



Mattias Kumm

**Academic Freedom in Liberal Constitutional Democracies. Justifications, Limits, Tensions, and Contestations**

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# Academic Freedom in Liberal Constitutional Democracies

## Justifications, Limits, Tensions, and Contestations

Mattias Kumm

### ABSTRACT

The article first describes the conditions under which issues relating to academic freedom have become a central focus of contestation. It then describes the moral point of the right to academic freedom as part of the organised practices of individual and collective self-government, contrasting it to the more limited role academic freedom tends to play in authoritarian states. The final part highlights how to think about the limits of freedom of speech by drawing out implications for some contemporary challenges.

### 1 INTRODUCTION

The boundaries of academic freedom have, across the world of liberal constitutional democracies, become a central theme of public debates. The issues and pressures come from a number of directions: On the one hand, there is the issue of de-platforming speakers, stifling debate, or disciplining professors in the name of identity politics and wokism on the left. On the other, there is the threat to cut funding or abolish courses or areas of study – such as gender studies or critical race theory – deemed subversive of traditional or patriotic values on the right (Kovács/ Spannagel forthcoming). Furthermore, there are pervasive threats to subject the academic world to rules connected to the commodification of research and higher education. These include bureaucratic rules and accountability structures that unduly authorise external managerial control of the academic enterprise, rules that reduce professors and researchers to service providers or workers, students to consumers, and

academic degrees to a marketable commodity linked to its credentialing function in labour markets.

Contemporary debates are not just a reflection of the threats that academic freedom is facing. These debates are also the manifestation of a relatively new sensibility that academic freedom is an important right deeply connected to liberal constitutional democracy, one that requires adequate institutionalisation and needs to be defended. Or, to put it another way, what goes on in the academy or institutions of higher learning and the rights and obligations researchers, teachers, and students have in that setting has become an issue of contestation, in part because it is recognised to be of general importance for liberal constitutional democracy to flourish. It is not regarded as merely a peripheral issue of concern to a small class of persons and their special interests who happen to be interested in research and affiliated with the academy. This broad recognition of academia's central role within a democratic society is a relatively new phenomenon. Likewise, whereas other related rights, such as freedom of speech or freedom of the press, have long been subjected to sustained public attention and debate, this has not been the case with academic freedom until recently. Notwithstanding its current flourishing (Cole 2017; Fish 2014; Lackey 2018; Reichman 2019; Simpson 2020; Stachowiak-Kudła 2023; Watermeyer et al. 2022), the literature on academic freedom has, until relatively recently, been comparatively limited and the right itself undertheorised.

This contribution focuses, first, on the conditions that enabled the right to academic freedom to emerge as a central element of the commitment to liberal constitutional democracy. Second, it analyses more closely what the point of academic freedom is in liberal democracies and what distinguishes liberal democracies in that regard from other forms of government, also to get a better understanding of the boundaries of this right. Third, it briefly discusses and assesses two contemporary challenges within liberal constitutional democracies in light of these considerations, focusing on the discussion of censorial positions connected to wokism and critical theories on the one hand and conservative reactions to them on the other.

Importantly, this contribution is not an attempt to engage in doctrinal discussions about how exactly the boundaries of academic freedom are to be drawn in any particular jurisdiction. Nor does it seek to discuss the idea of academic freedom within the relationship between individual researchers and the academy as a self-governing institution or as it pertains to the relationship between research and teaching or researchers and students. Nonetheless, the article should shed some light on some core issues of principle as they relate to academic freedom in liberal constitutional democracies in general and, more specifically, to contemporary debates.

## 2 THE RISE OF THE RIGHT TO ACADEMIC FREEDOM: FOUR PREREQUISITES

The rise of the right to academic freedom as a commitment within liberal constitutional democracies, canonised in constitutions and human rights treaties in the 20th century and beyond<sup>1</sup> and widely contested in public debates, is

connected to a number of preconditions. Four important ones are briefly discussed in this section: 1) a specific societal disposition towards intellectual inquiry, 2) the rise of the modern university, 3) its democratisation after 1945, and 4) the increasing importance of epistocratic institutions within liberal constitutional democracies. Each of the four phenomena mentioned has been well studied, and nothing I have to say about them is original or controversial. What is original is to bring them together as an important part of the overall context for the discussion of the role of academic freedom in liberal constitutional democracies that will then follow.

The first prerequisite concerns a certain attitude towards intellectual inquiry that needs to be prevalent in a given society. Without such an attitude, there would not be much on which to base any freedom of research and teaching. What is needed is an attitude that attributes intrinsic value to a reason-based, methodologically reflected truth-seeking oriented towards the self as well as the social and natural world around it. This truth-seeking enacts the human capacity of reason and is not constrained by theological dogma, political authority, or conventional social beliefs. Understanding oneself (think of the Delphic *gnōti seauton*, or the Latinised *nosce te ipsum*), as well as one's place in the social and natural world, is central to what it means to be human and requires serious and systematic interrogation, observation, and argument. As a matter of Western cultural history, the valorisation of such practice is paradigmatically reflected in the figure of Socrates in the early Platonic dialogues, insisting that the unexamined life is not worth living (Plato 399 BC: Section 38a, 5–6). Socrates engaged in dialogic reasoned truth-seeking regarding questions of justice and the virtuous life but was sentenced to death by a court of peers in democratic Athens in 399 BC for rejecting the gods of the community and corrupting its youth. His fate remains a paradigmatic reference point for what freedoms

<sup>1</sup> For a description of the spread of academic freedom as a codified right, see Spannagel (forthcoming).

relating to intellectual inquiry protect. Stories from early modernity featuring the likes of Giordano Bruno or Galileo Galilei, whose research led them to hold positions at odds with the views of established ecclesiastical authority and eventually be condemned or killed for these positions, enrich our gallery of martyrs for the freedom of reason-based inquiry. Of course, some version of the counter-position has always been present according to which, intellectual inquisitiveness, when not properly channelled and guided by authority, is merely a manifestation of the vice of *curiositas* in conjunction with the vanity that comes with misguided confidence in the capacity of reason. Ultimately, so the argument goes, this just leads to disrespect of conventions and traditions and reluctance to follow the commands of those who rightfully exercise authority or to follow God's revealed commands. It ends with the corruption of souls and endangers communities. Where some such position is the predominant perspective on intellectual inquiry, there is no fertile ground for academic research.

The second precondition is the rise of the modern university as the paradigmatic academic institution, organising research and teaching across a new range of faculties from the 19th century onwards. Whereas in the ancient world, philosophical questioning and reflection was an ideal directed to the elites, potential rulers, or wise men geared towards eternal truths,<sup>2</sup> the Enlightenment introduced the idea of a publicly organised and institutionalised pursuit of science to bring about general enlightenment and progress not only by way of enhancing self-knowledge but also by understanding the world more deeply and developing the means to bend it to our collective will.<sup>3</sup>

2 For this claim about ancient philosophy, see Hadot (1995: 64).

3 However, contrasting views exist. For example, Kwadwo Appiagyei-Atua (forthcoming) argues that there was immensely prolific research in the medieval Arabian world and the African continent.

Whereas the university, as a community of researchers and students, emerged as an institution in the early Middle Ages in Europe,<sup>4</sup> its focus was primarily directed backwards. Science consisted of the study of authoritative texts believed to reveal all truth humanly attainable. These texts were the works of a few ancient philosophers, of whom Aristotle was widely considered most authoritative, but sometimes also included legal texts such as the *Corpus Iuris Civilis*, and of course, there was a wide range of ecclesiastical authorities, ranging from Scripture itself over the so-called Fathers and Doctors of the Church to Synodal decisions or Papal Encyclicals. Research output generally took either the form of comments and refinements on such authoritative texts or of attempts at their doctrinal systematisation. Not surprisingly, many of early modernity's leading thinkers, philosophers, and scientists – think of Rene Descartes, Giordano Bruno, Galileo Galilei – were not based at universities, and when they were, they were subjected to considerable restraints. Isaac Newton, for example, could only have a career at the University of Cambridge after pledging celibacy and accepting the 39 articles of the Church of England. The modern university, on the other hand, was generally founded or evolved into an institution in which serious intellectual inquiry was not constrained *a priori* by such authority. Instead, both with regard to the research agenda and the methodologies used, academics were to follow the intrinsic standards of the respective disciplines as they were understood and debated within the academy. In that sense, it was understood that for research and science to succeed, its internal standards, as defined by the community of academic peers, had to be respected and the role of external authorities limited. Even though research would also be conducted by corporations and other privately

4 For an excellent and comprehensive history of the university in Europe, see de Ridder-Symoens/Rüegg (1992–2011).

or publicly funded institutions, universities became modernity's primary locus for research and teaching.

The third factor is the gradual democratisation of the university and its opening to ever-wider parts of the population after 1945, the end of the Second World War and, in particular, since the 1968 student protests. In this new context, universities were no longer reserved for a few faculty members, educating a few students who would then go on to pursue either academic careers themselves or highly specialised careers in private business. While in 1900, a mere 0.9% of the German population enrolled in university (Ringer 2004: 238), today, around 50% of a given (German) cohort spend some time of their lives in tertiary education (Statista Research Department 2024). Towards the last quarter of the 20th century, the university would become a higher education institution, reaching a significant percentage of young adults in their respective age cohorts. In this way, universities play an important role as institutions of the socialisation of modern society's citizens.<sup>5</sup>

The fourth precondition is the tendency to embed liberal constitutional democracy into an increasingly epistocratic institutional and social ecosystem prevalent since the 1990s. Whereas, in general, policy positions and priorities were defined mostly by ideological affiliation in Western Europe from the 1950s to the 1970s, since the 1990s, political loyalties, programmes, and orientations have become more malleable and more open to the types of considerations over which experts would claim expertise. Unsurprisingly, this process went hand in hand with the emergence or strengthening of technocratically focused expertise based on relatively independent national,<sup>6</sup>

European, or global intermediary governance institutions authorised to make far-reaching decisions previously made by national legislatures. Today, even within national political processes, public debates about pressing issues tend to be saturated with references to scientific studies and claims. Research and science have moved closer to the centre of political and legal debates. This greater role in public life has led to a greater politicisation of science and, as a corollary, contestations surrounding the boundaries of academic freedom.

### 3 ON THE MORAL POINT OF A RIGHT TO ACADEMIC FREEDOM IN LIBERAL CONSTITUTIONAL DEMOCRACIES

If Section 2 plausibly identifies four central prerequisites for the emergence of the right to academic freedom as an essential element of liberal constitutional democracy, what exactly is the moral point of academic freedom? This question can be specified in two ways relevant to the present context: 1) How is academic freedom connected to the ideals underlying liberal constitutional democracy? 2) Is the role of academic freedom in liberal constitutional democracy different from its role in authoritarian societies, and if so, how exactly?

#### 3.1 ACADEMIC FREEDOM AND ITS CONTRIBUTION TO THE PROJECT OF INDIVIDUAL AND COLLECTIVE SELF-GOVERNMENT

Within a liberal democratic framework, academic freedom plays a distinctive role because of its connection to individual and collective self-government, which, since the Enlightenment, has been connected to a promise of emancipation and progress. The connection between these ideas and academic freedom is threefold.

5 Today, even academic outsider intellectuals with significant public appeal, like YouTube superstars Jordan Peterson (on the right) or Slavoj Žižek (on the left), are affiliated with universities.

6 This includes the rise of relatively independent central banks, constitutional courts, and other administrative agencies.



First, imagining free and equal citizens as self-governing agents entails a commitment to their moral and political autonomy. Life is more than mere existence: it needs to be led and shaped by decisions in personal as well as political matters. The capacity to make such autonomous decisions is, at least to some extent, dependent on knowing and understanding the phenomena that shape our natural, social, and political reality. True autonomy requires a critical capacity and methodological surefootedness in assessing one's own dispositions and prejudices as well as claims made by others, thus becoming self-guiding in one's interaction with oneself as well as the social and natural world. To become a person with such an ability requires what Immanuel Kant called *Mündigkeit durch Vernunftgebrauch* (1784: 481) (maturity through the use of reason). Education and, more specifically, higher education – think of Alexander von Humboldt's *Bildung durch Wissenschaft* (1966: 258) (formation through science) – is supposed to help achieve this autonomy. The kind of reflection that science requires – its unprejudiced engagement with facts and careful assessment of reasons – is, in many ways, a model for the kind of skill a mature, autonomous person should have. In this way, the idea of the citizen as an autonomous subject is deeply connected to the type of higher education practices made possible by academic freedom.

Second, academic freedom is useful not only for empowering individuals to govern themselves but also supports a practice of collective self-government that, since the Enlightenment, has promised greater social justice and emancipation from domination. If the ideal of democracy is conceived as one geared towards the institutionalisation of justice-seeking by way of a free discourse among equals (Habermas 1996), the structural analogy between seeking truth in the academic realm and seeking justice in the realm of the democratic

process is obvious.<sup>7</sup> Some have gone so far as to describe the idea of the university as an ideal polity, as the context in which the basic ideals informing democracy are more easily institutionalised and realised (Bloom 1987). But even if that claim may go too far, a free academy helps form attitudes and habits central to critical and informed citizenship in a liberal constitutional democracy. Furthermore, insights and arguments generated by freely conducted academic pursuits are fed into the political process through the public sphere, whether by way of publishing major books or articles referenced by journalists or policymakers or by academics otherwise bringing their expertise to bear on public debate (say, through social media, blogs, or talk-shows). The input of theories, arguments, and insights developed in a free academy improves the quality of public discussion, thereby generally improving the prospect that democratic justice-seeking actually leads to genuine progress, greater inclusiveness, and genuine recognition. Either way, academic freedom (and not merely the freedom of speech) enhances what Kant called the public use of reason. It has an important role in grounding the liberal belief that, through collective democratic debate and action, the arc of history will bend towards justice.

Third, academic freedom has historically been connected to progress in the natural sciences and the development of new technology, which, in turn, help expand human agency in the world, leading to individual and collective empowerment. This domain is perhaps where progress is

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7 Structural differences are also obvious. In the academy, scientific inquiry does not lead to authoritative decision-making about what counts as binding for all. The pressures relating to power and interests are less pressing, even though, at times, questions of power, pride, and vested interests loom surprisingly large in the background of academic discourse. Furthermore, the modalities of participation in the academic context are more circumscribed by methodological standards. The discipline imposed by standards of open inquiry in the classroom differs from the orator's position on the soap box or the tweeter commenting on an issue on social media. Freedom of expression and academic freedom may partially overlap, but they have different justifications and different limits. For more on this, see Kovács (forthcoming).

most evident.<sup>8</sup> Think of the role of science and modern technology in emancipating significant parts of humanity from the indignities of incurable illnesses and premature death through the advances of hygiene and medicine, extending the average life span in Europe from around 43 years in 1900 to close to 80 today (Riley 2006: 538; Deutsche Stiftung Weltbevölkerung 2022) with the prospect of significant further life extensions on the horizon.<sup>9</sup> Or, think of liberating large parts of the population from the misery of a life where basic needs for food, clothing, or shelter are barely met compared to today's highly productive economies that ensure goods and services are produced in such quantities that the basic material needs of the whole population can easily be met while contemporaneously reducing the average time spent working significantly. The promise of a society of abundance where all scarcity is artificial (think of NFTs (non-fungible tokens) and, more generally, the art market) and concerns only non-essential goods no longer appears utopian.<sup>10</sup> Also, think about how technology enlarges the horizon for action and interaction, for example, by facilitating fast, near effortless, and moderately cheap physical mobility, or by allowing instantaneous and largely free communication with persons anywhere in the world through digital and social media, or access to most of humanity's knowledge generally available for free at everyone's fingertips online. In terms of material prerequisites and technological means, the contemporary world offers choices and opportunities about which previous generations could

barely dream. Progress in science and technology is deeply connected to the history of academic freedom and, to a considerable extent, the fruit of freedom of research often institutionalised in universities.

Academic freedom, then, is of instrumental value to individual self-government and collective self-government both because of its potential to enhance reflection and deliberation individually and collectively, and because it furthers the development of science and technology which tends to enhance the scope and range of options available to human beings individually and collectively.

### 3.2 ACADEMIC FREEDOM IN LIBERAL AND NON-LIBERAL SOCIETIES

What distinguishes academic freedom in liberal democracies from academic freedom in authoritarian countries? Whereas not all liberal constitutional democracies explicitly recognise a right to academic freedom, not all constitutions that do recognise such a right are liberal democratic constitutions (Spannagel forthcoming). It would be misguided to simply assume that authoritarian regimes only engage in window-dressing when they sign on to human rights treaties or go through the motions of enacting constitutions.<sup>11</sup> Non-liberal societies, too, seek to profit from advances in science and technology and have an incentive to grant the relevant institutions and their core actors the freedoms they need to succeed. Recognising a degree of autonomy in the academic sphere is a precondition for a society to reap the benefits of science and technology. In that sense, the idea of academic freedom merely connects to the modern differentiation of society and its respective spheres, where functional differentiation is a precondition for the optimal functioning

8 Of course, it is a standard trope that such progress – such as Promethean self-empowerment – is not without ambivalence. Besides the philosophical and cultural criticism relating to the deep and subtle shifts of human experience and orientation brought about by living in the modern and now digital world (from Martin Heidegger to Jonathan Haidt), such progress has resulted in a situation where human civilisation is faced with basic challenges potentially affecting its future survival: Nuclear weapons, climate change, and artificial intelligence.

9 An example of such life extension, living forever, is microcell rejuvenation (Harari 2017).

10 For such a prognosis, see Diamandis/Kotler (2012).

11 Even in these cases, there is generally more going on than simple window-dressing, see García/Frankenberg (2019).

of each sector, with each sector following its own internal prerogatives (Luhmann 1982).

Not surprisingly, even during the Cold War in the Soviet Union, leading physicists like Andrei Sakharov had considerable space for articulating public dissent to nuclear testing and nuclear policy before he was finally expelled from the nuclear programme where he had been assigned in 1968 after protesting the Soviet invasion into Czechoslovakia. Conversely, ideologically pristine political functionaries such as the Stalinist chief biologist Trofim Lysenko – who was ideologically opposed to insights and research into genetics and insisted that all evolution proceeded from gradual adaptation to environmental circumstances and, as a result, misdirected agricultural policies in the Soviet Union – was ultimately fired when fellow scientists questioned his scientific credentials and theories after he failed to increase the productivity of soviet agriculture. Academic freedom in non-liberal societies is functional. It serves predefined social functions, and its limits are defined with regard to these functions. When the relevant authorities deem that these functions are no longer adequately served in specific instances, academic freedom can be curtailed.

The same cannot be said of academic freedom in liberal societies. In liberal societies, too, academic freedom, in part, plays an instrumental role in bringing about desirable consequences. As was outlined in Section 3.2, academic freedom serves individual and collective self-government. However, there is a core difference in the way academic freedom relates to this function in liberal societies. There is no space for public authorities to make a top-down determination whether a particular research project or research question actually furthers such purposes or not. That is, academic freedom in liberal democracies can only function the way it is imagined to function if public authorities are disabled from judging whether

that function is fulfilled in concrete circumstances. In this way, academic freedom operates structurally, much like freedom of speech. If one of the purposes of freedom of speech is to further the discovery of the truth, it can only be successful if there is no general *a priori* truth test applied to public utterances.<sup>12</sup> Establishing some such test presupposes that the truth is already known and forecloses the possibility of challenging established convictions. In other words, there is generally a right to express what may well be wrong and misguided views in part precisely because expressing such views is a precondition for a process linked to successful public truth-seeking.<sup>13</sup> That is exactly how academic freedom functions to further individual and collective self-government. Its functioning presupposes the possibility of error and misdirection and precludes a general right of public authorities to limit academic freedom based on the judgment about the kind of research that, in its view, actually furthers individual or collective self-government.

There is another way of distinguishing between academic freedom in liberal and non-liberal societies. An authoritarian, state-centred instrumental approach to academic freedom defines the point and limits of academic freedom with regard to the concrete political objectives and frames established by the political leadership, while it has

12 This tenet illustrates why the type of censorship that has become commonplace as part of content management efforts of major digital platforms to address fake news dissemination is deeply troubling. It is a problem if claims that the Coronavirus came from a biological lab in Wuhan are censored, as they were until US security institutions determined that there is a real possibility that this might have happened. Similarly, it is a problem if any mention of Ukrainian War Crimes is censored just because it feeds a Russian propaganda narrative, even when independent human rights organisations have corroborated such views. If what counts as a plausible truth that is permitted to be stated on such platforms depends on the recognition by trusted public authorities, all is lost. Rather than focusing on substantively focused content management, formally content-neutral management techniques, such as source validation, ought to be favoured to remove or at least lessen the impact of spambots and politically sponsored disinformation campaigns.

13 This reasoning is the core argument of John S. Mill in *On Liberty* (Mill 1910: 61–170).

immunised existing power structures from challenges. A liberal approach, on the other hand, reflects a commitment to an open society and the centrality of bottom-up opinion- and will formation. The fact that it is inconvenient and potentially undermines established public authorities and conventional wisdom is no grounds for limiting academic freedom.

A paradigmatic contemporary example illustrating an illiberal approach to academic freedom is China after Xi Jinping became President and General Secretary of the Communist Party in 2012. His government's approach to research and academic freedom has two prongs. On the one hand, the state seeks to guide and coordinate research across all relevant institutions to ensure Chinese leadership in what are deemed to be key future technologies (robotics, artificial intelligence, unmanned and fully automated systems, quantum computing, and space technology). On the other hand, research that potentially undermines and critically reflects on existing authority structures, and in particular the monopoly of political power by the Chinese Communist Party, is strongly discouraged and disincentivised. In this way, the infamous Document No. 9, circulated within the Party in 2012 and leaked in 2013, defines themes and concepts not to be taught and discussed in universities. It specifies that Western constitutional democracy, human rights, civil society, interpretations of Chinese history not officially sanctioned (specifically about the role of the Chinese Communist Party and the disasters of the Great Leap Forward and the Cultural Revolution), and questioning economic reforms and socialism are topics that should not be taught (Fu forthcoming).

Note that in liberal societies, too, a government may believe that the country would profit from research in a certain field or from the development of a particular technology, and it may make extra funding available due to that prioritisation. In Europe, this prioritisation is what national and

European research fund programmes, to various extents, do.<sup>14</sup> But a government policy agenda may never be permitted to effectively shut down or crowd out alternative research orientations not prioritised by the government. So, making available additional funding to further a specific government agenda is not a problem. However, severely cutting the general funding of institutions not committed to such a programme would be incompatible with the value of academic freedom in open societies.

On the other hand, there is no liberal corollary to Document No. 9 applicable in liberal democracies. The substantive curtailment of topics – including topics that discuss and analyse alternatives to liberal democracy – are not off-limits in free academic institutions. Such a position is perfectly compatible with the position that it is *not* off-limits for liberal constitutional democracies to prohibit associations, organisations, or political parties or prevent individuals from running for office who seek to abolish liberal democracy.<sup>15</sup> Put differently, liberal democracies may take steps to protect themselves against reversion to autocratic forms of government, but these steps do not include prohibiting academic publications or discussions. A professor sympathetically discussing reactionary Weimar literature on the Conservative Revolution in academic publications and seminars has a right to do so, as does the socialist professor discussing the merits of monopolising political power in an avant-garde Leninist party.<sup>16</sup> But once these professors start organising

14 In part, such programmes are neutral with regard to their substantive focus and generally prioritise excellence.

15 For more on militant democracy, see Loewenstein (1937).

16 Whereas it is clear that such professors could not be fired or prevented from publishing their work, it is a more open question whether, in contexts such as hiring processes, for example, substantive restrictions might legitimately play a role within the academy as a reason not to hire someone. If so, that could only be true insofar as a potential candidate takes positions incompatible with the foundations of liberal constitutional democracy. Any other substantive criteria – For example, the claim that a candidate is insufficiently progressive, too conservative, or, conversely, too

political parties or other organisations to realise their political ideas, they may plausibly be prevented from doing so. Academic freedom is privileged by the specific forms and constraints of academic discourse compared to freedom of speech generally and further privileged when compared to freedom of association or freedom to found or support a political party. Each of these rights has its own significance in liberal constitutional democracy and is susceptible to a differentiated understanding of the limitations to which it may be subjected. In terms of substantive limitations, academic freedom is the freedom least susceptible to justifiable substantive constraints on the kind of questions that may be asked or the kind of positions that can be argued for. This relative privilege is connected to the constraints and forms of academic discourse on the one hand and the relative distance to immediate political action on the other.

#### 4 IMPLICATIONS: TWO CURRENT CHALLENGES WITHIN LIBERAL CONSTITUTIONAL DEMOCRACIES

In the previous section, I sketched the basic differences between a liberal and an illiberal conception of academic freedom. This section presents some basic points relating to two contemporary challenges to academic freedom within liberal constitutional democracies. These challenges concern, first, claims from the political left that certain biologically focused research projects and arguments undermine the recognition of all human beings as fundamentally equal and should not be permitted. Second, claims from the right that certain critical theories that insist on the foundational nature of group identities should be banished from liberal academia. These issues are, to some extent, symmetrical. They both claim that

our fundamental status as equals is questioned and that theories, research agendas, and discussions informed by such assumptions should not be permitted. There is a real issue that deserves to be taken seriously with regard to each of these positions: Do arguments about the foundational nature of differences – whether biological or socially constructed – not undermine the core foundational commitment in liberal democracies that all human beings should be regarded in their civic relationship as free and equals? Yet, I will argue that these challenges do not undermine liberal foundational commitments in a way that would justify imposing restrictions on academic freedom. The next sections provide a reconstructed and somewhat bland version of contemporary debates without engaging in any of the many specific incidences they have generated. Furthermore, the paper does not endorse any of the substantive positions described; the argument is merely presented to assess its relevance for questions relating to restrictions of academic freedom.

##### 4.1 THE NATURE VS NURTURE DEBATE: JUSTIFYING NATURAL HIERARCHIES?

The first issue concerns challenges from the left regarding research projects or findings that claim to establish the relevance of biology in explaining certain differences in the patterns of social conditions prevalent among different groups. Questions of biological fact are claimed to be relevant for a wide range of highly contested questions concerning, in particular, gender, race, or sexual orientation. Take research projects, whether in biology or the social sciences, that seek to establish that patterns of women's employment, say in nursing and primary care, in which women tend to be overrepresented, and as auto mechanics or IT support where women are underrepresented on the other have a biological basis, rather than just reflecting historical patterns of gender-biased

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leftist and nationally unreliable is incompatible with the academic enterprise and should be firmly rejected.

socialisation.<sup>17</sup> From a liberal point of view, the question is whether such research somehow undermines a basic commitment to freedom and equality of all persons regardless of gender and, as a result, is geared towards undermining the premises upon which liberal constitutional democracy is built. Whereas the methodological and empirical questions relating to such research are complex, the question of whether such research is protected by the right of academic freedom is simple. It clearly is.

Coming to this conclusion does not require examining the limits of militant democracy and assessing why and to what extent academic freedom also applies to research questions inimical to the idea of a shared status of free and equal citizens. The idea of a shared status of free and equal citizens is perfectly compatible with the idea that there are genetic grounds for differences between persons and groups along a wide range of dimensions (Kovács forthcoming).

To clarify this point, imagine, hypothetically, that it was conclusively established that for genetic reasons, women are statistically more inclined towards certain jobs rather than others. What would follow? It would follow that even in an ideal world without discrimination, we should not expect men and women to be represented equally in all professions. Consider the fact that, for example, most car mechanics are men, whereas most nurses are women. Let us assume that this fact would not be attributed exclusively to the social construct of gender and the social division of labour between men and women that culturally perpetuated. What would follow? Such a finding would be an important insight of great relevance to policy design in a liberal democracy that takes the equal status of men and women seriously. True, such a finding would discredit an ideology which

insists on seeing discrimination whenever patterns of gendered difference are apparent. However, it would raise important new issues. If the level of qualification between car mechanics and nurses (or other groups with a gendered distribution pattern between sexes) is comparable, is there comparable remuneration across professions of roughly the same skill level? If not, could it be that existing economic and status disparities between professions of comparable levels of qualification to the detriment of professions predominantly chosen by women reflect bias against women? That, of course, would be an issue raising serious concerns of gender discrimination exactly because if the distribution of genders across professions reflects in part free and authentic choices made by emancipated women and men, then such disparities become an issue of concern that biases against the valuation of women's work are in play.

Furthermore, if it were to turn out that genetic reasons contribute to the underrepresentation of women as professors of engineering (although not, let us assume, as professors of law), what would follow when thinking about the appointment process for professors of engineering? Arguably, the statistical probability that men are more likely to qualify for such positions is a reason why, in actual appointment procedures, gender serves as a distorting variable in favour of men to the detriment of equally qualified women, leading to outcomes that are effectively biased.

To understand this point, think about how a defendant's existing criminal record is treated in criminal trials. On the one hand, there is solid evidence that having a criminal record increases the probability that someone will commit another crime, all other things equal. Thus having a criminal record is a salient variable in the context of making an overall assessment whether someone is judged to be guilty of a crime. At the same time, that fact is likely to be taken into account by

<sup>17</sup> For example, the gender-equality paradox points out that the less women are represented in STEM fields, the better the national gender equality (Stoet/Geary 2018).

a jury disproportionately, making it prejudicial to the defendant and undermining the defendant's right to be judged on the merits of the particular evidence available regarding the particular crime with which he is charged. The criminal record of the defendant is a fact that positively affects the probability of his having committed a crime. But the fact that such a criminal record is likely to be given disproportionate weight distorts the finding of the jury to the defendant's detriment. This is why the fact of having a criminal record is hidden from the jury that is charged with determining whether the defendant is guilty or not.

In the same way, the fact that a candidate is a woman may well be prejudicial to a candidate applying for a job where the general statistical probability is that it will be occupied by a man. In other words, the case for some kind of affirmative action or quota regime does not depend on the dubious claim that all gendered employment patterns are connected exclusively to gender discrimination and that, in the absence of such discrimination, men and women would be represented equally across all professions. On the contrary, the most plausible justification of some sort of affirmative action policies may well be connected to biases that connect to statistically relevant differences between genders but disproportionately overemphasise its probative value in the relevant decision-making context.

Be that as it may. The issue here is not whether any of these claims relating to biology vs social construction are true. Here, the issue is whether this kind of research potentially undercuts a fundamental idea of equality, thereby at least raising concerns about the limits of academic freedom in liberal democracies. This hypothetical example illustrates two things. First, it is wrong to believe that claims that different groups have statistically relevant different genetic dispositions imply that there are natural social hierarchies between them. Research questions geared towards finding

such different genetic dispositions do not undermine the fundamental premise of equal status for all human beings and do not necessarily lead to the legitimisation of hierarchy. There simply is no serious issue with the limits of academic freedom in this regard. Second, the relationship of the nature vs nurture (or social construction) debate as it relates to specific policy choices regarding how different groups are treated is more complicated than is often presumed. There is no simple policy implication to be drawn from whatever the genetic relationship between biological givens and patterns of social ordering between groups might be. In this example, even if some differences in representation across professions between men and women may be due in part to statistically relevant genetic features, it is still likely that the actual distribution is the result of prejudices that make it less likely that equally qualified women will be seen as such, thus opening the door to discussions of adequate remedial measures.

#### 4.2 WOKISM, CRITICAL THEORIES, AND THE DEPTH OF DIFFERENCE

The ire of the left is provoked by genetic arguments related to differences between groups because of their assumed link to the justification of traditional hierarchies and the denial of our fundamental status as equals. The ire of the right is provoked by critical theories of the left claiming that any talk of equality is ideological and effectively masks power relationships shaped by differences of class, race, gender, sexual orientation, or in the postcolonial context, geography.<sup>18</sup> Any idea of universalism, connected to the freedom and equality of human beings, such theorists argue, should effectively be presumed to serve an

<sup>18</sup> These are either competing or complementary theories. As competing theories, they disagree about what the socially relevant fundamental category for discrimination and privilege is. As complementary theories, they emphasise how these categories interact to compound the degree of discrimination that individuals face. See Crenshaw (2019).

ideological legitimating function, covering up actual relationships of domination.

As an example, Critical Race Theories (CRT) is much maligned by the right in the US. CRT insists that racism is structural, and there is no realistic prospect of overcoming this state of affairs, given the pernicious depth of racism in humanity's corrupted and fallen state.<sup>19</sup> In the US, theorists can point to policing, sentencing, and penal practices to provide *prima facie* evidence for their position. Liberal responses typically recognise a history of oppression and, notwithstanding their insistence on the fact of historical progress, agree on the lingering structural presence of such oppression while insisting on the task of overcoming and transcending it in the name of universal freedom and equality. Conservative positions typically insist that the hard work of overcoming oppression has been achieved in the past and that in the present, apart from bad apples and residual incidents here and there, equality of opportunity has basically been achieved. According to this view, historically suppressed minorities are kept down in the present by an unhelpful culture informed in part by a backwards-looking self-victimising ideology that prevents people from pulling themselves up by their bootstraps and actively pursuing the opportunities open for them on an equal basis.

Note how all three positions regarding the role and implications of racism in contemporary US-American life are connected to specific but very different claims relating to academic freedom: The

<sup>19</sup> Note how such positions echo Carl Schmitt's claim in his 1923 essay on Political Theology that he who speaks of humanity seeks to deceive. Instead of speaking about universal human rights, he proposed that we would be more honest to speak of the universal fallen state of human beings, corrupted by original sin. In such a state, we can make a meaningful political distinction between friends and enemies, the latter presenting a potential threat that might lead to existential struggle, the stakes of which are life and death. Humanity, on the other hand, may, as *homo sapiens*, be a meaningful biological category. But it is not a meaningful political concept, except as part of a political strategy of subterfuge and deceit.

critical theorist claims that denying the structural and deep way that Black persons have been victimised throughout history effectively amounts to a nonrecognition of their fundamental equal status. The slogan "Black Lives Matter" is a response to the sense that Black lives do *not* seem to matter in many contexts and that their status as victims of deep and structural racism is not recognised. Surely, academic freedom cannot be a license to perpetuate such victimisation and denial of recognition! If Germans criminalise the denial of the Holocaust, should the US not, at the very least, ensure that their institutions of higher learning are purged from elements that refuse to recognise the legacy of slavery as it continues to shape structures of power and practices of subjugation? The conservative position, on the other hand, fears that any recognition of such a corrupted state of affairs would undermine a sense of community and pride in the traditions of the country and would fundamentally destroy it. Surely, national institutions of higher learning must not be permitted to be taken over by ideologies that are incompatible with a sense of pride in the history and traditions of the country. For liberals, finally, the idea of a shared status as equal bearers of rights remains the focal point of all discussions of domination and emancipation. Giving up on that means giving up on the foundations of liberal constitutional democracy. Not surprisingly, liberals may disagree with the more radical versions of CRT or other critical theories that are structurally comparable, while generally, they do not suggest that such positions should not be articulated and discussed in an academic setting.

If the discussions in Section 3 of this paper are plausible, the latter position is clearly the right position to take relating to the scope of academic freedom. The conservative position is based on the premise that CRT is a misguided ideology without allowing the possibility that it might be essentially correct. At the very least, it rules out the possibility that the view that slavery and



racism have long been overcome is a misguided, inappropriately Panglossian reading of US history. These kinds of issues and the range of empirical historical questions and normative assessments they entail are deeply appropriate subject matter for serious reflection, which the academy is well suited to address. The ongoing substantive debates on race in the US are important. It may well be true that such research and debate could undermine a certain kind of pride in the history and tradition of the country. However, if this pride is ultimately diminished, it may simply be because it was based on false consciousness, ignorance, or callous disregard for the suffering inflicted on oppressed groups. This pride might better be placed in the courage to confront one's history honestly and work towards overcoming its dark heritage instead of denying it. At any rate, academic freedom in liberal societies may not be limited to protecting identities based on ignorance and false consciousness. Whether existing identities are, in fact, based on narratives that exhibit such deficiencies is something for academic debate to explore and, perhaps, to settle over time. The perceived threat to existing identities simply cannot justify limiting academic freedom in liberal societies.

But critical theorists, too, are wrong to demand that challenges to their view of history and the present have no place in the academy. They can demand that their voices be heard and taken seriously in the academy, but it is presumptuous to demand consent rather than serious debate. Here, too, identities of persons deeply attuned to the suffering of a group subjected to historical oppressions may be threatened by counter-arguments and contextualisation they disagree with. Such disagreements are at the heart of the academic enterprise. Note how specific demands to recognise a group as victims go together with the insistence that the groups who share the relevant markers with the historical oppressors see themselves as such. This circumstance not only

likely threatens the identity of the groups sharing markers with the historical oppressors but also occurs within a context where the claim is that there is no common ground of a shared humanity where all persons are recognised as holders of equal rights. I have argued in this paper that there is space in liberal constitutional democracies for such claims, however threatening they might be. Nonetheless, these claims alone are not grounds for defining limits to academic freedom against those seeking to challenge them.

## 5 CONCLUSION

Academic freedom has become a central issue of our times. The article tries to provide an understanding why that is the case. It clarifies the moral point underlying a right to academic freedom and distinguishes between the very different principles defining the scope and limits of academic freedom in liberal and illiberal societies. The article does not seek to engage in subtle doctrinal debates about the limits of academic freedom in any particular jurisdiction, but it does engage in the discussion of some contemporary issues to illustrate how these principles play out in concrete situations. Fostering a deeper understanding of academic freedom and the principles undergirding it in today's context also provides a clearer perspective on the severity of the challenges that academic freedom faces today and what might be lost if those challenges are not met.

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