

Academic Freedom in the Age of Information Technology: Swimming Against the Tide

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In this volume celebrating 50 years of information technology at the Department of Law, Stockholm University, it is fitting for two reasons to examine the interplay between information technology and academic freedom during this ground-breaking period. First, without academic freedom, the legal academy would never have in general developed much beyond traditional Roman law subjects such as the law of obligations, and definitely not to include something as cutting-edge as information technology already in the 1970's. The second is that information technology has changed the faces of both teaching and research, and thus the premises for academic freedom, both facilitating and obstructing its exercise by legal scholars. Two specific challenges raised to academic freedom will be addressed at the end, one with respect to teaching, the copyright to teaching materials, and the other with respect to research, the protections of extramural utterances, both as facilitated by digitalization and social media.

This article begins by briefly exploring the history of academic freedom, university research and teaching, as well as its modern legal protections, then goes over to the impact of information technology on academic freedom. The need for the law regarding academic freedom to keep up with the technological advances made in the past half century is not only self-evident, but also integral to future academic endeavors. As a reminder of the urgency of such protection, the Scholars at Risk Network cites over 257 reported attacks on higher education communities in 35 different countries occurring in the year between 1 September 2016 and 31 August 2017. These comprised campus attacks, murders, disappearances, imprisonment, prosecutions, loss of position and travel restrictions.¹ Academic freedom can never be taken for granted, and as one scholar has summarized it, “in a knowledge economy, policy decisions about who controls research, teaching, and learning affect basic living and working conditions in a democracy.”²

1 The Origins of Academic Freedom

Despite the fact that academic freedom is oft cited as a fundamental cornerstone of democracy and particularly Western society, there is in reality little detail in the law that offers any substantive definition of what it actually is. Academic freedom historically has been discussed from three different perspectives, the general freedom of the university originally as a corporate body,³ the academic freedom of students, and the academic freedom of professors with respect to enquiry and teaching. As to the first, one can speak here of *libertas ecclesiastica*, the freedom of the Church, and *libertas scholastica*, the freedom of the universities from state control. *Libertas academica* began to be used in the 16th

1 Scholars at Risk (SAR), *Free to Think 2017*, “scholarsatrisk.org”.

2 Carvalho; E. J. and Downing, D. B. (eds), *Academic Freedom in the Post-9/11 Era*, Palgrave 2010, p. 1.

3 See Lindberg, B., *Akademisk frihet före modernitet*, Lychnos 2014, p. 41.

century during the Reformation in connection with the status of students, but also with respect to humanism.⁴

Western universities generally have the medieval university guilds as their starting points. Two main models existed in the middle ages, that of Bologna (1088) as guilds of students, and Paris (1096) as guilds of masters, and issues with respect to academic freedom, or its obverse, surfaced already then.⁵ Oxford and Cambridge in the 12th and 13th centuries respectively were based on the Paris model. After came for example, Prague (1348), Vienna (1365), Heidelberg (1386), Cologne (1388) and Uppsala (1477).⁶ Popes and later Kings granted privileges and freedoms by charter to universities. Legally these rights could be so extensive that there were categorized as the legal jurisdiction of the universities: the right to establish a corporate body/guild, elect leaders, adopt bylaws as well as laws, self-police breaches of such and even exclusively sanction crimes as committed by teachers, students, and the universities supporting community.⁷ Questions of legal jurisdiction quickly became intertwined with ideological control, as clearly seen during the Inquisition's focus on Galileo, arguable one of the first and best known cases to invoke technology, in his case, the telescope, and academic freedom.⁸

Academic freedom was protected from the outer world through this internalization of power within the universities.

2 Academic Freedom in the Age of Secularization

The perspective of academic freedom as a modern Western notion has its origins in the inception of the nation state during the 18th century, the parallel rise of the modern university, the enlightenment and secularization. It is tempting to look back farther, even to the Athenians and Socrates, but a consistent insistence at a societal level as to academic freedom did not surface until the break was made between religion and research, for example as in Germany in the late eighteenth

4 This was originally referred to as *libertas philosophica*, the freedom of philosophy. See Lindberg, p. 47. The freedom of philosophy issue was raised by René Descartes in his *Principles of Philosophy (Principia philosophiae 1644)*, an English translation available at the Project Gutenberg website, gutenberg.org.

5 See generally, Moule, G. S., *Corporate Jurisdiction, Academic Heresy, and Fraternal Correction at the University of Paris, 1200-1400*, Brill 2016.

6 Lund University was officially founded in 1666, however, its precursor, a *stadium generale* which granted bachelor's degrees, was founded in 1425, so there is debate whether Uppsala or Lund is the oldest Swedish university. Regardless, by the 17th century Uppsala and Lund had almost identical constitutions, see Kallenberg, E., *Akademisk jurisdiktion. Studenternas rättsliga undantagsställning*, Statsvetenskaplig Tidskrift 1906:2, p. 98.

7 This right was very extensive in Sweden as granted in the 1655 Uppsala and 1666 Lund university constitutions, marking the jurisdiction of the town and the gown. These extensive rights were in place effectively until 1851 when the jurisdiction of the university was successively reduced to only student discipline, see *Kungliga förordningen 2 april 1852 angående upphörande af universitetens domsrätt*.

8 Galileo Galilei, *Dialogue Concerning the Two Chief World Systems* (1632).

century.⁹ Prussia was the first European state to secularize and institutionalize the university sector,¹⁰ part of a social policy platform including social insurance and worker protections, predating such efforts in the rest of Europe by almost half of a century. Education had previously been the province of the Church, the Catholic Church in many European countries, the Anglican Church in England and the Lutheran Church in Sweden.

The Prussian secularization of the universities was a calculated move with the objective of creating a class of educated public servants employed on merits and not on birth or wealth. Fredrick the Great (1740-86) saw this meritocracy in the state sector as a way for the monarchy to be freed from aristocratic control and the problems such a relationship posed, as vividly seen in France at that time. The 1794 Prussian General Code (*German Allgemeines Landrecht*) was begun during the reign of Frederick the Great but not legislated until 1794 under his successor, Frederick William II. The Code created a system for the rights of all social classes, and a basic legal framework for schools and universities, which could only be established with state permission. The universities had the right to manage their own affairs through corporate charters, but the ultimate control was with the state.

German academics protested this structure and the subsequent state censorship and the view of the university as training schools for officials. Among others, Kant and Humboldt argued pure learning cultivated for its own sake. The state should support this objective without exercising controls over the materials learned and taught. Education was to be in the spirit of philosophic cultivation (*bildung*) and not simply as utilitarian for state purposes.¹¹ Self-enhancement and the acquisition of pure knowledge were now objectives in themselves, with scientific research pursued as an end in itself.¹² Consequently, in contrast to other Western universities at the time, German academics became outspoken proponents of academic freedom, both the freedom of the teacher as to teaching and enquiry, *Lehrfreiheit*, and to the freedom of the student, *Lernfreiheit*, already by the turn of the nineteenth century. This new German model of universities as centers of research become a model later for many countries, including both the United States and Sweden.¹³

Due to this early discussion as to academic freedom, constitutional protections for academic freedom were provided in Germany, as seen in § 152

9 For the argument that academic freedom was used in the Middle Ages to preserve the intellectual independence of the Church, see generally Russell, C., *Academic Freedom*, Routledge 1993.

10 See Frege, C. M., *Employment Research and State Traditions: A Comparative History of Britain, Germany and the United States*, Oxford University Press 2007, p. 122.

11 Ringer, F. K., *The Decline of the German Mandarins: The German Academic Community, 1890-1933*, Wesleyan University Press 1990, pp. 23-24.

12 Frege, p. 122.

13 For a history of this transformation of German universities, and its impact on American universities, see Metzger, W. P., *Academic Freedom in the Age of the University*, New York 1961, pp. 93-138. See also Thwing, C. F., *The American and the German University: One Hundred Years of History*, New York 1928, "babel.hathitrust.org".

of the 1849 Frankfurter Constitution (*Frankfurter Reichsverfassung*) and in Article 20 of the 1850 Prussian Constitution (*Preußische Verfassung*). Both of these stated that “[s]ciences and teaching shall be free” (*Die Wissenschaft und ihre Lehre ist frei*). Taking up this mantle, Article 142 of the 1919 Weimar Constitution (*Weimarer Reichsverfassung*) stated that the “[a]rts, sciences and teaching shall be free. The state provides for their protection and participates in upholding them (*Die Kunst, die Wissenschaft und ihre Lehre sind frei. Der Staat gewährt ihnen Schutz und nimmt an ihrer Pflege teil*).”¹⁴ Academic freedom with respect to professors, *Lehrfreiheit*, was seen to comprise both the freedom to teach and the freedom of inquiry as extensions of the search for truth function, the primary task of the academy. At this time, *Lehrfreiheit* included a vacuum as to administrative rules in teaching situations, “the absence of a prescribed syllabus, freedom from tutorial duties, the opportunity to lecture on any subject according to the teacher’s interest.”¹⁵ In contrast to the American AAUP definition of academic freedom as seen below, extramural utterances were not protected in Germany as professors were and still are civil servants with a duty of loyalty to the state.¹⁶ The protections given academic freedom in the Weimar Constitution were taken up again in the 1949 Constitution of Germany (*German Grundgesetz*, “GG”).

3 Academic Freedom as Challenged in the 20th Century

Three pivotal events challenged the legal protections of academic freedom in the Western national systems examined here, Nazism, McCarthyism and South African Apartheid.

The continued strong constitutional protections in Germany are the result of both the early secularization of universities as well as their later demise at the hands of the Nazis. The National Socialists took over the universities in 1933 under Nazism, repudiating academic self-government, the freedom of learning and the idea of objectivity under the policy of *Gleichschaltung*, total control of all aspects of society. The Third Reich rejected “impractical” scholarship, classical humanism and apolitical stances, determined to limit the academic proletariat. One law professor, Otto Koellreutter, neatly summarized the situation: “What we need is only the political, national socialist man. To educate him in the spirit of the ‘Führer’ and to contribute thereby building blocks to the foundation of the German leader—state, that seems to me to be today’s most urgent task for all German professors.”¹⁷ Thousands of professors resigned or

14 Translation provided by the author.

15 Metzger, p. 113.

16 The parallels and deviations of the AAUP definition of academic freedom with the German definition are products of the significant German influence on the AAUP Board, *see* Metzger, p. 122.

17 Dr. Gerhard Falk, *Commentary on the Nazi Expulsion of Professors from the Universities in Nazi Germany, 1933-1941*, “jbuff.com”.

were fired in this ideological and racial purge by the Nazis. Many fled to the UK and US, taking the legacy of the pre-Nazi German university system with them.¹⁸

A second devastating blow to academic freedom in the Western world occurred during the Cold War, on the heels of World War II. Not taking any lessons from the persecution of academics in Germany under the Nazi regime, a campaign of accusations began during the Cold War, lasting from about 1947 to 1956 of accusing persons of being either communist, Fascist, totalitarian, subversive or a sympathizer, or Russian spies. U.S. Senator Joseph McCarthy was most visible in these proceedings acting through the House on Un-American Activities Committee. Academics were among the targeted groups, raising central questions as to academic freedom.¹⁹

A third event affecting the jurisprudence of the American Supreme Court was the implementation of apartheid in South Africa, including in its universities. A statement was issued by the Chancellors of The Open Universities, the University of Cape Town and the University of the Witwatersrand, with respect to proposed South African legislation in the 1950's. Open universities were those open to all races as opposed to admissions based on race. The Chancellors identified the four essential freedoms of a university – “to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”²⁰ Freedom of expression was argued by the Chancellors as necessary to these four freedoms, as well as that academic liberty is meaningful only in a society in which few restrictions are placed on free expression and in which non-conformity is not viewed as heresy. Thus the Chancellors declared that a university is “characterized by the spirit of free inquiry”, which implies the rights to examine, question, modify or reject traditional ideas and beliefs. Despite opposition, legislation was enacted in 1959 to create an apartheid system with respect to university education, with non-white individuals allowed to attend only certain universities. Lord Radcliff stated in connection with these events that academic freedom means diversity instead of uniformity, the liberty to swim against the tide.²¹

18 For example, almost 15 percent of all tenured university teachers were fired during the Nazi years, see Waldinger, F., *Quality Matters: The Expulsion of Professors and the Consequences for PhD Student Outcomes in Nazi Germany*, 118(4) *Journal of Political Economy* (August 2010) 787-831, p. 788. Both the UK and the US already in 1933 began to receive these scholars, with the English Academic Assistance Council and the US Emergency Committee in Aid of Displaced Scholars. The majority of displaced scholars came to the United States, *id.* at p. 795.

19 See for example, Deery, P., 'Running with the Hounds': *Academic McCarthyism and New University, 1952-53*, *Cold War History*, Vol. 10 (2010) Issue 4, pp. 469-492.

20 *The Open Universities in South Africa, A statement of a conference of senior scholars from the University of Cape Town and the University of the Witwatersrand, including A. v. d. S. Centlivres and Richard Feetham, as Chancellors of the respective universities*, pp. 10-12. See also Academic Freedom Committees of the University of Cape Town and the University of Witwaterstrand, Johannesburg, *The Open Universities in South Africa and Academic Freedom 1957-1974*, Juta 1974.

21 Cited by Sir Robert Birley, *Richard Feetham Memorial Lecture 4*, Johannesburg 1970, p 2.

4 Modern Legal Approaches to Academic Freedom

Academic freedom has often been addressed tangentially, such as through moral rights and freedom of expression, both of which are protected in the United Nation's Universal Declaration of Human Rights. The protection of moral rights is echoed in Article 15 of the 1966 International Covenant on Economic, Social and Cultural Rights. There, the parties undertake to recognize the right of everyone to take part in cultural life; to enjoy the benefits of scientific progress and its applications; and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which she is the author. The steps to be taken by the States Parties include those necessary for the conservation, development and diffusion of science and culture. The States Parties also agree to respect the freedom indispensable for scientific research and creative activity, and to recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields. The 1966 Covenant on Civil and Political Rights is also seen to protect academic freedom under its Article 18 guarding the right to freedom of thought.

Several other international instruments have taken up the issue of academic freedom explicitly, such as the United Nations Education, Scientific and Cultural Organization (Unesco) Declaration of Rights and Duties Inherent in Academic Freedom (1982). The Declaration sets out rights and duties for individual academics, that they be "free to teach and express conclusions of research, subject only to canons of scholarship and intellectual rigour." Freedom to pursue and publish research, to hold tenured employment, to have objective evaluations of academic work, research time, freedom of expression both within and outside the university walls, as well as students taught who are free to learn, are the cornerstones of this document. Unesco also issued a recommendation in 1997 concerning the status of higher-education teaching personnel, which defines 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."²²

European policy documents have also addressed academic freedom. The Magna Charta Universitatum 1988 was signed that year by almost 400 (now over 850) European rectors and heads of universities on the 900th anniversary of the University of Bologna. Effective means are called for with respect to preserving freedom in research and teaching, and that research must be inseparable from teaching. The Parliamentary Assembly of the Council of Europe issued Recommendation 1762: Academic freedom and university autonomy in 2006, where the Parliament re-emphasized the vital interests of academic freedom and

22 See for a report of European compliance with the 1997 UNESCO Recommendations, Terence Karran, *Academic Freedom in Europe: Reviewing Unesco's Recommendation*, British Journal of Educational Studies, Vol. 57 No. 2 (2009).

university autonomy as expressed in the Magna Charta, calling for their need of constitutional protection. Issues of academic freedom have also been taken up within specific fields, such as in the European Council's Convention on Human Rights and Biomedicine. In an unpublished 2014 case, three concurring judges of the European Court of Human Rights found that academic freedom was protected under Article 10 of the European Convention, the right to freedom of expression. According to these justices, academic speech was to be accorded the highest level of protection, even where it is extramural due to its essential role in the communication of new ideas.²³

A brief comparison here of four different national legal systems sets out the spectrum of legal approaches existing with respect to legal protections of academic freedom, with the strongest and most explicit constitutional protections still found in Germany.

5 Academic Freedom Legal Protections in Germany

The Constitution of Germany, the Basic Law (*German Grundgesetz*, "GG") was enacted in 1949 under the auspices of the allies after the defeat of Germany in World War II. Its Article 5(III) protects academic freedom: "The arts and sciences, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution."²⁴ "Research" is explicitly included as a protected activity.²⁵ The Federal Constitutional Court (*Bundesverfassungsgericht*) has greatly shaped the concept of academic freedom as found in Article 5(III) GG. "Science" is an overarching concept including both research and teaching as two interdependent factors.²⁶ Science is deemed subject to constant revision and change, reflecting the autonomy granted to scientific activities.²⁷ Correspondingly, the methods used in a particular case, and the results found, are irrelevant. Uncommon and/or unorthodox methods are also protected, and the cogency of any arguments used is neither crucial nor decisive. Only a systemic, general avoidance of generally-accepted scientific standards

23 See *Erdogan v. Turkey* (346/04) Unreported May 27, 2014 (ECHR).

24 *Kunst und Wissenschaft, Forschung und Lehre sind frei. Die Freiheit der Lehre entbindet nicht von der Treue zur Verfassung*. An English translation of the GG is available at the website of the German Federal Ministry of Justice, "www.gesetze-im-internet.de/englisch_gg". The confirmation of the 1919 constitutional provision can be seen as an affirmation of the pre-Nazi status of German universities.

25 Research was already protected under the Weimar Constitution as a key element to the sciences – thus, the extension of the wording is simply a clarification, see Scholz, R., *Art. 5 para. III GG* in Maunz, T. and Dürig, G. (eds.), *Grundgesetz-Kommentar* (72 ed. 2014) ("Scholz") at annotation 9.

26 See Kempen, B. *Art. 5* in Epping, V. and Hillgruber, C. (eds.), *Beck'scher Online-Kommentar zum Grundgesetz* (23rd ed. 2014) ("Kempen") at annotation 179.

27 See Kempen at annotation 180, see also *BVerfG*, 17 August 1956 - 1 BvB 2/51, NJW 1956, 1393 at 1398.

can lead to the result of the loss of protection granted by Article 5(III) GG.²⁸ The Court has also held that this article not only protects specific ways of approaching academic activities or particular academic theories, but also every academic activity, *i.e.*, every activity that by its form and content can be seen as a serious and methodical/systematic effort to ascertain the truth.²⁹ As long as these requirements are met, academic works are protected and granted a certain amount of (academic/scientific) autonomy from state interference.³⁰

The very far-reaching level of protection for academic freedom from state interference is arguably only limited by allegiance to the constitution. In other words, protection is available for any exercise of academic freedom deemed not to be in contravention of other principles espoused by the constitution.³¹ Conflicting interests enjoying constitutional protection, such as those raised by other scientists or the university, can lead to a restriction of academic freedom.³² Unconditional protection is only guaranteed for the core of academic freedom, for instance, when it comes to a professor *vis-à-vis* the university and the provision of the means necessary to conduct research.³³

The requirement of being faithful to the constitution is a corrective measure that is more declaratory and does not play an independent/self-contained role.³⁴ This requirement of allegiance forbids malicious, aggressive and contemptuous statements attacking basic moral concepts and democratic principles and values, seen as a protection against the potential abuse of academic freedom, for instance, through subversive activities. This requirement does not hinder anyone from criticizing the state. Controversial and polarizing statements are also protected, as long as they are not purely made-up or lacking in any factual basis.

The very strong German constitutional approach to academic freedom creates a bright line with respect to its protections that the other three systems examined below do not share. Arguably the dismantling of the academy during World War II was a strong motivating force for continuing the strong Weimar Republic constitutional protections of academic freedom.

28 See *BVerfG*, 11 January 1994 - 1 BvR 434/87, NJW 1994, 1781 at 1782. Even where no protection under the provisions of academic freedom exists, an activity might still be protected under the provisions guaranteeing freedom of speech as found in Article 5(I) GG. For example, the publication of a propagandistic/subversive text about the Nazi-regime, failing to mention critics and in no way trying to ascertain the truth, but rather only promoting certain ideas, is not protected under Article 5(III) GG. However, it still might be protected under the provisions regarding freedom of speech. *Id.*

29 See the landmark judgment in *BVerfG*, 29 May 1973 - 1 BvR 424/71 u. 325/72, NJW 1973 at 1176. The Court's definition here of academic speech is cited by both the Academy and in later cases, including *BVerfG*, 9 June 1992 - 1 BvR 824/90, NJW 1993 at 916; and OVG Berlin-Brandenburg, 14 August 2009 - 1 S 151.09, LKV 2009, 66 at 568.

30 See *BVerfG*, 1 March 1978 - 1 BvR 174, 178, 191/71; 333/75, NJW 1978, 1621 at 1624.

31 See *BVerfG*, 29 May 1973 - 1 BvR 424/71 u. 325/72, NJW 1973, 1176.

32 See *BVerfG*, 15 September 1997 - 1 BvR 406/96, NVwZ-RR 1998, 175.

33 *Id.* See also *BVerfG*, 8 July 1980 - 1 BvR 1472/78, NJW 1981, 163 at 165.

34 See Kempen at annotation 200.

6 Academic Freedom Legal Protections in the United States

American universities were originally very much patterned on the medieval master's guild model, granted charters, self-regulation, setting standards for degrees. Harvard is one such example, founded in 1636 by the Massachusetts Bay Colony. Equally true is that the German 19th century university reforms were quickly adopted by American universities and professors, with John Hopkins University the first to incorporate the Humboldtian ideal in 1876.³⁵

The American Association of University Professors ("AAUP") was founded in 1915³⁶ to insure academic freedom for university faculty members.³⁷ Academic freedom has been twice defined by the AAUP, first in its 1915 Declaration of Principles on Academic Freedom and Academic Tenure.³⁸ The AAUP 1915 Principles note that academic freedom traditionally has had two applications, to the freedom of the teacher, *Lehrfreiheit*, and to the freedom of the student, *Lernfreiheit*.³⁹ Focusing on the former, the declaration defines academic freedom as comprising three elements: freedom of inquiry and research, freedom of teaching within the university or college, and freedom of extramural utterance and action. In addition, the scope and basis of power exercised by higher education institutions, the nature of the academic calling and the function of the university is emphasized in the Declaration by the following analogy: "[U]niversity teachers should be understood to be...no more subject to the control of the [university] trustees, than are judges subject to the control of the president."⁴⁰

The 1940 AAUP Statement of Principles on Academic Freedom and Tenure raises the same three interests, arguably much influenced by the influx of German scholars displaced under Nazism. University teachers are to be entitled

35 See Horn, M., *Academic Freedom in Canada: A History*, University of Toronto Press 1999, p. 7.

36 The AAUP was founded partly in response to the resignation of Professor Edward Ross at Stanford University in 1900 due to certain controversial statements Ross made with respect to eugenics and also the railroad industry. The AAUP today comprises three interlocked entities under the AAUP umbrella: the AAUP (a professional association), the AAUP-CBC (a labor union), and the AAUP Foundation (a foundation). The AAUP's mission is "to advance academic freedom and shared governance; to define fundamental professional values and standards for higher education; to promote the economic security of faculty, academic professionals, graduate students, post-doctoral fellows, and all those engaged in teaching and research in higher education; to help the higher education community organize to make our goals a reality; and to ensure higher education's contribution to the common good." For more information on the AAUP, see its website at "aaup.org".

37 For a history of the transformation of German universities and its impact on American universities, see Metzger, pp. 93-138.

38 See the *General Declaration of Principles* in Appendix 1 to the AAUP 1915 Declaration, "aaup.org.". Also available in AAUP, *Policy Documents & Reports* (11th ed. 2014)(the "Redbook").

39 The parallels and deviations of the AAUP definition of academic freedom with the German definition are not so surprising when keeping in mind that the eight of the thirteen signatories to the 1915 AAUP report had studied in Germany, see p. 122.

40 *Id.*

to full freedom in research and in the publication of the results, freedom in the classroom when discussing their subject, and freedom from institutional censorship.⁴¹ The 1940 AAUP Statement is deemed by some as a professional common or customary law of academic freedom and tenure.⁴²

Despite the fact that there is no explicit protection of academic freedom in the United States Constitution, the United States Supreme Court began to articulate strong protections for academic freedom indirectly under the First Amendment's free speech provisions during the witch hunts of the McCarthy Era, a time once again when academic freedom in both research and writing was severely constrained. This line of reasoning began in dissents⁴³ and eventually became the Court's reasoning in *Sweezy*:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.⁴⁴

In their concurring opinions, Justice Frankfurter, the first justice of Jewish descent to sit on the bench, and Justice Harlan stated that "[i]t is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation." Frankfurter and Harlan went on to reiterate those four essential freedoms of a university as identified by the Chancellors of the African Open Universities: "[T]o determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."⁴⁵

In another often-cited case, *Keyishian*, the Court states that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws

41 *Id.*

42 Euben, D. R., *Academic Freedom of Individual Professors and Higher Education Institutions: The Current Legal Landscape*, AAUP report, May 2002, p. 5 citing Finkin, M., *Towards a Law of Academic Status*, 22 BUFFALO L.REV. 575, 577 (1972).

43 For the first mention of academic freedom by the Court, see the dissent of Justice Douglas in *Adler v. Board of Education*, 342 U.S. 485 (1952), and the concurring opinions of Justices Douglas and Frankfurter in *Wieman v. Updegraff*, 344 U.S. 183 (1952), which opinion was accepted by the Court in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

44 *Sweezy* at p. 250.

45 *The Open Universities in South Africa*, pp. 10-12.

that cast a pall of orthodoxy over the classroom.”⁴⁶ The *Keyishian* Court went on to cite the above reasoning from *Sweezy*.⁴⁷ Based on the first amendment’s purpose of preserving an uninhibited marketplace of ideas in which the truth will eventually surface, the Court affirmed academic freedom both with respect to research and teaching. As the protection was based on free speech, American academics have also zealously guarded their rights to extramural utterances outside the walls of the universities.⁴⁸ Despite the rather dramatic sweep of the Court’s language, the actual protection afforded academic freedom has never been more closely defined by the Court.

7 Academic Freedom Legal Protections in Sweden

The university system in Sweden was several times influenced by events in Germany, first in the 17th century with the Reformation and transition from scholasticism to humanism. Sweden was at the height of its European political power at that time, and continental⁴⁹ researchers and scientists, particularly Germans, were brought to Sweden. A second wave followed with the contemplation of the Prussian model of university utility in educating students for governmental positions, which proposal was not adopted.⁵⁰ The Humboldtian reforms however quickly found their way to Sweden in the 19th century, with a focus on research and teaching based on research. The curriculum as a whole at that time was considered the responsibility of the individual professor as part of academic freedom, *lärofrihet*.

This freedom of teaching gave way to the general study plans first implemented by the state for all of Sweden in 1904. Reforms were also put in place whereby the absolute academic freedom of teaching was further dismantled. Professors eventually were allowed to select the course literature but the goals and objectives of the required courses were set by a government agency. This state planning was reversed to a degree in 1986 and faculties were again allowed to decide their own curriculum. However, the Swedish Higher Education Act still mandates, for example, that the legal education will include specific topics, such how societal and family conditions can affect the lives of

46 *Keyishian v. Board of Regents of University of State of N.Y.*, 385 U.S. 589 (1967) at p. 603.

47 *Id.* at p. 684, citing *Sweezy* at p. 250.

48 Stone, G. R., *A Brief History of Academic Freedom* in Akeel Bilgrami and Jonathan R. Cole, *Who’s Afraid of Academic Freedom?* Columbia University Press 2015, p. 26. A second distinction proffered by Stone is that the German concept of academic freedom encourages professors to convince their students of the correctness of the professor’s views, while the American counterpart’s role is that of neutrality in the classroom.

49 For example, Queen Christina brought Descartes to Sweden in 1649 to organize a new scientific academy, only to die a few months later of pneumonia.

50 Bertilsson, F., *Universitetens reformbehov: Uppfostringskommissionens beskrivning av problemen i svensk högre utbildning 1745-1751*, Lychnos 2014, p. 69.

women and men.⁵¹ The Swedish government can also decide that certain topics will be taken up in certain educations, for example, that environmental law will be taught in the legal education.⁵²

Explicit constitutional protection of the freedom of research⁵³ was not added until 2011. Under Article 18 of the Second Chapter of the Instrument of Government (1974:152), “[t]he freedom of research is protected according to rules laid down in law.”⁵⁴ This amendment was inspired by the Constitutional protections of academic freedom found in Germany and in Finland.⁵⁵ Despite the heavy reliance on legislative preparatory works as supplemental legal sources in the Swedish legal system, the legislative bill for this amendment states explicitly that it would not be suitable to further define academic freedom in the

51 See The Higher Education Ordinance, *Högskoleförordning* (1993:100) Bilaga 2. An English translation of this act is available at “uhr.se”.

52 A 2001 report on academic freedom published by the Swedish National Agency for Higher Education (Högskoleverket) adopts a highly pragmatic approach to academic freedom. There academic freedom is seen as the result of the interaction between the state, in the form of financer, and the academy, in the form of research, a relationship that at times can be antagonistic. This pragmatic approach defines academic freedom within the result of this interaction, the social contract between the state and the universities. The report notes the capacity of the state as financer to place certain demands on the academy based on the needs of society, however, the report fails to explicitly define academic freedom outside this contextual analysis, see Högskoleverket, *Akademisk frihet – en rent akademisk fråga?* Högskoleverket 2001. For the criticism that issues associated with academic freedom for faculty teaching have received the least amount of attention in the Swedish context see Berggren, H., *Frihetens fantomer* in Martin G. Erikson, Jenny Johannisson and Johan Sundeen, *Vetenskap på tvären: Akademiska värden, friheter och gränser, Vetenskap för profession 26:2013, Högskolan i Borås 2013*, p. 52.

53 Another distinction between Sweden and the other Nordic countries is that the Swedish legislation refers simply to freedom of research (*forskningsfrihet*) while the other Nordic legislation refers to academic freedom as well as institutional autonomy. See Nokkala, T. and Bladh, A., *Institutional Autonomy and Academic Freedom in the Nordic Context: Similarities and Differences*, 27 (1) Higher Education Policy, 2014, p. 6.

54 Chapter 2, Article 18(2) of the *Kungörelse (1974:152) om beslutad ny regeringsform*. The Instrument of Government is one of four Swedish constitutional acts comprising the Swedish Constitution. An English translation of the Instrument of Government is available at the website of the Swedish Parliament, “www.riksdagen.se/en” under the heading, Documents and laws. The protection of research was added in 2011 (SFS 2010:1408).

55 Legislative Inquiry 2008:125, *En reformerad grundlag del 1*, p. 460. Germany’s constitutional protections are discussed above. Article 16(3) of the Finnish Constitution states that the freedoms of the sciences, art and higher education are secured. The legislative preparatory works to the Finnish article demonstrate that this protection is not as wide as the German, as it states that the individual has the right to choose the object of her research, that the research method is a part of scientific freedom, and that the direction of science is to be primarily determined through scientific criticism from the scientific community. The Swedish legislative inquiry concludes by stating that this is the same type of protection as that found in the German constitution’s requirement of loyalty to the constitution. This is patently not the case, as the role of the collegium is very different in Finland (and also Sweden) than in Germany. The collegium can make decisions in the former two countries that are individual-based in countries such as Germany, the United States and the United Kingdom.

constitution, but rather that this task was left for the legislator.⁵⁶ Section § 1(6) of the Act on Higher Education (1992:1434)⁵⁷ states that: “With respect to research, the following general principles shall govern: (1) Research problems are to be freely chosen, (2) research methods are to be freely developed, and (3) research results are to be freely published.” Academic freedom with respect to teaching is mentioned neither in the constitutional provision nor in the statute. A 2012 governmental report⁵⁸ has pointing out a continued need for reform in the Swedish university system with respect to strengthening academic freedom. Criticism is raised against the increased control over research funds, commercialization, evaluation systems and management approaches as undermining academic freedom.⁵⁹ A 1997 case is noted in the report, in which a doctoral student in sociology invited a neo-Nazi member to discuss their concept of the world. The student was later sentenced for complicity to the hate crime of threat to a folk group and expelled as a doctoral student.⁶⁰ The 2012 report concludes by calling for stronger constitutional protections in Sweden with respect to academic freedom in both research and teaching.

8 Academic Freedom Legal Protections in the United Kingdom

The autonomy of the English universities was fiercely guarded from the royal power during the Middle Ages.⁶¹ As the state began to emerge, the medieval idea of a liberty, into which the State was not to enter, began to be encroached. Historically, strong ties have existed between the universities and first the Catholic Church, and later the Anglican Church, which ties still exist in certain higher education institutions, including Oxford and Cambridge, to the present day. In an effort to separate religion and state in the academy, Jeremy Bentham worked for education that was free for all, regardless of class, race or religion. Bentham is seen as the inspiration for the establishment of the University College of London in 1826, referred to by others then as the infamous “Godless Institution of Gower Street.” The redbrick polytechnics also began to be founded at about this time, focusing on the practical and industrial arts as well as being non-secular.⁶² A system of university research funding was created at the turn of the twentieth century. University grant committees were established to distribute

56 The legislative bill for the 2011 amendment states that it was not found be suitable to further define academic freedom in the constitution, but rather that this task was left for the legislator, *see id.*, citing Legislative Bill 1998/99:94, *Vissa forskningsfrågor*.

57 *Högskolelag* (1992:1434).

58 Henrik Berggren, *Den akademiska fråga – en ESO-rapport om frihet i den högre skolan*, Rapport till Expertgruppen för studier i offentlig ekonomi 2012:3.

59 *Id.* at p. 12.

60 *Id.* at p. 84.

61 Russell, p. 4.

62 Boden, R. and Epstein, D., *A flat earth society? Imagining academic freedom*, 59(3) *The sociological review*, Aug. 2011, p. 483.

public funds to universities with an inbuilt mechanism inhibiting government interference in the independence of the different institutions of higher education. This Haldane principle was in force in the United Kingdom until the 1980s, ensuring that universities, as self-governing communities, and their academics, could research and teach freely.

The Education Reform Act of 1988 adopted under Thatcher's government was a highly contested piece of legislation as it changed much of the existing system of university self-governance. It is seen as the first legislative incursion into the liberty of the academy historically. "Academic freedom" is defined in its section 202(2)(a)⁶³ as "that academic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions without placing themselves in jeopardy of losing their jobs or the privileges they may have."⁶⁴ Despite this promising wording, the 1988 Act gives universities for the first time the right to dismiss academics for redundancy due to an articulated need for universities to be more efficient and economical, whereas before academics had enjoyed lifetime tenure. Government evaluations of university research began in 1986, and have been carried out periodically since, in 1989, 1992, 1996, 2001, 2008 and 2014 with their outcomes tied to the government decisions concerning university funding.⁶⁵

The main legal source of academic freedom in the UK system consequently is not found in the constitution or the statutes, but is the employment agreement itself.⁶⁶ The University and College Union ("UCU") issued a 2009 statement on academic freedom due to its concerns over the threats to free academic inquiry, in part posed by the requirements for academics to find funding. The UCU statement set out that one of the purposes for higher education is to:

[S]erve the public interest through extending knowledge and understanding and fostering critical thinking and expression in staff and students, and then in society more widely. Academic freedom is essential to the achieving these ends and therefore to the development of a civilised democracy.⁶⁷

63 Two other acts are seen to touch upon academic freedom in the UK context, the Equality Act 2010 and its protections against discrimination, and the Counter-Terrorism and Security Act 2015. Section 31 of the 2015 act, Freedom of expression in universities etc, explicitly states that educational authorities must weigh the need to prevent people from being drawn into terrorism, the duty to ensure freedom of speech, and the importance of academic freedom. For criticism of the act with respect to academic freedom and the politicisation of lawful expression of views, see UCU, *2015 statement regarding Counter-Terrorism and Security Act 2015 and the Prevent Duty Guidance*, "ucu.org.uk".

64 This freedom is granted for the pre-1992 royal charter academic institutions, not the redbrick polytechnics that became universities after 1993.

65 Martin-Sardesai, A., Irvine, H., Tooley, S. and Guthrie, J., *Government research evaluations and academic freedom: A UK and Australian comparison*, 36(2) Higher Education Research & Development, 2017, p. 376.

66 Farrington, D. and Palfreyman, D., *The law of higher education*, 2nd ed. Oxford 2012, p. 456.

67 See the UCU, *2009 statement on academic freedom*, "ucu.org.uk".

The focus in the UK on academic outputs has been seen as jeopardizing academic freedom,⁶⁸ even to the point of the UK being designated as the “sick man of Europe”⁶⁹ given the lack of constitutional and statutory protections for academic freedom.

Of the four legal systems examined here, the only one with clearcut constitutional protections is that of Germany, backed by a century of tradition. Both Germany and the United States have case law discussing constitutional protections, the result of extreme perversions of academic freedom, in Germany under Nazism and in the United States under McCarthyism. The lesser legal protections offered in Sweden and the United Kingdom have been highlighted against European assessments as to the Unesco 1997 recommendations. A 2016 EU survey examines five factors identified as contributing to academic freedom: the constitutional and legislative protections of academic freedom, protection of institutional autonomy and academic self-governance, protection of job security and the ratification of international agreements relevant to the protection of the right to academic freedom.⁷⁰ Germany was ranked tenth, Sweden 27th and the United Kingdom 28th of the EU member states.

9 Academic Freedom in the Age of Information Technology

Information technology poses a new set of challenges to academic freedom in ways that both test stronger existing legal protections as well as reinforce the need for protections. One simple example of the changes wrought by information technology is the copyright to teaching materials. The digitalization of teaching materials has entailed the creation of a fairly self-contained readily reproducible package by the university instructor, as opposed to notes written in chalk on a chalkboard. Under the very strong constitutional protections given in Germany for academic freedom (as well as authorship), there is no gray zone as to this issue, the copyright always lies with the university instructor. In the other three jurisdictions, with less explicit and detailed protections of academic freedom, certain universities are now claiming copyrights to teaching materials, either directly through a work product analysis, or indirectly through an automatic and exclusive license. Those universities opting to not exercise such rights tend to be the older universities, such as Oxford, Cambridge, Uppsala and Harvard, unless substantial university funds have been used to create the work in question.⁷¹ The

68 Davies, M., *Academic Freedom: a lawyer's perspective*, 70 *High Educ.* 2015, pp. 987-1002.

69 Farrington, p. 456. *See also* Barnett, R., *Higher Education A critical business*, 1997, p. 53, arguing that in such an environment, “academic freedom is not taken away, rather, the opportunities for its realisation are reduced.”

70 *See* Beiter, K. D., Karran, T., Appiagyei-Atua, K., “*Measuring*” *the Erosion of Academic Freedom as an International Human Right: A Report on the Legal Protection of Academic Freedom in Europe*, *Vanderbilt Journal of Transnational Law* Vol 49, p. 668.

71 For a more detailed analysis of the issue of copyright to teaching materials as well as other issues arising with the digitalization of teaching, *see generally*, Carlson, L., Magnusson Sjöberg, C. och Papadopoulou, F., *The Wired World of University Teaching – Legal Challenges*, Ex Tuto 2017.

assertion of ownership or license by the university entails issues with respect to content, authors' moral rights and use. One obvious example here is whether the teaching materials, most often in a digitalized form, can be used by the university without the teacher. The responsibility as to updating in such cases also becomes blurred: can the university force a teacher no longer using such teaching materials to update them, and in the obverse, can the university either update, perhaps wrongly, or fail to update teaching materials in a way that would reflect negatively on the university teacher. In essence, the invocation of ownership or licensing rights results in a system in which university teachers are more motivated to not create teaching materials than to do so. Weak legal protections with respect to academic freedom allow these vacuums as exacerbated by digitalization to arise.

A second but different type of challenge raised in the academic context is that posed by social media to academic freedom. The constant vigilance, surveillance and permanent memory digitalization fosters leads to a teaching environment in which an academic may prefer safety through conservatism than challenging students (or society) with more controversial statements or questions. As there is no specific right to be forgotten in the context of teaching, a sentence uttered carelessly or taken out of context can become the death knell for an academic once it becomes part of the social media complex in existence today. One example of this is the statement made by Noble prize winning biologist who made remarks about the "problem" of women in the lab that was turned into a media storm, despite a life lead demonstrating otherwise, his wife a leading immunologist and a track record of support women in the science careers.⁷² Information technology allows for instant dissemination of any statements made, limited no longer to the actual audience, but now available to the world. One American survey found that less than one-fourth of the higher education institutions reviewed had an accessible social-media policy.⁷³ Scholars have called for social media policies that explicitly recognize the application of academic freedom to the social media context.⁷⁴

The social media outing of academics is reinforced by the new perceptions of roles with respect to students and universities. Students have now become consumers of the goods of education, and as such, have a more active role in determining the quality of the good for which they have paid. Universities across the world are becoming more business-like, with research outcomes often tied to public and private research funding, and teaching adjusted after the consumerism of students. The commercialization of universities, consumerism of students, leads to an environment in which the freedom to research can be seen as more and more curtailed. Academic heresy is still found, but now it is

72 Williams, J., *Why Academic Freedom Matters* in Hudson, C. and Williams, J., *Why Academic Freedom Matters – A response to current challenges*, Civitas 2016, p. 11.

73 Those institutions of higher education surveyed were those listed in the Carnegie Classification Data File, see Pomerantz, J., Han, C., and Sugimoto, C. R., *The State of Social Media Policies in Higher Education*, PLoS One 10(5), 2015 p. 1.

74 See for example, Murphy, M.H., *The Views Expressed Represent Mine Alone: Academic Freedom and Social Media*, scripted, Vol. 11, Issue 3, Dec 2014 211-228, p. 228.

with respect to the more dominant and vociferous voices as played out often in social media.

Information technology has brought about the most recent and innovative set of challenges to academic freedom, as seen by the two above examples of the rights to teaching materials as well as the impact of social media on classroom and extramural utterances. One only needs to look at the statistics garnered by Scholars at Risk to see how fragile an existence academic freedom actually has today, and historically, to Nazism, McCarthyism, apartheid and religious heresy to confirm this. The strong German constitutional protections appear to be still sufficient to weather this latest storm as to these latest academic challenges. The light legal approaches taken in the other three national jurisdictions, the United States, Sweden and the United Kingdom in contrast do not even begin to provide the tools needed in order to ensure academics the liberty needed in order to swim against the tide. Explicit protections of academic freedom need to be in place to protect academics in this brave new world created by information technology.