a German court has ruled that freedom of teaching does not extend to granting professors complete autonomy to choose which courses they teach. They must give priority to the courses required by the compulsory curriculum. Even a limited right of choice based solely on academic freedom goes too far, according to the court, because the organisational functioning of the university must be considered first. Once again, the Court argued that the core of academic freedom was not infringed in this case: "*In any case, university professors can realise the core of their fundamental right primarily within the framework of the compulsory courses they teach, in particular by expressing their academic opinion therein and generally by determining the courses themselves in terms of content, procedure and methodological approach*."[451]

In a subsequent academic freedom case, a professor argued that an obligation imposed by the dean to teach a particular course in a different faculty from the one in which his professorship was based, violated his academic freedom. The judge ruled that the core of academic freedom is the ability of professors to represent their field of expertise in teaching and research. For this reason, instructions to teach certain courses may interfere with the freedom to teach. However, the judge also held that measures that promote the organisational functioning of the university constitute permissible restrictions on the academic freedom of the professor. "*Decisions by the competent university bodies on the coordination of the content, timing and location of the education offered by the university and on the distribution and assumption of teaching duties*" are generally permissible. The judge found that the assignment of teaching duties by the dean was not objectionable since its purpose was to ensure the organisation of education. In addition, the judge found that these obligations did not unreasonably interfere with the professor's freedom to choose the content and method of the subject reserved for him. The judge considered that the course he was obliged to teach was closely related to the subject he normally teaches in another faculty.[452] Again, we see an extensive restriction and strict interpretation of the core of freedom of teaching in favour of organisational measures.

In a final case on the freedom of teaching, we are left with a similar observation as in the aforementioned cases. The court again opts for a restrictive interpretation of the core of the freedom of teaching. The case involves a professor who objected to the criteria outlined

[451] Federal Administrative Court of Germany 26 September 2012, nr. 6 CN 1/11, *BVerwGE* 144, 195-211.
[452] German Constitutional Court 3 September 2014, nr. 1 BvR 3048/13, ECLI:DE:BVerfG:2014:rk20140903.1bvr304813, https://www.bverfg.de/e/rk20140903_1bvr304813.html.

in the study regulations for awarding a certificate for a course, which stipulated a requirement of either a written or oral examination. He invoked his freedom of teaching as part of his academic freedom. The court had to assess the limits of the freedom of education and was confronted with the question of the extent to which the freedom of education, as defined in Article 5.3 of the German Constitution, includes the competence to determine the forms by which successful participation in a course is assessed. The Court held that the content and methodological design of a professor's courses are protected by the freedom to teach. However, the court concluded that academic freedom is not infringed by the study regulations which require students to take a written or oral examination. According to the judge, these performance requirements do not impact the content and methodological design of the courses.[453]

121. EXTRAMURAL SPEECH – There is little case law on academic speech in Germany, but one judgment is noteworthy. It concerns a case in which a professor, an expert in data protection law, gave an interview in his home which was later broadcast. The professor strongly protested against new security laws, arguing that they should be challenged by a judge and, if unsuccessful, citizens should not comply with them. The court had to decide whether this kind of speech fell within the scope of the professor's academic freedom.[454] The judge ruled that extramural speech is protected by academic freedom. He argued that in this case the interview was of a scientific nature and the professor's statements were based on scientific work. Furthermore, the judge takes the argument further and states that the protection of academic freedom does not cease when the statements of academics become political assessments.[455] Given the controversial nature of extramural speech, the judge seems to have opted for a broad interpretation of academic freedom, in contrast to the judgments on the freedom of teaching.

[453] Federal Administrative Court of Germany 24 May 1991, nr. 7 NB 5/90, *NVwZ* 1991, 1082-1083; In a very similar sense, see: Federal Administrative Court of Germany 22 August 2005, nr. 6 MLD 1/05, *NVwZ-RR* 2006, 36-37.
[454] Administrative Court of Berlin 16 September 1988, nr. Disz 12.88, *NJW* 1989, 1688-1691; I only have access to a summary of the judgment via the official German databases, so I'm using a secondary source to discuss the facts and the court's reasoning. See E. BARENDT, *Academic freedom and the law: a comparative study*, Oxford, Hart Publishing, 2010, 278.
[455] Administrative Court of Berlin 16 September 1988, nr. Disz 12.88, *NJW* 1989, 1688-1691.

5.3.3 CANADA

5.3.3.1 In general

122. TWO TYPES OF LEGAL UNCERTAINTY AND BROAD INTERPRETATION – I was able to distinguish between different levels of legal uncertainty in Canadian case law. First, in some cases, there is uncertainty about the interpretation of the text, where the arbitrator has an important interpretive role. Second, there are cases in which the uncertainty is due to the absence of a text, where the deciding authority must fill in academic freedom as an open standard. In both situations, the cases concern questions of whether certain conduct on the part of an academic is protected by individual academic freedom.

5.3.3.2 Interpretation of the terms of the collective agreement

123. CONSISTENT APPLICATION OF THE COLLECTIVE AGREEMENT TO THE FACTS – In the cases under review, the collective agreement is systematically applied by the arbitrator to the facts of the case. The parties tend to formulate quite specific grievances based on the sub-rights set out in the collective agreement, and the judge carefully examines these grievances, which may indicate that both the parties and the judge have a good understanding of the content of academic freedom. Moreover, the arbitrators consistently examine the meaning of academic freedom in detail, based on the provisions of the collective agreement. In my view, this consistent application of the collective agreement promotes legal certainty.

124. BROAD INTERPRETATION OF INDIVIDUAL ACADEMIC FREEDOM PROTECTED IN THE COLLECTIVE AGREEMENT – Arbitrators often explicitly advocate a broad interpretation of the terms of collective agreements. It seems to be a settled case law that a broad interpretation of contractual terms is considered appropriate. A broad interpretation does not only occur explicitly, but also implicitly. Although it could be argued that a consistent broad approach provides more legal certainty than an inconsistent approach, I maintain that a strict approach can provide more legal certainty than the very wide approach found in Canada. The latter arguably leads to a lot of (academic) behaviour falling under the notion of academic freedom, as the following cases show. The parties intended to define the limits of academic freedom by contract, but a very broad interpretation reopens those limits. A broad interpretation may therefore go against

the intention of the parties. This point becomes even more pertinent when one considers that collective agreements vary in the specificity of their provisions (*Supra* 58 and Annex 1) on academic freedom. If a very detailed provision is negotiated, it is less desirable, in terms of legal certainty for individual academic freedom, for the arbitrator to adopt a broad interpretation.

125. INTRAMURAL SPEECH – In *York University and York University Faculty Association*, a professor spread a pamphlet on campus which alleged that the York University Foundation, the school's fundraising arm, was biased by *"the presence and influence of staunch pro-Israel lobbyists, activists and fundraising agencies.*" The university responded by issuing a media release that was harshly critical of his work. At arbitration, the professor claimed the university issued the media release without any consideration of his academic freedom.[456] The arbitrator had to interpret the collective agreement provision on academic freedom as negotiated between the parties.[457] He noted that the professor was clearly engaged in academic speech while spreading the pamphlet, which is required by the collective agreement. The arbitrator reached this conclusion by adopting a very broad interpretation of the wording of the collective agreement. The arbitrator deducted from the list of academic freedom rights that the parties had intended to define academic freedom as *"the freedom to […] engage in the widest possible variety of intellectual and practical pursuits associated with the scholarly enterprise"*. There was no doubt for the arbitrator that the pamphlet was an exercise of scholarship as its content "*at least"* fell "*within the broad scope of his work and interests*." The professor's conduct was therefore protected by academic freedom as defined in the collective agreement.[458]

[456] Labour Arbitration Award Ontario 26 September 2007, nr. 0731, 'York University and York University Faculty Association', https://www.canlii.org/en/.

[457] The academic freedom provision provided: *"The parties agree to continue their practice of upholding, protecting, and promoting academic freedom as essential to the pursuit of truth and the fulfilment of the University's objectives. Academic freedom includes the freedom of an employee to examine, question, teach, and learn; to disseminate his/her opinion(s) on any questions related to his/her teaching, professional activities and research both inside and outside the classroom; to pursue without interference or reprisal, and consistent with the time constraints imposed by his/her other University duties, his/her research, creative or professional activities, and to freely publish and make public the results thereof; to criticize the University or society at large; and to be free from institutional censorship. Academic freedom does not require neutrality on the part of the individual, nor does it preclude commitment on the part of the individual. Rather, academic freedom makes such commitment possible."* (Labour Arbitration Award Ontario 26 September 2007, nr. 0731, 'York University and York University Faculty Association', https://www.canlii.org/en/).

[458] Labour Arbitration Award Ontario 26 September 2007, nr. 0731, 'York University and York University Faculty Association', https://www.canlii.org/en/.

Although the academic staff's claim for an alleged violation of the right to intramural expression was ultimately rejected after balancing it against institutional interests, the arbitrator in *University of Saskatchewan v University of Saskatchewan* adopted a broad interpretation of the collective agreement provision.[459] The case concerned academic staff who had criticised the university manager after the dismissal of colleagues. As a result, the university placed letters of caution on the academic staff's employment files. The arbitrator referred to the fundamental importance of academic freedom and stated that he accepted *"that academic freedom and its protections are concepts to be interpreted liberally in ways that allow them to achieve their purpose "* and further that *"one aspect of giving academic freedom a broad and liberal interpretation is to ensure that, within the University setting, free expression is genuinely respected."* [460]

In a similar case on intramural expression, the arbitrator upheld a professor's right to intramural expression, as provided for in the collective agreement,[461] to publicly disseminate a statement of non-confidence in the leadership of the principal of the university.[462] The arbitrator reasoned that the right to criticise the university *"peut porter*

[459] The academic freedom provision provided: *"The common good of society depends upon freedom in the search for knowledge and in its exposition. Academic freedom in teaching, scholarship and research at the University is essential to society. Accordingly, all employees, whether tenured or not and regardless of prescribed doctrine, are entitled to the exercise of their rights as citizens and to freedom in carrying out research and in publishing its results, freedom of discussion, freedom to teach the subject assigned in classes, freedom to criticize the University and the Association without suffering censorship or discipline. Academic freedom does not require neutrality on the part of the individual, but makes commitment possible. Academic freedom carries with it the duty to use that freedom in a manner consistent with the scholarly obligation to base teaching and research on an honest search for knowledge."* (Labour Arbitration Award Saskatchewan 6 May 2015, nr. 7580, 'University of Saskatchewan v University of Saskatchewan', https://www.canlii.org/en/).

[460] Labour Arbitration Award Saskatchewan 6 May 2015, nr. 7580, 'University of Saskatchewan v University of Saskatchewan', https://www.canlii.org/en/.

[461] The academic freedom provision provided: *"The Corporation and the Association acknowledge that the University is committed to the pursuit of truth, the advancement of learning, and the dissemination of knowledge. To this end, the parties agree to abide by the principles of academic freedom as expressed in the following statement. Academic freedom is the freedom to examine, question, teach, and learn, and it involves the right to investigate, speculate, and comment without deference to prescribed doctrine, as well as the right to criticize the University, the Corporation and the Association in a lawful and non-violent manner, and to criticize society at large. Specifically, and without limiting the above, academic freedom entitles members to: a) freedom in carrying out their activities as teachers subject to the academic regulations of Senate, b) freedom in pursuing research and scholarship and in publishing or making public the results thereof, and c) freedom from institutional censorship. Academic freedom does not require neutrality on the part of the individual, nor does it preclude commitment on the part of an individual. Rather academic freedom makes such commitment possible. The right to academic freedom carries with it the duty to use that freedom in a responsible way."* (Labour Arbitration Award Québec 20 August 2007, nr. F-05-02 and F-05-03, 'Association of Professors of Bishop's University c. Bishop's University', https://www.canlii.org/en/).

[462] Labour Arbitration Award Québec 20 August 2007, nr. F-05-02 and F-05-03, 'Association of Professors of Bishop's University c. Bishop's University', https://www.canlii.org/en/.

sur divers sujets, incluant la gouvernance de l'Université."[463] Due to a broad interpretation of the wording of the collective agreement, the action again fell under the protection of individual academic freedom.

126. TEACHING – In *University of Ottawa and Association of Professors of the University of Ottawa*, a conflict arose between a professor and the university on the decision of the content of a course. The professor published a description of a course in the terms he chose with a view to pursuing an alternative pedagogical approach to draw students into the learning of science. As a result, the university reacted with discipline.[464] The arbiter had to decide whether the professor acted beyond the bounds of academic freedom rights in the collective agreement.[465] The adoption of a broad interpretation of academic freedom led to the conclusion that the action fell within the right to teaching as protected by academic freedom: *"while it is clear that academic freedom does not extend to allowing a professor to introduce changes which effectively contradict or radically depart from the fundamental concept of the course as originally established, there must be some latitude for flexibility both as to the teaching methods and specific content of a course."*[466]

5.3.3.3 Interpretation of academic freedom as a concept outside the collective agreement

127. BROAD INTERPRETATION OF INDIVIDUAL ACADEMIC FREEDOM IN THE EVENT OF THE ABSENCE OF WORDING – In the cases under review, it sometimes occurs that certain conduct is not explicitly covered by the collective agreement. Despite the lack of explicit terms, courts nevertheless tend to opt for a broad interpretation of academic freedom. This broad interpretation is based on instruments outside the collective

[463] Labour Arbitration Award Québec 20 August 2007, nr. F-05-02 and F-05-03, 'Association of Professors of Bishop's University c. Bishop's University', https://www.canlii.org/en/.
[464] Labour Arbitration Award Ontario 25 June 2008, nr. 0788, 'University of Ottawa and Association of Professors of the University of Ottawa', https://www.canlii.org/en/.
[465] The academic freedom provision provided: *"The parties agree neither to infringe nor abridge the academic freedom of the members. Academic freedom is the right of reasonable exercise of civil liberties and responsibilities in an academic setting. As such it protects each member's freedom to disseminate her opinions both inside and outside the classroom, to practice her profession as teacher and scholar, librarian, or counsellor, to carry out such scholarly and teaching activities as she believes will contribute to and disseminate knowledge, and to express and disseminate the results of her scholarly activities in a reasonable manner, to select, acquire, disseminate and use documents in the exercise of her professional responsibilities, without interference from the employer, its agents, or any outside bodies. All the above-mentioned activities are to be conducted with due and proper regard for the academic freedom of others and without contravening the provisions of this agreement. Academic freedom does not require neutrality on the part of the member, but rather makes commitment possible. However, academic freedom does not confer legal immunity, nor does it diminish the obligations of members to meet their duties and responsibilities […]"*
[466] Labour Arbitration Award Ontario 25 June 2008, nr. 0788, 'University of Ottawa and Association of Professors of the University of Ottawa', https://www.canlii.org/en/.

agreement, such as the CAUT Policy Statement (Annex 2), the Universities of Canada Statement (Annex 3),[467] the AAUP Statement (Annex 4) or other case law. This is quite a remarkable finding in light of legal doctrine that emphasises the all-encompassing nature of academic freedom provisions and because the concept itself is being negotiated to define its limits in Canada (*Supra* 58). It defies intuition that arbitrators – even when applying a negotiated concept – would rely on norms outside the contract to determine the meaning of academic freedom. Moreover, there is no consistent application of any of these instruments outside the agreement, which is precisely a source of legal uncertainty. Even more so, these instruments may also impose restrictions on academic freedom that are not included in the collective agreement, which adds to the legal uncertainty.

128. GRADING AND ASSESSMENT – In *University of Waterloo and Faculty Association of the University of Waterloo*, the dean of the university changed the grade of a student assigned by the instructor of the course. The legal issue to be resolved during arbitration was whether grading and assessment were part of individual academic freedom, which the faculty association claimed.[468] The contractual provision on academic freedom made no reference to grading and assessment as matters that are part of academic freedom.[469] Nonetheless, the arbitrator decided that grading and assessment were an integral part of the freedom of teaching, which is protected by academic freedom in the collective agreement.[470] The arbitrator reasoned that academic freedom is a broader concept than a contractual right between the academic and the university. The arbitrator argued that, while tasked with interpreting the contract, the concept of academic freedom protected by the contract *"cannot be divorced from the understandings of that term within the University community*." He also argued that "*I do not believe that the words they have*

[467] Universities Canada is the voice of Canada's universities at home and abroad, advancing higher education, research and innovation for the benefit of all Canadians. One of the organisation's priorities is to advocate for academic freedom (UNIVERSITIES OF CANADA, *About us*, https://univcan.ca/about-us/ (consulted on 7 June 2024)).

[468] Labour Arbitration Award Ontario 13 April 2001, nr. 0607, 'University of Waterloo and Faculty Association of the University of Waterloo', https://www.canlii.org/en/.

[469] The academic freedom provision provided: *"Academic freedom provides the possibility of examining, questioning, teaching, and learning, and involves the right to investigate, speculate, and comment without deference to prescribed doctrine. As such, it entails the freedom of individuals to practise their professions of teacher, researcher and scholar, the freedom to publish their findings, the freedom to teach and engage in open discussion, the freedom to be creative, the freedom to select, acquire, disseminate, and use documents in the exercise of their professional activities, and the freedom to criticize the University and the Association. Academic freedom also entails freedom from institutional censorship. […]"* (Labour Arbitration Award Ontario 13 April 2001, nr. 0607, 'University of Waterloo and Faculty Association of the University of Waterloo', https://www.canlii.org/en/).

[470] Labour Arbitration Award Ontario 13 April 2001, nr. 0607, 'University of Waterloo and Faculty Association of the University of Waterloo', https://www.canlii.org/en/.

chosen can be interpreted in a vacuum." The arbitrator argues that grading and assessment have always been an integral part of the freedom of teaching. The arbitrator derived the content of this broader concept of academic freedom from the CAUT Policy Statement and American case law.[471]

In a similar case on grading and assessment, *Memorial University of Newfoundland and Memorial University of Newfoundland Faculty Association*, the arbitrator had to once again determine the meaning of academic freedom within the context of the collective agreement provision.[472] The provision lacked a reference to grading and assessment.[473] Referring to the Waterloo case above, the arbiter stated that *"while the parties are creating contractual rights with respect to academic freedom, I do not believe that the words they have chosen can be interpreted in a vacuum."* The arbitrator concluded that the evaluation of students is logically included in the term "teach" in the collective agreement.[474] However broadly arbitrators may interpret teaching freedom as an aspect of academic freedom in collective agreements, there are limits. In *University of Ottawa and Association of Professors of the University of Ottawa*, the arbitrator found that the non-objective assessment and grading of students resulting from a teaching method based on self-motivation and its necessary corollary, the absence of grading, was not protected by academic freedom.[475]

129. EXTRAMURAL SPEECH – A similar approach was taken in *University of Manitoba Faculty Association and University of Manitoba*. The case concerned a professor of marketing who made a critical statement about the company's position in the market at a reception hosted by a company and held at the university. It was subsequently discovered

[471] Labour Arbitration Award Ontario 13 April 2001, nr. 0607, 'University of Waterloo and Faculty Association of the University of Waterloo', https://www.canlii.org/en/.
[472] Labour Arbitration Award Newfoundland and Labrador 24 April 2007, nr. 0717, 'Memorial University of Newfoundland and Memorial University of Newfoundland Faculty Association', https://www.canlii.org/en/.
[473] The academic freedom provision provided: *"2.01 All ASMs enjoy equal rights to academic freedom. 2.02 Academic freedom is necessary for the pursuit of the University's purposes. The defence of academic freedom is an obligation on all members of the University community. Academic freedom does not require neutrality on the part of the individual, nor does it preclude commitment. Rather, it makes commitment possible. 2.03 Therefore, the Parties agree to uphold the right of ASMs to teach, to learn, to carry out research, to publish, to comment, to criticize, to acquire and disseminate knowledge, to create, and to perform; all of these without deference to prescribed doctrine. 2.04 Academic freedom includes the right to discuss and criticize policies and actions of the University and the Association and protects against the imposition of any penalty by either Party for exercising that right. […]"* (Labour Arbitration Award Newfoundland and Labrador 24 April 2007, nr. 0717, 'Memorial University of Newfoundland and Memorial University of Newfoundland Faculty Association', https://www.canlii.org/en/).
[474] Labour Arbitration Award Newfoundland and Labrador 24 April 2007, nr. 0717, 'Memorial University of Newfoundland and Memorial University of Newfoundland Faculty Association', https://www.canlii.org/en/.
[475] Labour Arbitration Award 27 January 2014, nr. 0911, 'University of Ottawa and Association of Professors of the University of Ottawa', https://www.canlii.org/en/.

that the statement was based on incorrect facts. As a result, the dean wrote a letter to the professor expressing his displeasure. The legal issue was whether the professor's statements at the university-related reception were protected by academic freedom.[476] At the time, the collective agreement's provision on academic freedom did not protect academic speech outside the classroom.[477] In this case, experts on academic freedom were asked to explain the meaning of academic freedom. Among other things, some important cases on academic freedom were cited by them on similar facts. Also, the CAUT Policy Statement and AAUC Statement were cited as authoritative statements for the meaning of academic freedom. Based on these materials, the court ruled that academic speech outside the typical academic setting were also part of academic freedom, regardless of the fact that there was no explicit recognition of the right in the collective agreement.[478]

130. LIMITS TO EXTRAMURAL SPEECH – The reasoning in the *Manitoba* decision may be reassuring to academics, as it ruled in favour of recognising a broad right to individual academic freedom, but it also has far-reaching implications. *Association des professeurs de l'université Concordia c L'université Concordia* shows that such a broad interpretation of academic freedom, as a norm independent of the contract, can also set dangerous precedents for individual academic freedom.[479] The case involved an academic

[476] Labour Arbitration Award Manitoba 11 February 1991, nr. 0054, 'University of Manitoba Faculty Association and University of Manitoba', https://www.canlii.org/en/.

[477] The academic freedom provision provided: *"The common good of society depends upon the search for truth and its free exposition. Academic freedom in the University in teaching, research and the dissemination of knowledge is essential to these purposes. The university faculty member is, therefore, entitled to freedom in carrying out research and in publishing the results thereof, freedom in carrying out teaching and in discussing his/her subject, and freedom from institutional censorship. Academic freedom carries with it the responsibility to use that freedom in a manner consistent with the scholarly obligation to base research, teaching and the dissemination of knowledge in a search for truth."* (Labour Arbitration Award Manitoba 11 February 1991, nr. 0054, 'University of Manitoba Faculty Association and University of Manitoba', https://www.canlii.org/en/).

[478] Labour Arbitration Award Manitoba 11 February 1991, nr. 0054, 'University of Manitoba Faculty Association and University of Manitoba', https://www.canlii.org/en/.

[479] The academic freedom provision provided: *"The purpose of academic freedom is to provide security for fundamental academic values. A university environment characterized by freedom of speech and of enquiry is required by the members to carry out the University's purpose. Freedom of speech guarantees the University as an open forum for the exchange of ideas; freedom of enquiry guarantees the University's commitment to the open investigation and interpretation of ideas. Within the unique university context, the most crucial of human rights is the right to academic freedom. We affirm that this right is meaningless unless it entails the right to raise probing questions and challenges to the beliefs of society at large. The parties agree to respect the right of all members of the academic community to exercise their academic freedom. The commitments, rights, and responsibilities of members involve three major related roles: to participle in the search for basic truths, and to communicate openly the results of this search; to develop creative scholarship in specific disciplines, within which the students participate in the process of rational enquiry; to encourage where feasible the generalized application of scholarship and research to the benefit of the university community and the common good of society. Members are entitled to freedom, without any form of institutional censorship, to disseminate their knowledge both inside and outside the classroom, to conduct research which they believe will enhance knowledge and to communicate the results of such research."* (Labour Arbitration Award Québec 12 February 2014, nr. AZ-51046719, 'Association des professeurs de l'université Concordia c L'université Concordia', https://www.canlii.org/en/).

who disagreed with some changes at the university, including a change in the curriculum. He waged a campaign against the university, colleagues and superiors over an extended period. According to the university, this was a smear campaign that damaged the university's reputation and was not covered by academic freedom. The arbitrator had to decide on the limits of academic speech negotiated in the collective agreement. He found that the parties had sought to protect freedom of expression, but the arbitrator also held that there were limits to academic speech. In determining those limits, he referred to a statement by the AAUP that an academic should at all times be accurate, exercise appropriate restraint, and show respect for the opinions of others. The arbitrator concluded that the academic's campaign clearly did not meet the criteria of the above quote and was not aimed at promoting research. Therefore, the opinions were not protected by academic freedom. This case illustrates that relying on a concept of academic freedom outside the scope of the collective agreement can also be detrimental to academics.[480]

We observe the same phenomenon in *Université du Québec à Montréal and Syndicat des professeurs de l'Université du Québec à Montréal*. A professor of accounting was highly critical of the university at a recruitment event. The arbitrator, charged with determining the limits of academic freedom, began by stating that academic freedom must be interpreted broadly and that speech outside the classroom clearly falls within the scope of academic freedom, using the same approach as in the Manitoba decision.[481] The parties had not provided for such a speech in their collective agreement.[482] The arbitrator, however, referred to the CAUT policy statement to clarify the limits of the right, namely that speech is protected only when exercised in furtherance of the pursuit of truth. On the basis of this finding, the academic's claim was dismissed.[483]

[480] Labour Arbitration Award Québec 12 February 2014, nr. AZ-51046719, 'Association des professeurs de l'université Concordia c L'université Concordia', https://www.canlii.org/en/.
[481] Labour Arbitration Award Québec 20 December 1991, nr. 89H-873, 'Université du Québec à Montréal and Syndicat des professeurs de l'Université du Québec à Montréal', https://www.canlii.org/en/.
[482] The academic freedom provision provided: « *Tout professeur a la pleine jouissance de ses libertés politiques et académiques qu'il soit ou non dans l'exécution de ses fonctions à l'Université et en aucun temps, ses droits prévus ou non à la convention ne pourront être affectés à cause du libre exercice de ses libertés* » (Labour Arbitration Award Québec 20 December 1991, nr. 89H-873, 'Université du Québec à Montréal and Syndicat des professeurs de l'Université du Québec à Montréal', https://www.canlii.org/en/).
[483] Labour Arbitration Award Québec 20 December 1991, nr. 89H-873, 'Université du Québec à Montréal and Syndicat des professeurs de l'Université du Québec à Montréal', https://www.canlii.org/en/.

5.3.4 COMPARISON AND EVALUATION

131. THE APPLICATION OF THE CONCEPT IN THE DISPUTE RESOLUTION BODY'S REASONING – The issue of legal certainty within the legal systems under examination demands a nuanced and complex answer. First, concerning the application of the concept of academic freedom in European case law, this research reveals that Dutch courts inconsistently and infrequently invoke academic freedom in their legal arguments. There exists only one instance where a judge explores the meaning of academic freedom and applies it directly to a case. In other cases, the concept is either disregarded altogether or discussed solely in terms of its limitations rather than its substantive content. Judges sometimes resort to labour law principles instead of the doctrine of academic freedom. These findings raise concerns about the legal certainty of academic freedom in the Netherlands. This lack of legal certainty can be attributed to the scarcity of legal interpretations in legal texts and the limited development of legal doctrine, which also contributes to legal uncertainty in the application of academic freedom. In my view, academic freedom remains an ambiguous standard in the Dutch legal system, inadequately understood and consequently challenging to apply effectively by a judge. While I cannot provide specific insights into Belgian legal practice because of the absence of practice, the Dutch example suggests that the application of case law in Belgium may be similarly uncertain due to the limited legal framework and scarce legal doctrine. This chapter also highlighted significant differences between European legal systems. In Germany, we observe a consistent use of the concept of academic freedom by judges, who interpret its meaning based on authoritative precedents from the Constitutional Court and established legal doctrine. This approach supports greater legal certainty, reflecting academic freedom as a well-established and historically rooted concept in German law.

In the Canadian legal system, arbitrators consistently refer to collective agreements and apply provisions on academic freedom to the specific circumstances of each case. They primarily derive the meaning of academic freedom from these collective agreements, aligning with the expectation that academic freedom is comprehensively defined within these agreements. This approach parallels the German system in its reliance on established legal frameworks for interpreting academic freedom, thereby promoting a high degree of legal certainty. However, a significant caveat emerges from this research. Contrary to expectations, the arbitrators occasionally rely on a concept of academic freedom beyond the boundaries set by collective agreements. This practice diverges from the assumption

that universities and unions negotiate extensively to define and limit the scope of academic freedom. Indeed, if an action falls outside the purview of the collective agreement, it might be assumed that the parties to the agreement intended that the action does not enjoy protection. Nevertheless, arbitrators tend to use additional tools, such as the CAUT Policy Statement, to explore the meaning of academic freedom. This tactic is also not used consistently. This inconsistent approach diminishes my initial impression of robust legal certainty within the Canadian system. Therefore, the German system could be perceived as providing more legal certainty in matters of academic freedom.

132. METHOD OF INTERPRETATION BY SUB-RIGHT – When examining cases by theme or sub-right, the methods of interpretation used by arbitrators reveal significant insights into the legal certainty. I have already mentioned that in the Netherlands, when the concept of academic freedom is used at all, a strict approach is taken, based on the responsibilities of professors. Specifically concerning the freedom of teaching in Germany, judges consistently adopt a stringent approach, often prioritising organizational interests over individual academic freedom. This tendency typically does not favour academics. The situation is more complex regarding the freedom of research. Judges tend to take a broader view when academic speech is at stake, whereas in cases where it is not, organisational interests again prevail. Notably, a broad approach is also evident in cases involving extramural expression, which represents a controversial scenario within academic freedom.

In contrast to the German and Dutch systems, the Canadian case law appears more consistent, with a prevailing consensus to interpret collective agreement terms broadly. While this consistency may generally enhance legal certainty, I argued that a stricter approach – as is used in Germany – might offer greater legal certainty as a broad approach may go against the intentions of the parties who negotiated the collective agreement. Moreover, the arbitrator's reliance on external instruments for interpreting the concept, even beyond the collective agreement, underscores the expansive nature of the interpretation in Canada. This approach is not only counter-intuitive, considering the negotiated nature of academic freedom, but in my opinion, it also undermines legal certainty. Therefore, I believe a more rigorous interpretation akin to that noticed in other jurisdictions could potentially enhance legal certainty further.

CONCLUSION

133. LEGAL AND JUDICIAL PROTECTION OF INDIVIDUAL ACADEMIC FREEDOM AGAINST INSTITUTIONAL INTERFERENCE – Academic freedom, the cornerstone of university life, is essential to the pursuit of knowledge and social progress. However, academics often find themselves in conflict with institutions and states over controversial ideas and research. European legal systems advocate stronger legislative and judicial protections, while Canada relies on collective agreements and arbitration to protect individual academic freedom. This contrast in the procedural design to protect individual academic freedom underscores a significant but understudied divergence in approaches that might impact the effective legal and judicial protection of individual academic freedom in practice. This study is the first to undertake such a comparison and to evaluate it in terms of the enforceability and legal certainty of individual academic freedom. This forms the first major step towards the normative question of which system is preferable.

134. ENFORCEABILITY – First of all, the research demonstrated that in all studied legal systems, there is an enforceable legal provision protecting individual academic freedom. These include constitutional and legislative provisions in European legal systems and contractual provisions in collective agreements in Canada. Additionally, academics can theoretically enforce their claims before a dispute resolution body, whether through the judicial system in the European legal system or a specific arbitration procedure in the Canadian legal system. However, the research also revealed that legal doctrine overlooks a critical aspect of practical issues related to the enforcement of individual academic freedom: the enforcement against the institution. Judicial protection of individual academic's freedom against institutional interference hinges on their ability to enforce claims against universities. European scholarship often assumes academic freedom is enforceable against institutions, but in practice, reliance on the uncertain doctrine of the direct horizontal effect of constitutional rights is necessary. Success in invoking this doctrine depends on the development of legal doctrine and case law regarding the horizontal effect, causing concern in the Netherlands, Belgium, and Germany, especially for academics at private institutions. In contrast, in Canada, universities are explicitly bound by collective agreements that include academic freedom, making the enforceability of academic freedom straightforward. The distinction between private and public universities in terms of enforceability does not exist in Canada, where contract law applies

equally to private and public institutions. I argued that the enforcement of academic freedom is more uncertain in European legal systems both in practice and theory, while it is unequivocal in Canada.

135. LEGAL CERTAINTY – Regarding the application of the concept of academic freedom in the dispute resolution body's reasoning, the case law analysis revealed differences in legal certainty across various legal systems. In the Netherlands, courts rarely refer to academic freedom, and when they do, they defer to labour law and emphasise professors' responsibilities rather than the positive content of academic freedom. This legal uncertainty is likely due to academic freedom being an open standard with minimal statutory explanation and scarce legal doctrine that could provide more clarity. Conversely, in Germany, judges consistently use and define academic freedom based on prior authoritative case law and legal doctrine, fostering greater legal certainty. Similarly, in Canada, arbitrators consistently refer to the collective agreement provisions to define academic freedom, providing a high degree of legal certainty. However, inconsistencies and legal uncertainty arise when judges rely on an understanding of academic freedom outside the collective agreement, which moreover contrasts with the Canadian literature reflecting strong legal certainty about the concept and with the expectation that detailed contractual provisions will provide significant legal certainty. This conclusion is not only completely counterintuitive, given the highly negotiated concept of academic freedom in Canada, but it also potentially undermines the intentions of the parties when drafting their contract.

The examination of the case law by specific themes reveals different approaches when it comes to the method of interpretation. Dutch courts apply a strict interpretation emphasising professors' responsibilities. In Germany, there is little consistency regarding the interpretation except for the freedom of teaching for which German courts consistently prioritise organisational interests over individual academic freedom. This approach arguably provides legal certainty, although it does not favour individual academic freedom with respect to the outcome of the case. What concerns the freedom of research, judges adopt a broader approach when academic freedom of expression is at stake but otherwise favour organisational interests. In extramural academic expression cases, a broad interpretation is applied, which is rather unexpected given its potential for controversy. The Canadian arbitrators consistently interpret collective agreement provisions very broadly. The consistency arguably supports legal certainty. However, I argued that a stricter

approach to the contractual terms might provide greater legal certainty. A wide approach may go against the intention of the parties who consciously negotiate in detail about the meaning of academic freedom. This contrast mainly exists when the judge refers to instruments outside the collective agreement.

136. FALSIFICATION OF THE HYPOTHESIS – The differences between the Canadian legal system and the selected European legal systems regarding legal certainty are less significant and less apparent than initially assumed. This research began with the premise that there are significant differences in the procedural legal frameworks of both systems for safeguarding academic freedom. My initial literature review and the literature review on the clarity of the concept of academic freedom suggested that the Canadian system would provide greater legal certainty, given the comprehensive regulation of academic freedom in collective agreements and the specialisation of arbitrators in academic freedom issues. However, the Canadian practice differs significantly from this expectation due to the legal uncertainty arising from a broad interpretation of the terms of the agreements, particularly when arbitrators rely on a concept of academic freedom beyond the collective agreements. This study revealed that both systems encounter interpretation issues and that there is no simple answer to the question of how they relate to legal certainty. After conducting this research, one might critically question whether the comprehensive regulation of academic freedom, given its complexity and controversial nature, is feasible without encountering issues regarding legal certainty. A notable distinction, however, lies in practical enforceability against institutions, which tends to favour academics in Canada, providing them with a more advantageous position than academics in the European legal systems.

137. SUGGESTIONS FOR FURTHER RESEARCH – Ideally, a normative follow-up study would explore which of the two legal and judicial protection systems is most desirable in terms of the enforceability and legal certainty of individual academic freedom. This research contains essential evaluative components which contribute to such normative inquiry. However, certain essential elements are missing to draw normative conclusions, exceeding the scope of a thesis and my methodological framework. Below, I offer food for thought for further research.

To begin with, additional research is needed on the balance between individual and institutional academic freedom rights in both the European legal systems and in Canada.

This is crucial for making substantive statements about dispute outcomes, which are tied to judicial protection of individual academics. When conflicts arise between the academic freedom rights of universities and those of academics, the dispute resolution body – be it a judge or arbitrator – must conduct a balancing exercise between the two claims. This involves weighing both rights against each other and finding an appropriate balance as a resolution. To investigate this, an extensive overview of case law should be compiled. In addition, a case law analysis should be conducted to examine how, to what extent, in what manner, and based on which arguments judges strike a balance between individual and institutional academic freedom.

Moreover, I propose further research into internal university procedures. My research was confined to official judicial and arbitral channels through which individual academic freedom can be enforced in Canada and in the European legal systems. However, I did not explore the internal procedures of Canadian and European universities, which may contribute to judicial protection of individual academic freedom. Internal procedures are, however, not publicly accessible and thus remain opaque. If this methodological limitation can be addressed, further research based on cases in internal procedures could shed light on effective judicial protection in terms of remedies, legal certainty, and enforcement. I recommend carrying out a new comparison including the internal procedures of universities.

In order to optimally address the normative question, I recommend conducting sociological research on the legal certainty of individual academic freedom in addition to legal research. Unfortunately, the limited scope of this thesis did not allow for such an approach. I have examined the legal certainty of the norm itself and its application through literature and case law. The differences between the two 'systems' turned out to be less significant than initially thought. However, sociological research is needed to capture academics' subjective perceptions of the concept of academic freedom, which may reveal greater differences.

Finally, I suggest further research into the accessibility of official legal channels for resolving academic freedom disputes. The volume of publicly accessible academic freedom cases via CanLii.org is significantly higher in Canada than in all European legal systems (even when combined). This trend was less pronounced in the German legal system, but this may be due to the fact that academic freedom in Germany extends beyond

the university context. Nevertheless, the difference between Canada and the European legal systems remains striking. The discrepancy in available cases may be due to a chilling effect related to the controversial horizontal effect of academic freedom, or it may reflect different preferences as to whether internal university procedures or judicial solutions are preferred for resolving disputes in European legal systems. This area of research potentially marks a significant divergence between Canada and the legal systems studied, but conclusive answers require further research.

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ANNEX 1

Below I have listed some collective agreements to give the reader an idea of what they entail and what an academic freedom clause might look like in Canada. I referred to the specific page of the academic freedom clause. I have included examples of collective agreements with broad and smaller provisions on academic freedom.

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ANNEX 2

CAUT Policy Statement

1

Post-secondary educational institutions serve the common good of society through searching for, and disseminating, knowledge and understanding and through fostering independent thinking and expression in academic staff and students. Robust democracies require no less. These ends cannot be achieved without academic freedom.

2

Academic freedom includes the right, without restriction by prescribed doctrine, to freedom to teach and discuss; freedom to carry out research and disseminate and publish the results thereof; freedom to produce and perform creative works; freedom to engage in service to the institution and the community; freedom to express one's opinion about the institution, its administration, and the system in which one works; freedom to acquire, preserve, and provide access to documentary material in all formats; and freedom to participate in professional and representative academic bodies. Academic freedom always entails freedom from institutional censorship.

3

Academic freedom does not require neutrality on the part of the individual. Academic freedom makes intellectual discourse, critique, and commitment possible. All academic staff must have the right to fulfil their functions without reprisal or repression by the institution, the state, or any other source. Contracts which are silent on the matter of academic freedom do not entitle the employer to breach or threaten in any way the academic freedom of academic staff employed under such collective agreements or other employment contracts.

4

All academic staff have the right to freedom of thought, conscience, religion, expression, assembly, and association and the right to liberty and security of the person and freedom of movement. Academic staff must not be hindered or impeded in exercising their civil rights as individuals including the right to contribute to social change through free expression of opinion on matters of public interest. Academic staff must not suffer any institutional penalties because of the exercise of such rights.

5

Academic freedom requires that academic staff play a major role in the governance of the institution. Academic staff members shall constitute at least a majority on committees or collegial governing bodies responsible for academic matters including but not limited to curriculum, assessment procedures and standards, appointment, tenure, and promotion.

6

Academic freedom must not be confused with institutional autonomy. Post-secondary institutions are autonomous to the extent that they can set policies independent of outside influence. That very autonomy can protect academic freedom from a hostile external environment, but it can also facilitate an internal assault on academic freedom. Academic freedom is a right of members of the academic staff, not of the institution. The employer shall not abridge academic freedom on any grounds, including claims of institutional autonomy.

ANNEX 3

Universities of Canada Statement on Academic Freedom

What is academic freedom?

Academic freedom is the freedom to teach and conduct research in an academic environment. Academic freedom is fundamental to the mandate of universities to pursue truth, educate students and disseminate knowledge and understanding.

In teaching, academic freedom is fundamental to the protection of the rights of the teacher to teach and of the student to learn. In research and scholarship, it is critical to advancing knowledge. Academic freedom includes the right to freely communicate knowledge and the results of research and scholarship.

Unlike the broader concept of freedom of speech, academic freedom must be based on institutional integrity, rigorous standards for enquiry and institutional autonomy, which allows universities to set their research and educational priorities.

Why is academic freedom important to Canada?

Academic freedom does not exist for its own sake, but rather for important social purposes. Academic freedom is essential to the role of universities in a democratic society. Universities are committed to the pursuit of truth and its communication to others, including students and the broader community. To do this, faculty must be free to take intellectual risks and tackle controversial subjects in their teaching, research and scholarship.

For Canadians, it is important to know that views expressed by faculty are based on solid research, data and evidence, and that universities are autonomous and responsible institutions committed to the principles of integrity.

The responsibilities of academic freedom

Evidence and truth are the guiding principles for universities and the community of scholars that make up their faculty and students. Thus, academic freedom must be based on reasoned discourse, rigorous extensive research and scholarship, and peer review.

Academic freedom is constrained by the professional standards of the relevant discipline and the responsibility of the institution to organize its academic mission. The insistence on professional standards speaks to the rigor of the enquiry and not to its outcome.

The constraint of institutional requirements recognizes simply that the academic mission, like other work, has to be organized according to institutional needs. This includes the institution's responsibility to select and appoint faculty and staff, to admit and discipline students, to establish and control curriculum, to make organizational arrangements for the conduct of academic work, to certify completion of a program and to grant degrees.

Roles and responsibilities

University leadership: It is a major responsibility of university governing bodies and senior officers to protect and promote academic freedom. This includes ensuring that funding and other partnerships do not interfere with autonomy in deciding what is studied and how. Canada's university presidents must play a leadership role in communicating the values around academic freedom to internal and external stakeholders. The university must also defend academic freedom against interpretations that are excessive or too loose, and the claims that may spring from such definitions.

To ensure and protect academic freedom, universities must be autonomous, with their governing bodies committed to integrity and free to act in the institution's best interests.

Universities must also ensure that the rights and freedoms of others are respected, and that academic freedom is exercised in a reasonable and responsible manner.

Faculty: Faculty must be committed to the highest ethical standards in their teaching and research. They must be free to examine data, question assumptions and be guided by evidence.

Faculty have an equal responsibility to submit their knowledge and claims to rigorous and public review by peers who are experts in the subject matter under consideration and to ground their arguments in the best available evidence.

Faculty members and university leaders have an obligation to ensure that students' human rights are respected and that they are encouraged to pursue their education according to the principles of academic freedom.

Faculty also share with university leadership the responsibility of ensuring that pressures from funding and other types of partnerships do not unduly influence the intellectual work of the university.

ANNEX 4

AAUP 1940 Statement of Principles on Academic Freedom and Tenure

In 1915 the Committee on Academic Freedom and Academic Tenure of the American Association of University Professors formulated a statement of principles on academic freedom and academic tenure known as the 1915 Declaration of Principles, which was officially endorsed by the Association at its Second Annual Meeting held in Washington, D.C., December 31, 1915, and January 1, 1916.

In 1925 the American Council on Education called a conference of representatives of a number of its constituent members, among them the American Association of University Professors, for the purpose of formulating a shorter statement of principles on academic freedom and tenure. The statement formulated at this conference, known as the 1925 Conference Statement on Academic Freedom and Tenure, was endorsed by the Association of American Colleges (now the American Association of Colleges and Universities) in 1925 and by the American Association of University Professors in 1926.

In 1940, following a series of joint conferences begun in 1934, representatives of the American Association of University Professors and of the Association of American Colleges (now the American Association of Colleges and Universities) agreed upon a restatement of principles set forth in the 1925 Conference Statement on Academic Freedom and Tenure. This restatement is known to the profession as the 1940 Statement of Principles on Academic Freedom and Tenure.

Following extensive discussions on the 1940 Statement of Principles on Academic Freedom and Tenure with leading educational associations and with individual faculty members and administrators, a joint committee of the AAUP and the Association of American Colleges met during 1969 to reevaluate this key policy statement. On the basis of the comments received, and the discussions that ensued, the joint committee felt the preferable approach was to formulate interpretations of the 1940 Statement from the experience gained in implementing and applying it for over thirty years and of adapting it to current needs.

The committee submitted to the two associations for their consideration Interpretive Comments that are included below as footnotes to the 1940 Statement.1 These interpretations were adopted by the Council of the American Association of University Professors in April 1970 and endorsed by the Fifty-Sixth Annual Meeting as Association Policy.

The purpose of this statement is to promote public understanding and support of academic freedom and tenure and agreement upon procedures to ensure them in colleges and universities. 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.2 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. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.3

Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.

Academic Freedom

1. Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

2. 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.4 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.5

3. College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes

special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.6

Academic Tenure

After the expiration of a probationary period, teachers or investigators should have permanent or continuous tenure, and their service should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.

In the interpretation of this principle it is understood that the following represents acceptable academic practice:

1. The precise terms and conditions of every appointment should be stated in writing and be in the possession of both institution and teacher before the appointment is consummated.

2. Beginning with appointment to the rank of full-time instructor or a higher rank,7 the probationary period should not exceed seven years, including within this period full-time service in all institutions of higher education; but subject to the proviso that when, after a term of probationary service of more than three years in one or more institutions, a teacher is called to another institution, it may be agreed in writing that the new appointment is for a probationary period of not more than four years, even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years.8 Notice should be given at least one year prior to the expiration of the probationary period if the teacher is not to be continued in service after the expiration of that period.9

3. During the probationary period a teacher should have the academic freedom that all other members of the faculty have.10

4. Termination for cause of a continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution. In all cases where the facts are in dispute, the accused teacher should be informed before the hearing in writing of the charges and should have the opportunity to be heard in his or her own defense by all bodies that pass

judgment upon the case. The teacher should be permitted to be accompanied by an advisor of his or her own choosing who may act as counsel. There should be a full stenographic record of the hearing available to the parties concerned. In the hearing of charges of incompetence the testimony should include that of teachers and other scholars, either from the teacher's own or from other institutions. Teachers on continuous appointment who are dismissed for reasons not involving moral turpitude should receive their salaries for at least a year from the date of notification of dismissal whether or not they are continued in their duties at the institution.11

5. Termination of a continuous appointment because of financial exigency should be demonstrably bona fide.