



Academic freedom in national constitutions: an initial comparative study

Liberdade acadêmica nas constituições nacionais: um estudo comparativo inicial

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Abstract

Constitutions are a particularly significant expression of State practice and of opinio juris, the two constitutive elements of customary international law. The question of whether academic freedom has attained the status of customary international law has not been squarely addressed in international legal scholarship, nor by national or international adjudicative bodies. This article intends to contribute to the debate by mapping “academic freedom” and cognate concepts in national constitutions. The introduction presents the reader first the concept of customary international law and, second, the elusive notion of academic freedom. Then, the article introduces the Academic Freedom in Constitutions (AFC) database and makes a few historical observations regarding the diffusion of academic freedom in world constitutions. However, because the AFC database allows only for quantitative and trend analysis, the article dwells next into the text of relevant “academic freedom”

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constitutional provisions. In particular, it tracks and analyzes mentions of "academic freedom", "scientific freedom", "autonomy of higher education institutions" and equivalent expressions in world constitutions. The article draws also some observations regarding limitations in constitutions to "academic freedom" provisions. Of course, an analysis of academic freedom constitutional provisions cannot *per se* be dispositive of whether academic freedom has attained customary international law status. It must be complemented by a deeper and more robust research. Yet, it adds a piece to the puzzle.

Keywords: Academic freedom; scientific freedom; autonomy of higher education institutions; constitution; customary international law.

Resumo

As Constituições são uma expressão particularmente significativa da prática estatal e da *opinio juris*, os dois elementos constitutivos do direito internacional consuetudinário. A questão de saber se a liberdade acadêmica alcançou o status de direito internacional consuetudinário não foi abordada de forma direta na literatura jurídica internacional, nem por órgãos judiciais nacionais ou internacionais. Este artigo pretende contribuir para o debate, mapeando a "liberdade acadêmica" e conceitos afins nas constituições nacionais. A introdução apresenta ao leitor e a leitora, em primeiro lugar, o conceito de direito internacional consuetudinário e, em segundo lugar, a noção elusiva de liberdade acadêmica. Em seguida, o artigo apresenta a base de dados Academic Freedom in Constitutions (AFC), fazendo algumas observações históricas sobre a difusão da liberdade acadêmica nas Constituições mundiais. Como a base de dados do AFC permite apenas análises quantitativas e de tendências, o artigo aprofunda-se em seguida no texto das disposições constitucionais relevantes sobre "liberdade acadêmica". Em particular, ele rastreia e analisa menções à "liberdade acadêmica", à "liberdade científica", à "autonomia das instituições de ensino superior" e expressões equivalentes nas Constituições mundiais. O artigo também faz algumas observações sobre as limitações nas constituições às disposições sobre "liberdade acadêmica". É claro que uma análise das disposições constitucionais relativas à liberdade acadêmica não pode, por si só, determinar se a liberdade acadêmica alcançou o status de direito internacional consuetudinário. Ela deve ser complementada por uma pesquisa mais profunda e robusta. No entanto, ela acrescenta uma peça ao quebra-cabeça.

Palavras-chave: Liberdade acadêmica; liberdade científica, autonomia das instituições de ensino superior; Constituição; direito internacional consuetudinário.

Sumário

1. Introduction; 2. The Academic Freedom in Constitutions dataset; 3. Historical trends in the recognition of academic freedom; 4. From a quantitative to a qualitative analysis of academic freedom in Constitutions; 4.1. Recognition of Academic Freedom; 4.2. Recognition of Scientific Freedom; 4.3. Recognition of Autonomy of Higher Education Institutions; 5. Limitations to Academic Freedom in Constitutions; 6. Conclusions; 7. References.

1. Introduction

This article maps the diffusion of the notion of “academic freedom” and cognate concepts in national constitutions. Mapping of the diffusion of the notion of academic freedom in national constitutions might help answer the question of whether academic freedom has attained the status of customary international law. Grounding academic freedom in customary international law, as opposed to specific international legal instruments, whether they be treaties or soft law legal instruments, is paramount since treaties bind only those States that have ratified them (Vienna Convention on the Law of Treaties, 1969). However, customary international law’s reach is universal, binding all States, as well as international organizations (Treves, 2006, para. 39).

While the constitution is the main source of law of a given State, constitutions, in the plural, are not a source of international law, at least not *per se*. As stated by Art. 1.a of the Vienna Convention on the Law of Treaties, international law has two main sources: treaties (i.e. “international agreement concluded between States in written form and governed by international law”) and customary international law (also known as “custom”, “international custom”, “international customary law”, “law of nations” or “general international law”). Two elements are necessary to determine the existence of a norm of customary international law. First, there must be a “general practice” of States (Statute of the International Court of Justice, Art. 38.1.b). This is the *diuturnitas*, or the objective element of customary international law. Second, this practice must be “accepted as law” (Statute of the International Court of Justice, Art. 38.1.b). This is the so called *opinio juris*, or the subjective element of customary international law.

Constitutions are a particularly significant expression of State practice and of *opinio juris*. According to the International Law Commission’s *Conclusions on Identification of Customary International Law*, “[State p]ractice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct “on the ground”; *legislative and administrative acts*; and decisions of national courts” (International Law Commission, 2018, p. 133-134 emphasis added).

Arguably, for the purpose of the determination of a given State practice, constitutions have an evidentiary weight superior to the one of ordinary laws. First, by definition, Constitutions are the highest source of law within a State. As stated by Rainer Grote, it is important to note that “[w]hile the constitution is the most important source of constitutional law, it is not its only source and therefore does not comprise the whole body of constitutional law” (Grote, 2018, para. 7). In States where the rule of law prevails, the legality and legitimacy of all national laws depends on their degree of consistency with the constitution. Second, constitutions address some of the most fundamental issues related to a State’s structure, including relations between State institutions, the rights of people vis-à-vis the State, and the powers and responsibilities of different levels of government. They are also a powerful symbol of the State and a source of national unity, identifying shared national goals, aspirations, and values. Finally, they are usually drafted through a process different from the one used to adopt ordinary laws, justifying the claim that they draw their authority from the people.

So far, the question of whether academic freedom could be considered a norm of customary international law has not been squarely addressed in international legal scholarship, nor by national or international adjudicative bodies.

This is probably because academic freedom is not clearly defined, certainly not in international law, and very rarely, if ever, in national law.

The only treaty that explicitly mentions academic freedom is the Charter of Fundamental Rights of the European Union, which, at Article 13, recites “The arts and scientific research shall be free of constraint. Academic freedom shall be respected”. Yet, the Charter does not define academic freedom and even a search through the *travaux préparatoires* of the Charter does not yield much insight (Coghlan & Steiert, 2020). Academic freedom is not included *per se* in the so-called International Bill of Rights (i.e. the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic. Social and Cultural Rights (ICESCR). Rather, it is read in a several rights contained in those instruments, such as the freedom of opinion and expression (UDHR, Art. 19; ICCPR, Art. 19), freedom of assembly (UDHR, Art. 20; ICCPR, Art. 21), the right to education (UDHR, Art. 26; ICESCR, Art. 13) or the right to science (UDHR, Art. 27; ICESCR, Art.15.3). It is, in sum, a composite human right, made of pieces of other rights applied in a specific context (i.e. higher education). It is, at the same time, both an individual and a collective right, a right of individuals (faculty, staff, students) and of institutions.

Lacking an authoritative definition in a binding legal instrument of academic freedom, some international organizations have tried to define it, with varying degrees of clarity. Amongst the most significant are the UN Committee on Economic, Social and Cultural Rights’ (UN CESCR) *General Comment 13 on the Right to Education* (Art. 13 of the ICESCR). There, the Committee noted, “... [a]cademic freedom includes the liberty of individuals to express freely opinions about the institution or system in which they work, to fulfil their functions without discrimination or fear of repression by the State or any other actor, to participate in professional or representative academic bodies, and to enjoy all the internationally recognized human rights applicable to other individuals in the same jurisdiction” (UN CESCR, 1999, para. 39). It also added: “The enjoyment of academic freedom requires the autonomy of institutions of higher education. Autonomy is that degree of self-governance necessary for effective decision-making by institutions of higher education in relation to their academic work, standards, management and related activities” ((UN CESCR, 1999, para. 40).

In 1997, the United Nations Educational, Scientific and Cultural Organization (UNESCO) adopted the *Recommendation concerning the Status of Higher-Education Teaching Personnel*, where it declared that “[h]igher-education teaching personnel are entitled to the maintaining of academic freedom, that is to say, 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” (UNESCO, 1997, para. 27).

More recently, in 2021, the Inter-American Commission on Human Rights (IACHR—along with its Special Rapporteurship for Freedom of Expression and its Special Rapporteurship on Economic, Social, Cultural, and Environmental Rights— issued the *Declaration of Inter-American Principles on Academic Freedom and University Autonomy*, whereby academic freedom “entails the right of every individual to seek, generate, and transmit knowledge, to form part of academic communities, and to conduct independent work to carry out scholarly activities of teaching, learning, training, investigation, discovery, transformation, debate, research, dissemination of information and ideas, and access to quality education freely and without fear of reprisals. In addition, academic freedom has a collective dimension, consisting of the right of society and its members to receive the information, knowledge, and opinions produced in the context of academic activity and to obtain access to the benefits and products of research and innovation” (IACHR, 2021, Principle I).

It is clear from these three attempts to define academic freedom that it is difficult to separate it from cognate concepts that are often found in international legal instruments or national constitutions, such as “freedom of science” or “freedom of scientific research”, and “autonomy of universities” or “autonomy of higher education” (i.e. institutional

autonomy). “Freedom of science” or “freedom of scientific research” are broader than, and conceptually distinguishable from, academic freedom (Romano & Boggio, 2024; Romano & Boggio, 2020). While the autonomy of higher education institutions is conceptually not a direct part of academic freedom, it is often considered strictly connected to academic freedom and a functional condition to its protection (Roberts Lyer, Saliba & Spannagel, 2022; Thorens, 2006).

2. The Academic Freedom in Constitutions dataset

A new dataset released in 2023, called *Academic Freedom in Constitutions* (AFC), is a major step forward towards bringing about some clarity about the diffusion of the concept of academic freedom and related concepts in constitutions (Spannagel, 2003; Spannagel, 2024). The AFC includes the constitutions of 203 States between 1789 to 2022¹. It tracks three types of constitutional provisions: those on “academic freedom”²; on “freedom of science”³, and on “university autonomy”⁴. Coding the concepts separately is methodologically sensible since the three do not overlap conceptually completely. Indeed, the principle of autonomy of higher education protects the institutions but not necessarily also its members. Not all science is done in academic institutions. Not everyone in academic institutions does science. It should be noted that, because the AFC maps constitutions throughout time and not just contemporary ones, and because many States, especially in Latin America, included in their constitutions provisions regarding “freedom of teaching” or “freedom of education” long before they included more specific guarantees relating to the higher education sector, the database tracks also provisions on “freedom of teaching” or “freedom of education”, even without a specified link to higher education, when none of the three main indicators of academic freedom are encountered⁵.

3. Historical trends in the recognition of academic freedom

The fact that the AFC dataset spans almost two and half centuries helps spotting historical trends that had so far been missed in literature. As it is well known, the first-ever academic freedom constitutional provision was one guaranteeing the freedom of science in the 1848 Constitution of the German Empire, which proclaimed: “Science and teaching are free” (*Die Wissenschaft und Lehre ist frei*) (German Constituent National Assembly, *Constitution of 28 March 1849*, Art. VI, para. 152). The philosophical roots of that provision have been traced far back in time to the late 1600s, during early Enlightenment movement, if not earlier (Classen, 1981). The *libertas philosophandi*, advocated by Baruch Spinoza and Samuel Pufendorf, demanded that the State guarantee free thinking, independent of ecclesiastical dogmas, and free exchange of opinions among scholars. Later, in the 1700s, three more German philosophers, Immanuel Kant, Wilhelm von Humboldt, and Frederick Hegel, further refined the idea (Starck, 2006; Zwirner, 1973). The 1849 Constitution of the German Empire was short-lived, lasting only about a year and half. Academic and scientific freedoms reappeared in the German constitution of 1919 (the “Weimar Constitution”) (Germany, *Constitution of the German Empire of 1919*, Art. 142). Its wording influenced many others, including Art. 16 of the Yugoslavian constitution of 1921

¹ The AFC dataset includes 203 sovereign States (the 193 current UN member States, plus Kosovo, Taiwan, and eight historic entities: Austria-Hungary, Czechoslovakia, the German Democratic Republic, Korea, Serbia and Montenegro, South Vietnam, South Yemen, Yugoslavia). Coding for each State starts with the year of the first constitution’s adoption. The dataset starts at 1789 because that is the date of the adoption of the U.S. constitution, the first modern constitution.

² This variable includes the exact phrase “academic freedom” as well as the Spanish expression “libertad de cátedra”, even though the two are not perfect synonyms, and related expressions such as “freedom of teaching” or “freedom of education”, when used in connection with higher education.

³ This variable includes the phrase “freedom of science” and other variants such as “freedom of research”, “freedom of scientific investigation”, “freedom of scientific creativity”, “freedom of higher education teaching”, “freedom of intellectual creation”, and the like.

⁴ This variable includes phrases such as “autonomy”, “self-governance”, “independence” of higher education institutions, or “institutions of science are free”, and the like.

⁵ This variable includes phrases like “freedom of learning”, “freedom of acquiring and imparting knowledge” and the like.

(McBain & Rogers, 1922) which proclaimed, “[I]earning and arts are free and enjoy the protection and support of the government.” Later, in 1963, the Constitution of Yugoslavia it was reformulated and its Art. 45 stated: “scientific and artistic creativity shall be unrestricted”, influencing several socialist-inspired constitutions across the world (Spannagel, 2024).

University autonomy as a constitutional norm first appeared after the First World War, almost simultaneously in Art. 100 of the 1917 Constitution of Uruguay, in Art. 77 of the 1919 Constitution of Finland, Art. 12 of the 1920 Constitution of Estonia, and Art. 109 of the 1921 Constitution of Georgia. However, the specific term “academic freedom” is comparatively rare in constitutional texts. In the AFC database, during the period 1789 to 2022, the constitutions of only 35 States are coded as containing provisions on “academic freedom” as such (Spannagel, 2023). Its Spanish version, “libertad de cátedra” (Beiter, et. al., 2016)⁶, was first enshrined in Art. 48 of Spain’s 1931 constitution. Latin American constitutions with similar provisions were likely inspired by that.

Academic freedom, understood in a broad sense, started to be more common in constitutions after the end of the Second World War (Spannagel, 2024). By 1950, one-third of constitutions in force included at least one of the three provision types traced by the AFC (Spannagel, 2024). The decolonization wave of the 1960s, with the ensuing emergence of dozens of new States, caused a drop in the overall occurrence of academic freedom provisions in constitutions (23% of the total in some years) (Spannagel, 2024). However, the vast majority of newly adopted constitutions after the end of the Cold War contained academic freedom provisions, bringing the global percentage to over 40% in the mid-1990s and to a bit over 50% today (Spannagel, 2024).

While during the period 1789 to 2022, the constitution of only 35 States contained provisions on “academic freedom” as such (Spannagel, 2023), 93 constitution included provisions on “freedom of science” (Spannagel, 2023), 51 provided for “university autonomy” (Spannagel, 2023), and 37 contained provisions on “freedom of teaching” or “freedom of education” (Spannagel, 2023). Of course, some constitutions included two or more of those at the same time. Thus, overall, at some point during the observed period, 116 States had at least an academic freedom provisions in their constitution (Spannagel, 2023). In 2022, 101 such provisions were still in place (Spannagel, 2023). While this is about, or even a bit more, than half States of the world and, therefore, might suggest that the practice is sufficiently generalized to meet the first prong of customary international law (a “general practice” of States), the occurrence of academic freedom provisions is still remarkably lower than the occurrence of many other constitutional rights (Goderis, Versteg, 2014), a consideration that should give some pause when trying to ascertain the second prong of customary international law (*opinio juris*).

4. From a quantitative to a qualitative analysis of academic freedom in Constitutions

Besides these interesting historical considerations, the AFC database allows mostly quantitative analysis. For a qualitative analysis, one needs to look past coding and, at a very minimum, consider the text of these academic freedom provisions⁷. This short article is certainly not the place for a comprehensive and sophisticated analysis of constitutional provisions regarding academic freedom. We will just limit ourselves to quoting the relevant provisions and make some initial observations. We will also provide article number and reference – something that the AFC does not – to assist further research.

⁶ “Libertad de cátedra” literally translates in English to “freedom of the academic chair”. In this sense, “libertad de cátedra” is a concept narrower than “academic freedom”.

⁷ A limitation of this approach that should be noted is that, given the large number of constitutions, to facilitate the search, it is necessary to do it in one single language (to wit, English). However, translations are always approximate and might erase linguistic subtleties that point to a different meaning. On the limitations of translations, see, in general, ECO, Umberto. *Mouse or Rat?: Translation as Negotiation*. Phoenix Literature, 2003.

Unless otherwise indicated, all texts of Constitutions in this article are found at Constitute Project, <https://www.constituteproject.org/>.

4.1 Recognition of Academic Freedom

In the Americas, academic freedom is mentioned in several constitutions, either verbatim, or as “freedom to teach”, “freedom of education” or equivalent expressions. For example, Art. 18 of the Constitution of Peru (“The State guarantees academic freedom and rejects intellectual intolerance”); Art. 29 of the Constitution of Ecuador (“The State shall guarantee the freedom to teach, academic freedom in higher education”); Art. 206 of the Constitution of Brazil (“Teaching shall be provided on the basis of the following principles: 2. freedom to learn, teach, research and express thoughts, art and knowledge;”); Art. 125 of the Constitution of Nicaragua (“Academic freedom is guaranteed....”); Art. 79 of the Constitution of Costa Rica (“The freedom of teaching is guaranteed.”, as well as its Art. 87 “The freedom of professorship is [a] fundamental principle of the university teaching”); Art. 27 of the Constitution of Colombia (“The State guarantees freedom of teaching ...”); Art. 67.7 of the Constitution of the Dominican Republic (“The State ... shall guarantee ... academic freedom”); Art. 32 of the Constitution of Haiti (“The State guarantees the right to education. Instruction is free (libre) at all the degrees...”); Art. 60, para. 4 of the Constitution of El Salvador (“Academic liberty (*cátedra*) is guaranteed”); Art. 155 of the Constitution of Honduras (“The State recognizes and protects freedom of investigation, of learning and of teaching”); Art. 92 of the Constitution of Panama (“Freedom of education is guaranteed,”); Art. 79 of the Constitution of Paraguay (“.... The freedom of teaching and that of chaired professorship [*cátedra*] is guaranteed.”); Art. 68 of the Constitution of Uruguay (“Freedom of education is guaranteed”); and Art. 71 of the Constitution of Guatemala (“The freedom of education and educational [*docente*] criteria is guaranteed) are some of the constitutional provisions in Latin America that recognize different forms of academic freedom, freedom to teach or freedom to education.

Some Latin American constitutions are more nuanced or qualify academic freedom. For instance, Art. 3.VII of the Mexican Constitution provides that “[u]niversities and other higher education institutions, upon which the law has conferred autonomy, shall have both the powers and the duty to govern themselves. They must subject themselves to the principles established in this article to educate, do research and promote culture, *respecting academic freedom*, researching freedom, freedom to apply exams and to discuss ideas. These institutions shall develop their academic plans; they shall establish the terms for admission, promotion and tenure of their academic personnel; and they shall manage their estate”. Art. 75.19 of the Constitution of Argentina does not speak of academic freedom *per se* but rather gives Congress the power to “.... guarantee the principles of free and equitable public education by the State and the autonomy and self-sufficiency of the National universities”. Art. 104 of the Constitution of Venezuela falls very short of declaring academic freedom, limiting itself to providing that “... [a]dmissions, promotion and continued enrollment in the education system shall be provided for by law, and shall be responsive to evaluation criteria based on merit, to the exclusion of any partisan or other nonacademic interference.”

In North Africa some constitutions explicitly protect academic freedom. For example, Art. 44 of the Constitution of Algeria (“Academic freedom and the freedom of scientific research shall be guaranteed ...”), and Art. 33 of the Constitution of Tunisia (“Academic freedoms and freedom of scientific research shall be guaranteed”) expressly recognize academic freedom.

In Sub-Saharan Africa, academic freedom is protected in Art. 33.1.c of the Constitution of Kenya (“Every person has the right to freedom of expression, which includes.... academic freedom and freedom of scientific research”); Art. 38.2.a of the Constitution of South Sudan (“The National Government shall ... guarantee academic freedom in institutions of higher education”); Art. 16.1.d of the Constitution of South Africa (“Everyone has the right to freedom of expression, which includes academic freedom ...”); Art. 25.1.b of the Constitution of The Gambia (“Every person shall have the right to ... freedom of thought, conscience and belief, which shall include academic freedom”); Art. 21.1.b of the Constitution of Ghana (“All persons shall have the right to ... freedom of thought, conscience and belief, which shall include academic freedom”); Art. 33.1.c of the Constitution of Kenya (“Every person has the right to freedom of expression, which includes ... academic freedom ...”); Art. 15 of the Constitution of Liberia (“Every person shall have the

right to freedom of expression ... The right ... includes ... academic freedom to receive and impart knowledge and information and the right of libraries to make such knowledge available."); Art. 33 of the Constitution of Malawi ("Every person has the right to freedom of conscience, religion, belief and thought, and to academic freedom."); Art. 21 of the Constitution of Namibia ("All persons shall have the right to ... freedom of thought, conscience and belief, which shall include academic freedom in institutions of higher learning"); Art. 25 of the Constitution of Sierra Leone ("Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purpose of this section the said freedom includes ... academic freedom in institutions of learning"); Art. 63 of the Constitution of Sudan ("The state guarantees ... academic research."); Art. 29 of the Constitution of Uganda ("Every person shall have the right to ... freedom of thought, conscience and belief which shall include academic freedom in institutions of learning"); and Art. 61 of the Constitution of Zimbabwe ("Every person has the right to freedom of expression, which includes ... academic freedom") also constitutionally recognize academic freedom.

Notably, only a few European constitutions protect academic freedom as such. Starting with Germany, the cradle of academic freedom, Art. 5.3 of the contemporary German constitution declares: "Arts and sciences, research and teaching shall be free."; Art. 16.1 of the Constitution of Greece ("Art and science, research and teaching shall be free and their development and promotion shall be an obligation of the State."); Art. 38.3 of the Constitution of Armenia ("The institutions of higher education shall have the right to ... academic and research freedom"); Art. 48 of the Constitution of Kosovo ("Academic freedom is guaranteed"); Art. 20 of the Constitution of Switzerland ("Freedom of research and teaching is guaranteed."); and Art. 20.1.c of the Constitution of Spain ("The following rights are recognized and protected ... the right to academic freedom") recognize academic freedom. While the constitution of the Czech Republic does not mention academic freedom, Art. 15.2 of its Constitution provides that "[t]he freedom of scholarly research and of artistic creation is guaranteed".

In Asia and the Pacific constitutional provisions protecting academic freedom are found in Art. 17.1.d of the Constitution of Fiji ("Every person has the right to freedom of speech, expression, thought, opinion and publication, which includes ... academic freedom ..."); Art. 23 of the Constitution of Japan ("Academic freedom is guaranteed"); Section 5.2 of the Constitution of The Philippines ("Academic freedom shall be enjoyed in all institutions of higher learning"); and Section 34 of the Constitution of Thailand ("Academic freedom shall be protected.").

Again, these were the constitutions that mention academic freedom, either verbatim, or in equivalent expressions, such as "freedom to teach" "freedom of education" and the like. However, there are several constitutions that while they do not mention academic freedom or freedom of teaching, they declare the freedom of science and scientific research. Again, it should be noted that in several constitutions, academic freedom and scientific freedom are found in the same provision, and some constitutional provisions include the trifecta: academic freedom, scientific freedom, and autonomy higher education institutions.

4.2 Recognition of Scientific Freedom

In the Americas, freedom of scientific research is guaranteed as such only in Art. 38.3 of the Constitution of Suriname ("The practice of science and technology shall be free"). Several other constitutions protect the "freedom of investigation", "freedom of research", "freedom of scientific creation" and the like. For example, Art. 155 of the Constitution of Honduras ("The State recognizes and protects freedom of investigation, of learning and of teaching"); Art. 32.f of the Constitution of Cuba ("Creative and investigative activity in science is free."); Art. 3.VII of the Constitution of Mexico ("Universities and other higher education institutions ... must ... do research and promote culture, respecting academic freedom, *researching freedom* ..."); Art. 5.IX of the Constitution of Brazil ("expression of intellectual, artistic, scientific, and communication activity is free, independent of any censorship or license"); Art. 2.8 of the Constitution of Peru ("Every person has the right ... to freedom of intellectual, artistic, technical, and scientific creation...."); Art. 125 of the Constitution of Nicaragua ("The State promotes and protects the free creation, research, and diffusion of the

sciences, technology, the arts and letters ..."); and Art. 71 of the Constitution of Colombia ("The search for knowledge and artistic expression are free to be pursued.") expressly recognize this freedom of investigation or research.

The constitutions of El Salvador and Ecuador are way more nuanced and although they indicate constitutional support for science, they fall way short of declaring scientific freedom. Art. 53 of the Constitution of El Salvador ("The State will propitiate research and scientific occupations.") and Art. 22 of the Constitution of Ecuador ("Persons have the right to develop their creative capacity, to the commendable and steady exercise of cultural and artistic activities, and to benefit from the protection of moral and heritage rights that pertain to them as a result of the scientific, literary or artistic productions of which they are the authors") have specific sections on science.

The constitutions of five North African States protect the freedom of scientific research. Art. 25 of the Constitution of Morocco ("The freedoms of creation, of publication and of presentation [exposition] in literary and artistic matters and of scientific and technical research[,] are guaranteed"); Art. 44 of the Constitution of Algeria ("Academic freedom and the freedom of scientific research shall be guaranteed ..."); Art. 33 of the Constitution of Tunisia ("Academic freedoms and freedom of scientific research shall be guaranteed"); Arts. 23 and 66 of the Constitution of Egypt ("The state grants the freedom of scientific research...", and "Freedom of scientific research is guaranteed"); and Art. 10 of the Constitution of Mauritania ("The State guarantees to all citizens the public and individual freedoms, notably... the freedom of intellectual, artistic, and scientific creation") do so.

In Sub-Saharan Africa, freedom of scientific research is protected in Art. 28 of the Constitution of São Tomé and Príncipe ("Intellectual, artistic and scientific creation are free"); Art. 53.1 of the Constitution of Cape Verde ("Intellectual, cultural, and scientific creation shall be free, as well as the spread of literary, artistic and scientific works"); Art. 28 of the Constitution of Burkina Faso ("The freedom of creation and [of] artistic, scientific and technical works, are protected by the law"); Art. 50.1 of the Constitution of Guinea Bissau ("Intellectual, artistic and scientific creations are free if not contradictory to the promotion of social progress"); Art. 46 of the Constitution of Democratic Republic of the Congo ("The right to culture, to freedom of intellectual and artistic creation, and that of scientific and technological research are guaranteed"); Arts 42.1, 43.1 and 43.2 of the Constitution of Angola ("Intellectual, artistic, political, scientific and communications activities shall be freely expressed, independently of any censorship or licence" and "[i]ntellectual, artistic and scientific creation shall not be restricted. [This] freedom shall comprise the right to invent, produce and publicise scientific, literary and artistic works ..."); Art. 33.1.c of the Constitution of Kenya ("Every person has the right to freedom of expression, which includes... freedom of scientific research"); Art. 61.1.b of the Constitution of Zimbabwe ("Every person has the right to freedom of expression, which includes ... freedom of ... scientific research and creativity"); Art. 38.2.a of the Constitution of South Sudan ("The National Government shall ... protect the freedom of scientific research ..."); Art. 16.1.d of the Constitution of South Africa ("Everyone has the right to freedom of expression, which includes freedom of scientific research"); Art. 94.1 of the Constitution of Mozambique ("All citizens shall have the right to freedom of scientific, technical, literary and artistic creativity."); Art. 17.3 of the Constitution of Somalia ("Every person has the right to freely express their artistic creativity, knowledge, and information gathered through research."); and Art. 63 of the Constitution of Sudan ("The state guarantees the ... freedom of ... academic research."). Lastly, Art. 9.3 of Eritrea's Constitution is more nuanced committing the State only to "promote the development of the arts, science, technology and sports and [to] create an enabling environment for individuals to work in an atmosphere of freedom and to manifest their creativity and innovation.").

In the Middle East, three constitutions are notable: Art. 24.3 of the Constitution of Palestine ("The law shall guarantee the independence of universities, institutes of higher education, and scientific research centres in a manner that guarantees the freedom of scientific research ..."); Art. 15 of the Constitution of Jordan ("The State shall guarantee the freedom of scientific research ..."); and Art. 23 of the Constitution of Bahrain ("Freedom of opinion and scientific research is guaranteed."). In addition, Art. 36 of the Constitution of Kuwait ("Freedom of opinion and scientific research is guaranteed."); Art. 47 of the Constitution of Qatar ("Freedom of opinion and scientific research are guaranteed"); Art. 31 of the Constitution of Syria: ("The state shall support scientific research and all its requirements,

ensure the freedom of scientific, literary, artistic and cultural creativity and provide the necessary means for that end.); Art. 27 of the Constitution of Yemen ("The state shall guarantee freedom of scientific research and achievements in the fields of literature, arts and culture...") recognize scientific freedom.

While few European constitutions protect academic freedom as such, about half of European States have constitutions declaring the freedom of science. As we mentioned earlier, Art. 5.3 of the German constitution declares: "Arts and sciences, research and teaching shall be free". Art. 16.1 of the Greek Constitution declares that "[a]rt and science, research and teaching shall be free and their development and promotion shall be an obligation of the State", while Art. 27 of the Turkish constitution announces: "Everyone has the right to study and teach, express, and disseminate science and the arts, and to carry out research in these fields freely."

Several more declare "scientific freedom", using various expressions, and often associating science with art or other cultural expressions (Romano & Boggio, 2014). They include Art. 42 of the Constitution of Portugal ("Intellectual, artistic and scientific creation shall not be restricted. This freedom shall comprise the right to invent, produce and publicise scientific, literary and artistic works); Art. 33 of the Constitution of Italy ("The Republic guarantees the freedom of the arts and sciences, which may be freely taught."); Art. 81.c of the Constitution of Austria ("The public universities are places of free scientific research, tuition and revelation of the arts."); Art. 73 of the Constitution of Poland ("The freedom of artistic creation and scientific research ... shall be ensured to everyone."); Art. 17 of the Constitution of Iceland ("The freedom of science, higher learning and the arts shall be ensured by law."); Section 16 of the Constitution of Finland ("The freedom of science, the arts and higher education is guaranteed."); Art. 38 of the Constitution of Lithuania ("Culture, science and research, and teaching shall be free."); Art. 38 of the Constitution of Estonia ("Science and art and their instruction are free"); Art. 113 of the Constitution of Latvia ("The State shall recognise the freedom of scientific research, artistic and other creative activity..."); Art. 59 of the Constitution of Slovenia ("The freedom of scientific and artistic endeavour shall be guaranteed"); Art. 68 of the Constitution of Croatia ("Freedom of scientific, cultural and artistic creativity shall be guaranteed."); Art. 43.1 of the Constitution of Slovakia ("Freedom of scientific research and in art is guaranteed."); Art. 47 of the Constitution of North Macedonia ("The freedom of scholarly, artistic and other forms of creative work is guaranteed"); Art. 73 of the Constitution of Serbia ("Scientific and artistic creativity shall be unrestricted"); Art. 48 of the Constitution of Kosovo ("The freedom of artistic and scientific creativity is guaranteed."); Art. 57 of the Constitution of Albania ("Freedom of artistic creation and scientific research ... are guaranteed for all"); Art. 44.1 of the Constitution of Russia ("Everyone shall be guaranteed the freedom of literary, artistic, scientific, technical and other types of creative activity and teaching"); Art. 54 of the Constitution of Ukraine ("Citizens are guaranteed the freedom of literary, artistic, scientific and technical creativity..."); Art. 43 of the Constitution of Armenia ("Everyone shall have the freedom of literary, fine arts, scientific, and technical creation"); Art. 33 of the Constitution of Moldova ("The freedom of the artistic and scientific creation shall be guaranteed. The creation whatsoever shall not be subject to censorship"); Art. 20 of the Constitution of Switzerland ("Freedom of research and teaching is guaranteed."); and Art. 23 of the Constitution of Bulgaria ("The State shall establish conditions conducive to the free development of science, education and the arts, and shall assist that development....). Finally, the Hungarian constitution deserves special mention as it addresses an issue at the core of the scientific enterprise: the self-regulatory power of science (Romano & Boggio, 2024), as stated in Art. X.2 of the Constitution of Hungary: "The State shall have no right to decide on questions of scientific truth; only scientists shall have the right to evaluate scientific research."

In Asia and the Pacific constitutional provisions protecting scientific freedom are comparatively rarer than in other regions of the globe. Amongst the few constitutions that protect scientific freedom include Art. 49.1 of the Constitution of Kyrgyzstan's ("Everyone shall be guaranteed freedom of activity in literature, art, science, technical and other areas as well as teaching"); Art. 45 of the Constitution of Laos ("Lao citizens have the right and freedom to conduct research and apply scientific technologies and innovation ... "); Art. 366.c of the Constitution of Myanmar ("Every citizen ... have the right to conduct scientific research explore science ... "); Art. 47 of the Constitution of China ("Citizens of the People's Republic of China have the freedom to engage in scientific research"); Art. 17.1. d of the

Constitution of Fiji ("Every person has the right to freedom of speech, expression, thought, opinion and publication, which includes ... freedom of scientific research"); Art. 40 of the Constitution of Vietnam ("Everyone has the right to carry out scientific and industrial research ... and enjoy benefits from those activities."); Art. 42 of the Constitution of Uzbekistan ("Everyone shall be guaranteed the freedom of research and engineering work"); and Art. 56 of the Constitution of Turkmenistan ("Citizens of Turkmenistan shall have the right to participate in cultural life, to freedom of artistic, scientific and technical creativity.").

Certain Asian constitutions fall way short of declaring "scientific freedom", such as Art. 51.II of the Constitution of Azerbaijan ("The State ensures the realization of belles-lettres, scientific-technical and other forms of creative work."); Art. 31.5 of the Constitution of Indonesia ("The government shall advance science and technology with the highest respect for religious values and national unity for the advancement of civilisation and prosperity of humankind."); and Art. 22.1 of the Constitution of South Korea ("All citizens shall enjoy freedom of learning and the arts."). Unsurprisingly, Art. 51 of the Constitution of North Korea does not guarantee scientific freedom. To the contrary, it is an example of extreme dirigisme applied to science. It provides that "[t]he State shall elaborate a correct plan to develop science and technology, set up a strict discipline to implement it, and strengthen creative cooperation among scientists, technicians and producers."

4.3 Recognition of Autonomy of Higher Education Institutions

As it was said earlier, while the autonomy of higher education institutions is conceptually not a direct part of academic freedom, it is often considered inextricably linked to academic freedom. Before reviewing the constitution that declare the autonomy of higher education institutions it is necessary to point out that some constitutions make a distinction between public and private institutions, and while they might protect the autonomy of the former, they do not necessarily do so for the latter.

Thus, in the Americas, Art. 75.19 of the Constitution of Argentina recognizes "... the autonomy and self-sufficiency of the National universities". The autonomy of higher education institutions is declared also in Art. 19.11 of the Constitution of Chile ("Freedom of teaching includes the right to open, organize and maintain educational institutions."); Art. 69 of the Constitution of Colombia ("The autonomy of universities is guaranteed. The universities shall be able to administer and govern themselves through their own by-laws, in accordance with the applicable statute."); Art. 67.8 of the Constitution of Dominican Republic ("The State ... shall guarantee university autonomy ..."; as well as its Art. 67.7: "The universities shall choose their leadership and shall be regulated by their own statutes, in accordance with the law"); and Art. 79 of the Constitution of Paraguay "... The universities are autonomous. They will establish their statutes and forms of government and they will elaborate their study plans in accordance with the national educational policy and the national development plans...". Art.125 of the Constitution of Nicaragua specifies that "professors, students, and administrative employees shall participate in the university management."

Institutional autonomy entails budgetary, financial, and patrimonial guarantees, and, sometimes, also tax exemptions. Thus, Art. 207 of the Brazilian Constitution proclaims: "Universities enjoy autonomy with respect to didactic, scientific and administrative matters, as well as autonomy in financial and patrimonial management ...". Art. 3.VII of the Mexican constitution provides that "Universities and other higher education institutions, upon which the law has conferred autonomy, shall have both the powers and the duty to govern themselves. These institutions shall develop their academic plans; they shall establish the terms for admission, promotion and tenure of their academic personnel; and they shall manage their estate". Under Art. 355 of Ecuador's Constitution, "[t]he State shall recognize the academic, administrative, financial and organizational autonomy of universities and polytechnic schools Universities and polytechnic schools are recognized the right to autonomy, exercised and understood as matter of solidarity and responsibility. This autonomy guarantees ... self-governance and management in conformity with the principles of rotation of power, transparency, and political rights ... The Executive Branch shall not be able to deprive them of their

revenues or budget allocations, or delay transfers to any institution of the system, or shut them down or restructure them either totally or partially.”

The Constitutions of Honduras and Nicaragua are notable for the fact that they specify a minimum State budget allocation (6 percent) that must be allocated to the National University. Art. 160 of the Constitution of Honduras (“The National Autonomous University of Honduras is an autonomous institution of the State, with juridical personality. It enjoys the exclusive privilege of organizing, directing, and developing higher and professional education. The law and the bylaws of the University shall determine its organization, functioning, and responsibilities.”), while Art. 161 determines the following: “The State shall contribute to the maintenance, development and enlargement of the National Autonomous University of Honduras, with a required annual appropriation of not less than six percent of the budget of net revenues of the Republic, the amounts of loans and donations excluded. The National Autonomous University is exempt from any form of taxes or contributions.”). Art. 125 o of the Constitution of Nicaragua states the following: “The universities and superior technical education centers enjoy academic, financial, organic, and administrative autonomy, in accordance with the law. They shall be exempt from any class of taxes and fiscal contributions, regional and municipal. Their assets and revenues may not be the object of intervention, expropriation or seizure, except when the relevant obligation originates in civilian, business, or labor contracts. Universities and superior technical education centers which, according to law, must be State-funded, shall receive an annual allocation of six percent of the General Budget of the Republic, which shall be distributed according to law. The State may allocate additional contributions to cover extraordinary expenditures of these universities and superior technical education centers.”.

The Constitutions of El Salvador and Panama assign to the state the duty to fund the University of El Salvador but does not specify a percentage of the national budget that should be allocated to it. Art. 61 of the Constitution of El Salvador (“... The University of El Salvador and the others of the State shall enjoy autonomy in teaching, administrative and economic aspects. The funds (*partidas*) destined to the sustainment of the state universities and those necessary to assure and increase its patrimony shall be consigned annually in the State Budget. These institutions shall be subject, in agreement with the law, to the inspection of the corresponding state organs.”); Art. 103 of the Constitution of Panama (“The Official University of the Republic is autonomous. Juridical status, its own patrimony, and the right to administer it are hereby recognized. It is empowered to organize its own study programs, and to appoint and dismiss personnel in the manner determined by law.” and its Art. 104 “In order that the economic autonomy of the University be made effective, the State shall provide it with what is essential for its establishment, operation, and future development, as well as [an] endowment ..., and the necessary resources to increase it.”), include specific provisions on this matter.

Peru’s constitution includes provision regarding taxation. According to its Art. 18, “Every university is autonomous in its regulations, governance, and academic, administrative and financial regimes. Universities are governed by their own statutes within the framework of the Constitution and the law.”, while its Art. 19 establishes: “Universities, colleges, and all other educational institutions ... enjoy exemption from all direct and indirect taxes levied on assets, activities, and services concerning their educational and cultural purposes. On the subject of import tariffs, a special arrangement for allocation of taxes may be established for specific assets. Scholarships and grants for educational purposes shall be exempt from taxes and enjoy tax benefits in the manner and within the limits prescribed by law. For private educational institutions that generate revenues legally defined as profits, the income tax may be applied.”

Lastly, the constitutions of Ecuador and Venezuela stand out for declaring the inviolability of university campuses. Under Art. 355 of Ecuador’s Constitution, university premises “... are inviolable and they cannot be broken into and searched except in those cases and terms applicable to the domicile of a person. The guarantee of internal law and order shall be the area of competence and responsibility of their authorities. When protection of the forces of law and order is required, the supreme authority of the institution shall request the relevant assistance.”, while Art. 109 of

Venezuela's Constitution contains similar guarantees: "The State shall recognize the autonomy of universities as a principle Autonomous universities shall adopt their own rules for their governance and operation and the efficient management of their property, under such control and vigilance as may be established by law to this end. Autonomy of universities is established in the planning, organization, preparation and updating of research, teaching and extension programs. The inviolability of the university campus is established. Experimental national universities shall attain their autonomy in accordance with law."

Several European constitutions declare the autonomy of higher education institutions, without particular restrictions or qualifications other than saying that their autonomy is regulated by law. These include Art. 38.3 of the Constitution of Armenia ("The institutions of higher education shall ... have the right to self-governance ... "); Art. 27 of the Constitution of Georgia ("... the autonomy of higher educational institutions shall be guaranteed"); Art. 57.7 of the Constitution of Albania ("The autonomy ... of higher education institutions are guaranteed by law."); Art. 53.4 of the Constitution of Bulgaria ("Higher educational establishments shall enjoy academic autonomy."); Art. 67 of the Constitution of Croatia ("The autonomy of universities shall be guaranteed. Universities shall independently decide on their organization and work in conformity with law."); Art. 76 of the Constitution of Montenegro ("The autonomy of universities, higher education and scientific institutions shall be guaranteed"); Art. 27.3 of the Constitution of Georgia "... the autonomy of higher educational institutions shall be guaranteed"; Art. 35.6 of the Constitution of Moldova ("Higher education institutions shall enjoy the right to autonomy"); Art. 40 of the Constitution of Lithuania ("... Schools of higher education shall be granted autonomy."); Art. 38 of the Constitution of Estonia "Universities and research institutions are autonomous"; Art. 32.6 of the Constitution of Romania "The autonomy of universities is guaranteed."; Art. 72 of the Constitution of Serbia "Autonomy of universities, faculties and scientific institutions shall be guaranteed. Universities, faculties and scientific institutions shall decide freely on their organization ..."; Section 27.10 of the Constitution of Spain "The autonomy of universities is recognized"; Art. 63.a of the Constitution of Switzerland ("The Confederation and the Cantons are jointly responsible for the coordination and guarantee of quality in Swiss higher education. In fulfilling this responsibility, they shall take account of the autonomy of the universities and the various bodies responsible for them and ensure the equal treatment of institutions with the same functions."); Art. 46 of the Constitution of North Macedonia ("The autonomy of universities is guaranteed."); Art. 70.5 of the Constitution of Poland ("The autonomy of the institutions of higher education shall be ensured in accordance with principles specified by statute."); Art. 33 of the Constitution of Italy ("... Higher education institutions, universities and academies, have the right to establish their own regulations within the limits laid down by the law."); Art. 76.2 of the Constitution of Portugal ("... universities shall autonomously draw up their own by-laws and shall enjoy scientific, pedagogical, administrative and financial autonomy."); Art. 58 of the Constitution of Slovenia "State universities and state institutions of higher education shall be autonomous. The manner of their financing shall be regulated by law."; and Art. 16.5 of the Constitution of Greece "Education at university level shall be provided exclusively by institutions which are fully self-governed public law legal persons. These institutions shall operate under the supervision of the State and are entitled to financial assistance from it; they shall operate on the basis of statutorily enacted by-laws.".

Other constitutions limit autonomy to a greater degree. Thus, for instance, Art. X.3 of the Constitution of Hungary provides for autonomy of higher education institutions when it comes to "methods of research and teaching", but it leaves it to the government to "lay down the rules governing the management of public higher education institutions and [to] supervise their management." The constitution of Turkey is dirigiste to a high degree, so much that it is possible to argue that institutions of higher education are not autonomous in Turkey. Despite the fact that Art. 130 of the Turkish Constitution provides for "universities comprising several units and having scientific autonomy and public legal personality". It does not leave them free to pursue knowledge but instead puts their activities to the service of "... training manpower to meet the needs of the nation and the country, ... to educate at different levels ... , to conduct research, to issue publications, to act as consultants, and to serve the country and humanity."

In this line, Art. 131 of the Turkish Constitution provides for the creation of a Council of Higher Education to "... plan, organize, administer, and supervise education provided by institutions of higher education, to orient teaching activities, education and scientific research, to ensure the establishment and development of these institutions in conformity with the objectives and principles set forth by law, to ensure the effective use of the resources allotted to the universities, and to plan for the training of the teaching staff". This article also states that the "Council of Higher Education is composed of members appointed by the President of the Republic from among candidates who are nominated by universities, and in accordance with the numbers, qualifications and election procedures prescribed by law, priority being given to those who have served successfully as faculty members or university presidents, and of members directly appointed by the President of the Republic." Finally, its Art. 130 determines that university presidents are "elected and appointed by the President of the Republic, and faculty deans by the Council of Higher Education, in accordance with the procedures and provisions of the law. The administrative and supervisory organs of the universities and the teaching staff may not for any reason whatsoever be removed from their office by authorities other than those of the competent organs of the universities or by the Council of Higher Education". "The budgets drawn up by universities, after being examined and approved by the Council of Higher Education [are] submitted to the Ministry of National Education and shall be put into effect and supervised in conformity with the principles applied to central government budget."

The Turkish Constitution lists in detail several aspects of the functioning of higher education institutions that are to be "regulated by law", including, as per its Art. 130, "[t]he establishment of institutions of higher education, their organs, their functioning and elections, their duties, authorities and responsibilities, the procedures to be followed by the state in the exercise of the right to supervise and inspect the universities, the duties of the teaching staff, their titles, appointments, promotions and retirement, the training of the teaching staff, the relations of the universities and the teaching staff with public institutions and other organizations, the level and duration of education, admission of students into institutions of higher education, attendance requirements and fees, principles relating to assistance to be provided by the State, disciplinary and penalty matters, financial affairs, personnel rights, rules to be abided by the teaching staff, the assignment of the teaching staff in accordance with inter-university requirements, the pursuance of training and education in freedom and under guarantee and in accordance with the requirements of contemporary science and technology, and the use of financial resources provided by the State to the Council of Higher Education and the universities ...".

The constitution of Greece and Portugal stand out for containing provisions regarding the participation of students and other stakeholders in university administration and education policy. Art. 16.5 of the Constitution of Greece ("... A special law shall define all matters pertaining to student associations and the participation of students therein."); and Art. 77 of the Constitution of Portugal ("Teachers and students shall possess the right to take part in the democratic management of schools, as laid down by law. The law shall regulate the forms in which teachers', students' and parents' associations, communities and scientific institutions participate in drawing up the education policy."), include references to this form of participation.

Only a few African and Asian constitutions declare autonomy of higher education institutions. These include Arts. 21, 23 and 66 of the Constitution of Egypt ("The state guarantees the independence of universities, scientific and linguistic academies ..."); Art. 63 of the Constitution of Sudan ("The state guarantees the independence of universities and academic research centers ..."); Art. 24.3 of the Constitution of Palestine ("The law shall guarantee the independence of universities, institutes of higher education, and scientific research centres in a manner that guarantees the freedom of scientific research as well as literary, artistic and cultural creativity"); Art. 95.I.14 of the Constitution of Madagascar ("... [t]he law establishes the rules concerning... the status and the regime of autonomy of the Universities, as well as the status of the teachers of superior education"); Art. 114.2 of the Constitution of Mozambique ("Public institutions of higher education shall ... have legal personality and enjoy scientific, teaching, financial and administrative autonomy ..."); and Art. 31.4 of the Constitution of South Korea ("Independence, professionalism and political impartiality of education and the autonomy of institutions of higher learning shall be guaranteed as prescribed by law").

5. Limitations to academic freedom in constitutions

Academic freedom and most freedoms and rights associated with it are not absolute but can be limited⁸. The question of the legality of limitations needs to be examined both from the point of view of any given national legal order and from the point of view of international law, since the two do not necessarily coincide.

As far as domestic law is concerned, unsurprisingly some constitutions subordinate the exercise of academic freedom and cognate rights and freedoms to the respect of the constitution. Unsurprisingly because unless academic freedom is given a higher rank within the constitution, then it is only logical that it must exercise consistently with other constitutional norms and values. Thus, for instance, Art. 5.3 of the German constitution declares: “The freedom of teaching shall not release any person from allegiance to the constitution”⁹. Likewise, Art. 16.1 of the Greek Constitution provides that “Academic freedom and freedom of teaching shall not exempt anyone from his duty of allegiance to the Constitution.”, and, according to Art. 27 of the Constitution of Yemen, “The State shall guarantee freedom of scientific research and achievements in the fields of literature, arts and culture, which conform with the spirit and objectives of the Constitution.”).

Many more declare that the exercise of academic freedom and cognate rights and freedoms can be limited by law. Examples in Europe include Art. 38.3 of the Constitution of Armenia (“The institutions of higher education shall, within the framework stipulated by law, have the right to self-governance ... academic and research freedom”); Art. 72 of the Constitution of Serbia (“Autonomy of universities, faculties and scientific institutions shall be guaranteed. Universities, faculties and scientific institutions shall decide freely on their organization and work in accordance with the law”); Section 27.10 of the Constitution of Spain (“The autonomy of universities is recognized, under the terms established by the law.”); Art. 16.5 of the Constitution of Greece (“Education at university level shall be provided exclusively by institutions which are fully self-governed public law legal persons. These institutions ... shall operate on the basis of statutorily enacted by-laws.”); Art. 46 of the Constitution of North Macedonia (“... The conditions of establishment, performance and termination of the activities of a university are regulated by law.”); Art. 70.5 of the Constitution of Poland (“The autonomy of the institutions of higher education shall be ensured in accordance with principles specified by statute.”); Art. 33 of the Constitution of Italy (“... Higher education institutions, universities and academies, have the right to establish their own regulations within the limits laid down by the law.”); and Art. 38 of the Constitution of Estonia (“Universities and research institutions are autonomous within the restrictions prescribed by law.”).

Examples from other regions include Art. 45 of the Constitution of Laos (“Lao citizens have the right and freedom to conduct research and apply scientific technologies and innovation which are not contrary to the laws”); Art. 38.2.a of the Constitution of South Sudan (“... freedom of scientific research ... shall be regulated by law”); Art. 36 of the Constitution of Kuwait (“Freedom of opinion and scientific research is guaranteed. Subject to the conditions and stipulations specified by Law, every person shall have the right to express his opinion by speaking or writing or otherwise.”); Art. 47 of the Constitution of Qatar: “Freedom of opinion and scientific research are guaranteed, according to conditions and circumstances laid down by the law.”; Art. 44 of the Constitution of Algeria (“Academic freedom and the freedom of scientific research shall be guaranteed and practised within the framework of the law”); Art. 23 of the Constitution of Bahrain (“Freedom of opinion and scientific research is guaranteed. Everyone has the right to express his opinion and publish it by word of mouth, in writing or otherwise under the rules and conditions laid down by law ...”); Art. 15 of the Constitution of Jordan (“The State shall guarantee the freedom of scientific research and literary, technical, cultural and sports excellence provided that such does not violate the provisions of the law ...”); and Art. 46 of the Constitution of Democratic Republic of the Congo (“The right to culture, to freedom of intellectual and artistic

⁸ The exception being the freedom of opinion, which is absolute. Human Rights Committee, General Comment 34 (Article 19: Freedoms of opinion and expression), 12 Sept 2011, CCPR/C/GC/34, paras. 5 and 9.

⁹ It is notable that, while the 1849 Constitution of the German Empire did not limit academic freedom to observance of the Constitution, the 1949 Basic Law of the Federal Republic of Germany does so.

creation, and that of scientific and technological research are guaranteed, under reserve of respect for the law ..."). The provisions of the constitutions of Haiti and Myanmar that make the exercise of academic freedom subject to "control of the State" in Art. 32 of the Constitution of Haiti or consistent with the State "educational policy" in Art. 366.c of the Constitution of Myanmar have the same effect as insofar as the State exercised control over academic freedom through laws and its educational policies are set in law.

More problematic is the case of Constitutions that add to the requirement of the observance of the constitution and/or the law other criteria, such as respect for public order¹⁰, morality¹¹, religious values¹², ethical parameters¹³, good customs¹⁴, national security¹⁵, social responsibility¹⁶, or individual responsibility¹⁷. These vague criteria, if broadly interpreted, could sap the principles of academic freedom, scientific freedom or autonomy of higher education institutions of any practical value.

As to the compatibility with international law of constitutional limitations to academic freedom and cognate concepts, the question is way too complex to be properly addressed here. Suffice to say that most freedoms and entitlements deriving from the right to academic freedom and cognate concepts are not absolute but can be limited¹⁸. Yet, limitations are lawful and justifiable as a matter of international law only if they meet certain conditions. Some of these are written in the treaties that codify human rights (e.g. non-discrimination, legality, legitimacy, and compatibility) others stem from international customs or are general principles of law (e.g. generality, publicity, prospectively, intelligibility, consistency, practicability, stability, congruence, necessity and proportionality) (Fuller, 1964; Finnis, 1980; Rawls, 1999; Raz, 1979; Bingham, 2010).

The ICESCR, at Article 4, provides that "The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society". Thus, the components of academic freedom that are codified to the ICESCR (i.e. the right to education and the right to science) can be limited but only "in so far as this may be compatible with the nature of these rights and solely for the purpose of

¹⁰ Jordan, Constitution of 1952 (last amend. 2014), Art. 15 ("The State shall guarantee the freedom of scientific research and literary, technical, cultural and sports excellence provided that such does not violate the provisions of the law or public order and morality"); Panama, Constitution of 1972 (rev. 2004), Art. 105 ("Freedom of teaching is recognized subject to no other limitations than those that for reasons of public order may be established in the University charter."); Chile, Constitution of 1980 (rev. 2021), Art. 19.11 ("Freedom of teaching includes the right to open, organize and maintain educational institutions. The teaching freedom has no limitations but those imposed by morals, good customs, public order and national security."); Democratic Republic of the Congo, Constitution of 2006 (last amend. 2011), Art. 46 ("The right to culture, to freedom of intellectual and artistic creation, and that of scientific and technological research are guaranteed, under reserve of respect for the law, for public order and for morality").

¹¹ Jordan, Constitution of 1952 (last amend. 2014), Art. 15; Chile, Constitution of 1980 (rev. 2021), Art. 19.11; Democratic Republic of the Congo, Constitution of 2006 (last amend. 2011), Art. 46; Thailand 2017, Sect. 34, second para ("Academic freedom shall be protected. However, the exercise of such freedom shall not be contrary to the duties of the Thai people or good morals").

¹² Bahrain, Constitution of 2002, Art. 23 ("Freedom of opinion and scientific research is guaranteed. Everyone has the right to express his opinion and publish it by word of mouth, in writing or otherwise under the rules and conditions laid down by law, provided that the fundamental beliefs of Islamic doctrine are not infringed ...").

¹³ South Sudan, Constitution of 2011 (last amend. 2015), Art. 38.2.a. ("The National Government shall ... protect the freedom of scientific research within the ethical parameters of research ...");¹³

¹⁴ Chile, Constitution of 1980 (rev. 2021), Art. 19.11.

¹⁵ Bahrain, Constitution of 2002, Art. 23 ("Freedom of opinion and scientific research is guaranteed. Everyone has the right to express his opinion and publish it by word of mouth, in writing or otherwise under the rules and conditions laid down by law, provided that ... the unity of the people is not prejudiced, and discord or sectarianism is not aroused"); Chile, Constitution of 1980 (rev. 2021), Art. 19.11; Turkey, Constitution of 1982 (rev. 2017), Art. 130 ("...Universities, members of the teaching staff and their assistants may freely engage in all kinds of scientific research and publication. However, this shall not include the liberty to engage in activities against the existence and independence of the State, and against the integrity and indivisibility of the nation and the country...").

¹⁶ Ecuador, Constitution of 2008 (rev. 2021), Art. 355 ("Autonomy does not exonerate the system's institutions from ... social responsibility, accountability and participation in national planning."); Thailand, Constitution of 2017, Sect. 34, second para ("Academic freedom shall be protected. However, the exercise of such freedom shall not ... obstruct the different views of another person.").

¹⁷ Liberia, Constitution of 1986, Art. 15 ("Every person shall have the right to freedom of expression, being fully responsible for the abuse thereof. ... The right ... includes ... academic freedom to receive and impart knowledge and information and the right of libraries to make such knowledge available.").

¹⁸ Freedom of expression, freedom of assembly, the right to education or the right to science can be limited. However, freedom of opinion is absolute.

promoting the general welfare in a democratic society". The ICCPR and the UDHR lack a similar provision but, like the ICESCR, they both caution that "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant" (ICESCR, Art. 5.1; ICCPR, Art. 5.1. See also UDHR, Art. 30). Moreover, certain rights have specific limitations. For instance, under Article 19.3 of the ICCPR, the freedom of expression "carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals." Similarly, freedom of assembly can be limited "in conformity with the law" and "when necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others" (ICCP, Art. 21).

6. Conclusions

As it was explained in the introduction, two elements are necessary to determine the existence of a norm of customary international law: a general practice (*diuturnitas*) and the acceptance of this practice as law (*opinio juris*). As to the *diuturnitas*, to establish the existence of a customary international rule, the practice must neither necessarily include all States, nor must it be completely uniform (Treves, 2006, para. 35). However, it must be sufficiently widespread and include States representing the main legal, economic, and political orientations and geographical areas (Treves, 2006, para. 35). The quantitative survey made possible through the AFC database tells that "academic freedom" and its related concepts are to be found in the constitution of about, or even a bit more, than half States of the world (101), in all continents and across the main legal, economic, and political orientations. Moreover, it should be considered that the constitutions of common law countries tend to be thin and focus mostly on core, first-generation, rights and freedom, and to neglect second generation economic, social, and cultural rights. Academic freedom and its related concepts are not codified in the constitution of the U.S., Canada, Australia, India and many more common law countries even though those States have a long tradition of respect of academic freedom and often a substantial constitutional jurisprudence on point. That being said, academic freedom provisions appear more seldom in constitutions than many other constitutional rights (Goderis & Versteeg, 2014). All in all, this account of constitutional provisions is helpful but certainly not dispositive to determine whether the practice is sufficiently generalized.

As to the *opinio juris*, the fact that many States have incorporated academic freedom and its related concepts in their constitution certainly indicates that they deem it to be sufficiently important to warrant constitutional guarantee. The fact that the constitution of a bit less than half of the States of the world is silent on the matter does not necessarily mean those States are opposed to the concept. Absent explicit opposition, it can actually be read as acquiescence and, therefore, weight in favor of a finding of *opinio juris*, and explicit opposition to the concept of academic freedom is very rare.

Of course, an analysis of academic freedom constitutional provisions – even one that is not as cursory as the present one – cannot *per se* be dispositive of whether academic freedom has attained customary international law status. It must be complemented by a deeper and more robust research, one that takes into account constitutional jurisprudence, implementing legislation, limitations, in the constitution itself and in laws, and, ultimately, to what extent States that have given constitutional dignity to academic freedom actually practice it, a consideration that could eventually prove to be damning. However, it does add a piece to the puzzle.

References

ALBANIA. **Constitution of 1998** (amended 2012).

ALGERIA. **Constitution of 1996** (amended 2016).

ANGOLA. **Constitution of 2010**.

ARGENTINA. **Constitution of 1853** (reinst. 1983; rev. 1994).

ARMENIA. **Constitution of 1995** (rev. 2015).

AUSTRIA. **Constitution of 1920** (reinst. 1945; amended 2013).

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