

## **Academic Freedom in Europe: Reviewing UNESCO's *Recommendation***

**Terence Karran**

**Centre for Educational Research and Development, University of Lincoln, LN6 7TS UK.**

**Email: [tkarran@lincoln.ac.uk](mailto:tkarran@lincoln.ac.uk)**

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**BIOGRAPHICAL NOTE:** Dr Terence Karran works in Centre for Educational Research and Development, at the University of Lincoln, in the U.K. He is also a Docent Professor in the Faculty of Education at the University of Oulu in Finland. From 2005 to 2007, he was a Visiting Professor at the Universidad Autónoma de Guadalajara in México, and Director of the Distance Learning Centre and the Mexican National Co-Ordination Centre for the World Bank Institute's Global Development Learning Network for Latin America and the Caribbean.

## **Academic Freedom in Europe: *Reviewing UNESCO's Recommendation***

**ABSTRACT:** *This paper examines the compliance of universities in the European Union with the UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel, which deals primarily with protection for academic freedom. The paper briefly surveys the European genesis of the modern research university and academic freedom, before evaluating compliance with the UNESCO recommendation on institutional autonomy, academic freedom, university governance and tenure. Following from this, the paper examines the reasons for the generally low level of compliance with the UNESCO Recommendation within the EU states, and considers how such compliance could be improved.*

**Keywords:** academic freedom; European Union; UNESCO.

### **Introduction**

Academic freedom is necessary as knowledge is created by challenging orthodox ideas and beliefs which means that, because of the nature of their work, academics are more naturally led in to conflict with governments and other seats of authority. Academics are responsible for many important scientific discoveries (in chemistry, medicine, etc.), and without their work, knowledge would not have advanced, and many benefits which people enjoy today would not be possible. To allow academics to challenge existing knowledge and create new ideas, they are granted academic freedom to undertake research and discuss new ideas and problems of their disciplines, and express their conclusions, through both publication and in the teaching of students, without interference from political or ecclesiastical authorities, or from the administrative officials of their institution, unless their methods are found by qualified bodies within their own discipline to be clearly incompetent or contrary to professional ethics. Hence Fritz Machlup, one time President of the American Association of University Professors, defined the concept as ‘the absence of, or protection from, such restraints or pressures — chiefly in the form of sanctions threatened by state or church authorities or by the authorities, faculties, or students of colleges and universities, but occasionally also by other power groups in society — as are designed to create in the minds of academic scholars (teachers, research workers, and students in colleges and universities) fears and anxieties that may inhibit them from freely studying and investigating whatever they are interested in, and from freely discussing, teaching, or publishing whatever opinions they have reached.’ (Machlup, 1955: 753). Additionally, there are three further parameters, university autonomy, which is, as Roversi-Monaco (2005. p.8) points out ‘a fundamental

principle ... for the life of the University', and shared governance and tenured employment, which are, as Gerber (2001) maintains, "inextricably linked" to, and essential for the sustenance of, academic freedom.

Nowadays, academic freedom is considered a basic human right in universities across the globe and is consequently enshrined in many national constitutions and in the U.N. Universal Declaration of Human Rights. However, both the university as a concept and a locus for research and learning, and the principle of academic freedom as an essential pre-requisite for such an institution, find their genesis in Europe. As Renaut (2006, 121) makes clear 'if there is any institution that Europe can most justifiably claim as one of its inventions, it is the university'. This development, as Wieruszowski (1966, 16) has noted, 'was a spontaneous movement and not the result of planning. Students gathered around teachers or resorted to famous schools attached to cathedrals in centers soon known as *studia*.' Formalisation of the powers and duties of these new institutions started with the famous *Authentica Habita* enacted by Emperor Frederick Barbarossa in 1155, which provided protection for scholars traveling to new seats of learning. As Ruegg (2006, 42) points out 'This law was incorporated into the *Corpus iuris* and today takes the form of the fundamental charter of the medieval university'.

However, academic freedom in its modern sense was not formally recognised within such institutions, and its lineal precedent, *libertas philosophandi*, did not appear, again in Europe, until the 17th Century. Sutton (1953, 311) records that Tommaso Campanella's use of the phrase *libertas philosophandi* in his 1622 defence of Galileo 'was the first reasoned argument to be published in support of the freedom of scientific investigation' adding that 'if Campanella did not invent the phrase, he was surely one of the earliest to use it'. Stewart (1994, 35) indicates the concept arose 'as a result of the controversies in European science in the post-Copernican period. ... (rather than) ... the periodic and undoubted medieval tensions between universities and the Church, or between the arts and theology faculties.' In this sense the freedom protected by *libertas philosophandi* related to individual scholars, rather than institutional autonomy. The principle was adopted slowly and, before the 18th century, European universities existed to preserve and transmit a received body of knowledge. This changed in 1694 with the founding of the Friedrichs-Universität at Halle, which had, Paulsen (1906, 46) declaimed, 'the honour of being the first modern university: it was the first one founded on the principle of *libertas philospandi*, of free research and instruction'. However, as Thorens (2006, 94) points out '(such) academic liberties ... do not correspond to the present concept of academic freedom in the singular, the purpose of which is to protect the individual member of the university, teacher and researcher or even student'. The present concept of academic freedom to which Thorens alludes is associated with Berlin University (created in

1810), and with the writings of Wilhelm von Humboldt. The true extent of Humboldt's contribution to the specific creation of Berlin University has been disputed (see for example Ash (2006) and Miyasaka (2005)), but his cardinal tenets [the need for freedom of teaching and learning (*Lehrfreiheit und Lernfreiheit*), the unity of teaching and research (*Einheit von Lehre und Forschung*), and the unity of science and scholarship (*Einheit der Wissenschaft*)] together constitute the theoretical and organisational paradigm which became the hallmark of the modern research university, firstly, within Europe, and then beyond.

As Sanz and Bergan (2006, 15) point out, the European heritage of universities is complex and multi-faceted, involving 'the principles of academic autonomy, intellectual curiosity, the freedom to teach, pursue research and publish its results and rigorous standards of peer review ... (but also) ... fundamental societal values such as participation, community and equal opportunity.' The central importance of academic freedom to universities, and society more generally, has been recognised in the national constitutions of E.U. nation states, but also at European levels. For example, the European Universities Association's 1988 *Magna Charta Universitatum* states: 'Freedom in research and training is the fundamental principle of university life, and governments and universities, each as far as in them lies, must ensure respect for this fundamental requirement' (E.U.A, 1988). Subsequently, the E.U. Charter of Fundamental Rights, which includes the declaration from that 'The arts and scientific research shall be free of constraint. Academic freedom shall be respected' (E.U., 2000: 11), was incorporated into the recent E.U. Revision Treaty (E.U., 2008: 337). Similarly, at the Assembly debate on 30th June 2006, the 47 members of the Council of Europe approved a *Recommendation on Academic Freedom and University Autonomy* and exhorted the Council's Committee of Ministers to 'strengthen its work on academic freedom and university autonomy as a fundamental requirement of any democratic society' (Council of Europe, 2006).

However the most detailed such recommendation was issued in 1997 by UNESCO (1997, 26) which affirmed that 'the right to education, teaching and research can only be fully enjoyed in an atmosphere of academic freedom ... the open communication of findings, hypotheses and opinions lies at the very heart of higher education and provides the strongest guarantee of the accuracy and objectivity of scholarship and research.' The *Recommendation concerning the Status of Higher-Education Teaching Personnel* which was adopted by the UNESCO General Conference in November 1997, was the result of extensive consultation with academic and legal experts, NGOs including the International Labour Organisation, and with member states. As Savage and Finn (1999, 43) relate 'strong positive support ... came from Canada, France, Japan and Norway. ... The document was then passed without a

dissenting vote, although four countries objected ... So after thirty years of frustration, UNESCO finally achieved a policy in this area.’ The *Recommendation* is not a stand alone document but is well-embedded in other international regulations - as Beiter (2005, 278) points out ‘in its preamble the *Recommendation* refers to article 26 of the Universal Declaration of Human Rights ... article 13(2)(c) of the International Covenant on Economic, Social and Cultural Rights, to the Convention against Discrimination in Education, (and) to the UNESCO/International Labour Organisation Recommendation concerning the status of teachers.’ Subsequently UNESCO increased the responsibilities of the Committee of Experts on the Application of the Recommendation concerning Teaching Personnel (CEART) to include monitoring of the implementation of the 1997 *Recommendation*. Legal arrangements like the UNESCO *Recommendation* have the judicial status of “soft law” which, Hillgenberg (1999, 504) opines, is often concluded ‘because the states involved do not want a full-fledged treaty which, in the event of non-fulfillment, would result in a breach of international law’. However Koïchiro Matsuura, the Director-General of UNESCO, whilst admitting that soft law recommendations can have different meanings in diverse contexts, has argued that in UNESCO’s case: ‘Although recommendations are not binding on Member States, in the same way as conventions that have been ratified by them, it is the underlying idea of common solutions to common problems that usually lead to the incorporation of their principles and precepts into national legislation’ (Matsuura, 2007, 12).

Given the genesis of academic freedom in Europe and the plethora of statements confirming its importance, it is instructive to see whether the European states have incorporated the UNESCO *Recommendation* into law, for the following reasons. First, universities in the EU consistently trade on their assumedly world class credentials, in order to attract overseas international students, so any indication that they do not meet the international standards determined by UNESCO could damage this income stream. Second, the most recent London Communiqué issued by the 44 Bologna Process signatory nations indicated that they were developing a ‘European Higher Education Area based on institutional autonomy, academic freedom, equal opportunities and democratic principles’ (London Communiqué, 2007, 1), hence failure to conform with the UNESCO *Recommendation* could compromise the implementation of the Bologna Process. Finally, given the authority of United Nations organisations, and the fact that the EU nation states consider themselves the guardians of the principle and practice of academic freedom and voted in support of the *Recommendation*, there is a moral and categorical imperative on universities and nations to implement the *Recommendation*. Hence this paper will examine whether the EU states have

implemented the *Recommendation*, and assess possible reasons for non-compliance, before considering what could be done to increase the level of compliance.

### **The 1997 UNESCO *Recommendation***

The UNESCO *Recommendation* specifies a range of parameters which are deemed important to academic freedom, this study will address the following major critical elements:

- Institutional Autonomy - ‘that degree of self-governance necessary for effective decision making by institutions of higher education regarding their academic work, standards, management and related activities’ (para 17).
- Individual rights and freedoms - ‘the principle of academic freedom should be scrupulously observed. Higher-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.’ (para 27).
- Self governance and collegiality - ‘Higher-education teaching personnel should have the right and opportunity, ... to take part in the governing bodies ... while respecting the right of other sections of the academic community to participate, and they should also have the right to elect a majority of representatives to academic bodies within the higher education institution. ... Collegial decision-making should encompass decisions regarding the administration and determination of policies of higher education, curricula, research, extension work, the allocation of resources and other related activities’ (para 31, 32).
- Tenure - ‘Tenure or its functional equivalent, where applicable, should be safeguarded as far as possible even when changes in the organization of or within a higher education institution or system are made, and should be granted, after a reasonable period of probation, to those who meet stated objective criteria in teaching, and/or scholarship, and/or research to the satisfaction of an academic body,’ (para. 46).

To assess whether EU nations complied with the UNESCO *Recommendation*, data was gathered from the 27 EU nations on national legislation on academic freedom, institutional autonomy, institutional governance, and academic tenure. The information for Cyprus, however, applies only to the Greek controlled section of the island, while the data for Belgium is based on the Flemish and French speaking communities, the German-speaking community has been omitted owing to its small size.

The complexity and diversity of the EU nations required that compromises had to be made. For example, the laws relating to private universities (e.g. in Spain and Poland) were ignored as such institutions are relatively small in number, and moreover are often regulated by national legislation and are subject to national Constitutions. Furthermore, in countries with federal structures, different legislation relating to universities may be passed at state level, which is not easily accessible. In Germany for example, the legal basis of higher education lies in both the Federation's Framework Act for Higher Education (Hochschulrahmengesetz) and in the legislation on higher education of the Länder (Hochschulgesetze). Following the recent modernisation reforms of the federal system (Föderalismusreform), in 2006, the relationships between the Federation and the Länder with respect to education legislation have changed, and the Federation's framework responsibility for higher education has been removed. The Federation now has responsibility for admission to higher education institutions and for degrees from higher education institutions as part of concurrent legislation (Art. 72 of the Basic Law). However, the Länder have been granted the power to enact their own provisions in deviation from the relevant federal laws. For example under the 2006 University Reform Act in the federal state of North Rhine-Westphalia, which took effect on 1st January 2007, the collegial governing system, derived from the University Law of 2004 under which the universities had the Rectorate and Senate as governing bodies, will be replaced by management by a Presidential Board.

In addition, many EU states are in the process of reform of their universities. For example, in Finland the government is in the process of undertaking major changes to the Universities Act. The new law, scheduled for enactment in August 2009, and implementation in January 2010, will extend the autonomy of universities and give them an independent legal personality, either as public corporations or as foundations under private law. Under the new law, half of the members of the University Board (the strategic and executive arm of the university), will be drawn directly from the University academic community, while the remaining half will be appointed by the Collegial body of the university, but from outside of the university. In addition the current civil-service employment status of academics will be replaced by a contractual relationship between the university and individual staff. Consequently, the information compiled for the individual member states which forms the basis for this analysis provided in the tables is based on a best estimate of current legislation applied to public universities but from which new legislation, enacted during the research period, may vary.

The legislative data was examined to see whether or not it was in compliance with the UNESCO *Recommendation* by addressing the following questions: Are the universities

legally autonomous? Is academic freedom protected either in the constitution or in law? Do the academic staff elect the majority of representatives to academic decision making bodies? Does academic tenure exist? For some countries, the legislation was unequivocal - for example Article 17: 6 of the Greek Constitution guarantees tenure by stating: 'Professors of university level institutions shall not be dismissed prior to the lawful termination of their term of service, except in the cases of the substantive conditions provided by article 88 paragraph 4 and following a decision by a council constituted in its majority of highest judicial functionaries, as specified by law.' Similarly, but in stark contrast, paragraph 203 of the U.K. 1988 Education Reform Act had the purpose of 'securing that the statutes of each qualifying (h.e.) institution include a provision enabling an appropriate body, ... to dismiss any member of the academic staff by reason of redundancy'. However, in other states (such as Spain), tenure is offered following some form of competition but may be subject to periodic review, hence the nation concerned can be said to be in *qualified* rather than *absolute* compliance with the UNESCO *Recommendation*. Similarly, in the example of Finland quoted above, academic staff are not in the majority on the University Board, but all members of the university board are appointed by the University Senate, which suggests *qualified* compliance with the UNESCO *Recommendation* on academic governance, as the majority of board members are either elected from, or appointed by, the academic staff. In addition, difficulties in adjudging compliance arise from the UNESCO *Recommendation* sometimes lacking clarity – for example paragraph 18 states that 'the nature of institutional autonomy may vary according to the type of establishment involved' (but fails to specify what is required for compliance) while paragraph 46 states that 'Security of employment in the profession, including tenure or its *functional equivalent*, where applicable, should be safeguarded' (my emphasis). For these reasons, on the basis of the relevant legislation, each nation was adjudged to be in compliance, qualified compliance, or non-compliance with the UNESCO *Recommendation*. Space does not permit inclusion of the full set of results, however table 1 contains illustrative examples demonstrating the approach used.

**[Table 1 to go about here]**

The first parameter identified by the UNESCO *Recommendation* as essential for academic freedom is institutional autonomy. Autonomy is a necessary but not a sufficient condition for academic freedom, as autonomous universities (for example private universities) can deny academic freedom to their employees. As table 2 shows, in all but two of the EU states, universities are autonomous bodies. Moreover in some states university autonomy is considered to be sufficiently important to be included in the Constitution – in Estonia, for example, article 38 (1) of the Constitution states that: 'Universities and research institutions



shall be autonomous'. In the last decade recognition of the centrality of the university sector as a major lever in creating new knowledge and providing a hi-tech skills base in order to build a knowledge economy has led governments to increase the autonomy of universities. This has been especially marked in universities previously subject to strong centralising control by dint of their governments being under the control of the USSR (e.g. in Latvia, Lithuania, etc.). However other nations not within the USSR or the Warsaw Pact, (e.g. France) have also sought to increase the autonomy of their universities to better enable them to compete in an emerging global market for higher education. The situation in Denmark constitutes a special case. The Danish government passed an act in 2003 which fundamentally altered the workings of universities, as Carney (2006, 222) reports the Prime Minister Anders Fogh Rasmussen stated that 'The Government proposes that universities should develop concrete goals for knowledge dissemination, for example in terms of how many patents they sell, or in terms of their collaboration with private businesses. Their work in terms of knowledge dissemination and application will have implications for how much money they receive in order to undertake research'. Consequently, Danish universities have much less autonomy than their European counterparts - for example, the 2003 Act states that 'The Minister lays down general rules governing education, including grading and quality development'.

**[Table 2 to go about here]**

The second UNESCO parameter focuses on individual academic freedom. In the majority of EU states academic freedom is explicitly protected, either in the constitution or, more usually, in specific laws relating to universities or the higher education sector. For example, Article 20(1) of the Spanish Constitution states that 'The following rights are recognised and protected: (c) academic freedom', while the Irish Universities Act of 1997 states in Section 14 that 'A member of the academic staff of a university shall have the freedom, within the law, in his or her teaching, research and any other activities either in or outside the university, to question and test received wisdom, to put forward new ideas and to state controversial or unpopular opinions and shall not be disadvantaged, or subject to less favourable treatment by the university, for the exercise of that freedom'. Consequently such states can be considered as compliant with the UNESCO *Recommendation*. In some nations, however, academic freedom only has indirect protection, derived from judicial interpretations of the protection of free speech and expression provided by the Constitution. In such cases, academic freedom is a specific liberty granted on a professional basis, and is not allowed to exceed the more generally granted freedom of speech. Conversely, nations which prohibit freedom of speech and expression to ordinary citizens, are generally unable to grant academic

freedom to university scholars. Perhaps the most well-known example of indirect protection is the USA, where protection for academic freedom has been sought by appeals to the Supreme Court through interpretations of the First Constitutional Amendment which protects free speech. Similarly within some of the EU nations academic freedom is protected derivatively by constitutional freedom of speech clauses. The two exceptions within the EU are Malta and the UK. The UK constitutes a special case in that, unlike the other EU states, it does not have a written constitution protecting either academic freedom or freedom of speech. Academic freedom is mentioned in the U.K. 1988 Education Reform Act. However the purpose of the Act was to abolish tenure, and the clause on academic freedom was designed to ensure just cause in instances of the cessation of academic employment, rather than to protect the academic freedom of those in employment in higher education, which is the purpose of (for example) the 1997 Irish Universities Act cited above. Moreover significantly, the last Statutory Instrument (No. 604) which confirmed the powers and duties of the UK University Commissioners under the 1988 Act to protect academic freedom until 1st April 1996, was issued in 1995, and none have been issued since.

**[Table 3 to go about here]**

The third UNESCO *Recommendation* concerns academic governance, and recommends that academic staff should have the right to take part in the governing bodies and the right to elect a majority of representatives to academic bodies. In some nations, the elected Senate is also the university's supreme decision making body, and hence comply with this requirement. In others the executive committee is a separate body on which (for example) the academic staff may not sit, although they may have the right to elect representatives to it. In circumstances such as this academic staff can take part in the work of the governing body but do not have a direct voice - hence the situation is one of qualified compliance, in which the spirit of the Recommendation is upheld. In just over half of the EU states, universities are in compliance with the UNESCO Recommendation, and academic staff have the majority voice in the key decision making bodies. In six nations a state of qualified compliance exists in which external representatives are in the minority on the university executive bodies, but academic staff are also in a minority, with the balance of power held by the remaining representatives drawn from elsewhere in the university (i.e. the students and academic support and administrative staff). However in six of the EU states, the universities' decision making bodies are dominated by external representatives, and the academic staff either make a minor contribution to decision making, or have no input at all. For example in Denmark the Board is the supreme executive body comprising a majority of members external to the University. Moreover, as Carney (2006, 223) relates: 'boards are nonetheless manifesting some of the

most pervasive elements embedded in the reforms: accountability demands from central authorities are reshaping the work of the supreme decision-making bodies within universities to the needs of external stakeholders (primarily the controlling ministry) at the expense of those internal groups that have, historically, provided them with their legitimacy.’

**[Table 4 to go about here]**

The final important parameter of academic freedom identified in the UNESCO *Recommendation* is tenure. As can be seen from table 5 the level of compliance with this recommendation is generally low in the EU states - in about half, a system of tenure operates which is basically in line with UNESCO’s requirements. However, in eleven states, some form of qualified compliance exists in which academics can receive some form of employment protection, albeit for a limited period, or tenure following some form of probation. For example in Austria the University Law of 2002 Chapter 3 states that ‘Employment contracts may be of indefinite or limited term. The term of limited term employment contracts shall not exceed six years, on pain of invalidity, unless otherwise provided for by this Act.’ In the remaining states tenure does not exist and staff have little or no employment protection. Regrettably many states are contemplating, or are in the process of undertaking, a shift away from a system of tenure, where the staff have the status of civil servants, to a contractual system, in which tenure does not exist.

**[Table 5 to go about here]**

Examining compliance with the UNESCO *Recommendation* in a summative fashion, Table 6 shows that only about one third of states can be considered as fully compliant with all elements of the UNESCO *Recommendation*. Interestingly, it is notable that this minority includes those states which have, until relatively recently, been under totalitarian control (e.g. Estonia, Poland, etc.). These nations have only recently re-written their constitutions and their higher education legislation, and it is possible that their experiences of undemocratic rule have led them to better appreciate the benefits of academic freedom, both to the higher education sector, and society at large. Nevertheless in the majority of states, there is either complete or qualified compliance with the majority of UNESCO’s *Recommendation*. However, recent and proposed legislation in the EU states has been designed to move universities away from what Olsen would describe as ‘a meritocratic community of scholars’ in which ‘the University’s corporate identity and integrating self-understanding is founded on a shared commitment to scholarship and learning, basic research and search for the truth, irrespective of immediate utility and applicability, political convenience or economic benefit. The advancement, validation and dissemination of knowledge are founded on cognitive categories such as free inquiry and intellectual freedom, rationality, intelligence, learning,

academic competence and expertise, fidelity to data and knowledge, theoretical simplicity, explanatory power, conceptual elegance and logical coherence' towards a model in which the university is a 'service enterprise embedded in competitive markets (in which) research and higher education are commodities, bundles of goods to be sold in a free market. ... Information and knowledge are strategic resources for competitiveness and survival, not a public good. Autonomy from government is turned into a management tool for changing universities and the New Public Management ideas and techniques from private enterprises are celebrated. Collegial, disciplinary and democratic organization and individual autonomy are viewed as hindrances to timely decisions and good performance, to be replaced by strong management and inter-disciplinary organization' (Olsen 2005, 8, 12f). This is manifest in a general trend towards a greater level of autonomy for universities, being accompanied by a decline in employment protection for academic staff, allied to a lower level of representation on university decision making bodies. For example, in August 2007, the French National Assembly passed the LRU (Law no. 2007-1199 - Loi Relative aux libertés et responsabilités des universités), which by 2012 will have given all French universities powers to spend their own budgets, recruit and decide pay levels of their staff and take over ownership of their buildings. Of France's 85 universities, 20 have been granted autonomous status by the government under the new act, and between them, these newly autonomous institutions cater for 312,000 students, which is circa 20% of the total student enrolment in French universities. However, while the universities have been given greater autonomy, the participation of academic staff in the executive bodies within the universities has been weakened.

**[Table 6 to go about here]**

### **The Reasons for Low Compliance with the UNESCO *Recommendation***

This paper has demonstrated that there is not a universally high level of compliance among the EU nations with the 1997 UNESCO *Recommendation* which safeguards academic freedom, despite agreeing to implement it more than a decade ago. This conclusion concurs with UNESCO's own finding that 'it is regrettable that the fundamental principle of the independence of higher-education teaching personnel has to date not been affirmed through any treaty instrument' (Eisemann, 2007, 292). Given the diversity of historical circumstances within the EU states, it is difficult to identify generically applicable reasons for this deficit. However, one problem may lie in the nature of one aspect of academic freedom covered by the *Recommendation*, namely institutional autonomy. Table 2 showed that most nations have increased the level of autonomy of their universities, to make them more efficient and better able to compete with other institutions, both in their mother countries and abroad. Given that

academic freedom should enable universities to be independent from government control, it is conceivable that European Universities, having been granted full functional and financial autonomy, might choose to ignore requests from central government to conform with the UNESCO *Recommendation*. However, this possibility was foreseen when the *Recommendation* were drafted, which is why paragraph 20 explicitly states: ‘Autonomy should not be used by higher education institutions as a pretext to limit the rights of higher-education teaching personnel provided for in this Recommendation or in other international standards set out in the appendix’ (UNESCO, 1997, 28). Moreover, it is likely to be the attitude of national governments, rather than that of university rectors, which helps explain the low level of compliance. Clearly if the governments of individual nations observe the 1997 *Recommendation*, it is likely that universities within their jurisdictions will follow suit; conversely where governments fail to apply the *Recommendation*, there is no reason or incentive for universities to apply it unilaterally. More significantly perhaps, as the GATS agreement on higher education starts to take effect, and universities begin to compete for students and research prestige globally, if one university (or nation) chooses to ignore the *Recommendation*, it could gain a comparative advantage, if all other universities or nations are complying with it.

However, some of the reason for low compliance must lie with the legal status of UNESCO and the content of the *Recommendation*. The UN Charter and the Constitution of UNESCO established UNESCO’s legal competence with respect to human rights but, as Marks (1977, 39) points out ‘the Organisation is prohibited from “intervening in matters which are essentially within [the] domestic jurisdiction of Member States”. This provision undeniably sets limits to the Organisation’s action in this sphere’. In essence, nations may ignore an element of the *Recommendation* (say, for example, on the salaries and employment security of academic staff) on the grounds that such matters relate to domestic jurisdiction and national economic policy. Furthermore UNESCO recommendations have lower legal status (and moral authority) than conventions, given that the adoption of an international convention requires a two-thirds majority at the UNESCO General Conference, while for recommendations, a simple majority is sufficient. Moreover conventions, thus established, constitute binding contracts (with the threat of sanctions for non-compliance), while recommendations do not, and although signatories are invited, and pledge, to implement them, they are under no compulsion. As Aust (1986, 794) points out ‘The fundamental distinction between an informal instrument and a treaty is that, although the former puts on record the mutual understandings of the states concerned as to how each will act in relation to the others, or others, the parties have no intention that the instrument should itself create a

legal relationship and be binding on them.’ In the absence of legal compulsion in the event of a breach for recommendation, Yusuf suggests (2007, 37) ‘observance is generally based on the moral and political obligations assumed by Member States through the negotiation, elaboration and approval of such recommendation by the General Conference’. However, recommendations thus constitute pledges rather than contracts and thereby have the status of “soft” law, whose efficacy has been questioned. Raustiala (2005, 586), for example, argues that ‘There is no such thing as “soft law”. The concept of soft law purports to identify something between binding law and no law. Yet as an analytic or practical matter no meaningful intermediate category exists.’

A further allied problem concerns the content and drafting of the *Recommendation*. O’Connell (p.109f) argues that ‘Soft law has many advantages, ... Its instruments are flexible, being able to take almost any form global actors wish to use. Soft law instruments thus can provide an experimental response to new challenges as they continually arise.’ However, in consequence of such flexibility, soft laws are often couched in such general terms so as to both dilute their impact and ensure that compliance may be readily achieved. In such circumstances, as Baxter (1980, 556) disparagingly suggests, compliance often occurs ‘through force of bureaucratic habit ... in order to maintain the credit-rating of their government or ministry. ... They do not, in the generality of cases, purport to do so because the undertakings constitute binding legal instruments.’ This deficiency is recognized within UNESCO – indeed Yusuf (2007, 48) acknowledges that ‘another area that might offer ample room for improvement is the layout and drafting of such recommendations. ... there is a need to ... avoid unwieldy texts that often juxtapose principles and measures and formulate too many detailed provisions for their implementation’. It is evident that some tightening up of the 1997 *Recommendation* would be beneficial – for example with respect to governance, the document states that ‘Higher-education personnel should have the right and opportunity, ... to take part in the governing bodies ... [and] have the right to elect a majority of representatives to academic bodies’(para 31). In some states such as Greece, Academic Senate is the supreme decision making body, while in others executive power is granted to a non-academic managerial board or council, and the Senate has little or no impact on important strategic financial decisions. More generally, the recommendation on h.e. personnel was drafted before the advent of the widespread use of new technologies in teaching and learning, and the shift towards the commodification of higher education. Such information and communication technologies make it perfectly possible for a university to establish outreach institutions in overseas countries to deliver higher education, and whereas the nation of the home institution may comply with the UNESCO *Recommendation*, that of the outreach institution may not –

hence Lieberwitz's analysis of distance learning and academic freedom concludes that 'The assurances that academic freedom will be protected are illusory' (Lieberwitz, 2002, 115).

However, although lacking the status of a treaty and the authority of hard law, compliance with the UNESCO *Recommendation* is, nevertheless, subjected to periodic scrutiny, and a mechanism exists to report infringements. Moreover, as Symonides (2001, 317) points out 'the *Recommendation* provides that the Director-General of UNESCO will prepare a comprehensive report on the world situation with regard to academic freedom on the basis of information supplied by Member States'. Hence an important aspect of the work of the Joint ILO-UNESCO Committee of Experts on the Application of the Recommendation concerning Teaching Personnel (CEART) is to monitor progress towards international compliance with the Recommendation, and investigate allegations of non-observance. The Committee meets every three years, for up to five working days. At its 2006 meeting the Committee reported that 'in many countries recent developments have therefore, in a practical sense, steadily undermined the traditional practical application of the concepts expressed in the relevant Articles of the 1997 *Recommendation*. ... there is a pressing need to identify the nature, extent and effect of that erosion in a definitive manner and to then develop new approaches to ensure the Recommendation's proper application in the present, rapidly changing environment.' (CEART, 2007, 26f). The acceleratory rate of change in higher education suggests that, to be effective in protecting academic freedom, the Committee will need to consider increasing its work rate and meeting more frequently. For example, in May 2006, the Committee received a complaint from the National Tertiary Education Union of Australia in respect to non-observance of the 1997 *Recommendation* by the Australian National Government. It took the CEART more than two years to issue a seven page report in response to this complaint (CEART, 2008). In May 2008 the Dansk Magisterforening (a registered union and professional association with over 36,000 members from the h.e sector in Denmark) submitted a petition to the CEART concerning the Danish University Law of 2003 and its negative implications for academic freedom - specifically mentioning freedom of research, institutional autonomy, institutional accountability, and collegiality and governance rights. The impact of the 2003 law is due to be evaluated in 2009 and may be subject to revision by the Danish government. However, it is possible that the CEART's response will come too late to have an impact on, or input to, the evaluation.

## **Conclusion**

This paper shows that the level of compliance with the UNESCO *Recommendation* is generally lower in the EU states than might be expected. Moreover, the problems of getting

nations to comply with ‘soft’ law like the UNESCO *Recommendation*, allied to the rapid speed of change in the function and management of universities, have meant that the protection of the academic freedom of the majority of the individual academic staff in Europe’s Universities has probably diminished over recent years. Reversing this trend will require concerted effort by NGOs, universities and their staff, the form of which will need to be debated and agreed. At the very least UNESCO needs to undertake a more detailed analysis, utilising a methodology similar to that employed in this paper, in order to ascertain the level of legal protection for academic freedom in Europe and beyond. In addition, as Standler (2000: 18) correctly observes: ‘A significant part of individual academic freedom is not a legal concept, but dependent on the internal culture among faculty and management (e.g. Department Chairmen, Deans, the Chancellor, and their administrative staff)’, thus there may be a stronger (or weaker) cultural commitment to academic freedom than is evident from an analysis of the legislation. Moreover, even when legal protection exists, changes in the academic environment (such as increased student numbers and reduced research funding) may lead to a situation where, Barnett (1997: 53) suggests, ‘academic freedom is not taken away; rather, the opportunities for its realisation are reduced’. Hence although UNESCO’s aspiration is that the *Recommendation* will be enacted in national legislation, as well as assessing the strength of legal protection, UNESCO might usefully investigate whether, and which forms of, *de jure* protection of academic freedom also result in *de facto* protection for academic staff.

At their last meeting in 2006, the CEART members reported that ‘in some countries it is apparent that the relevant provisions of the 1997 *Recommendation* are either not well known or totally unknown’ and consequently recommended to ‘take steps to better promulgate the contents of the 1997 *Recommendation* to governments, university governing bodies and staff organizations involved in higher education’ (CEART, 2007, xiv). Such observations are repeated, *ad nauseam*, in the academic literature on the subject – in a recent work, for example, O’Neil (2008, vii) described academic freedom as ‘a curious concept, not easily defined and poorly understood’. At European level, the European Universities Association and professional associations representing academic staff in individual states (e.g. the Sveriges universitetslärarförbund in Sweden) could do more, both individually and collectively, to raise the level of awareness and knowledge of academic freedom at individual and institutional levels. In the USA the American Association of University Professors’ *Recommended Institutional Regulations on Academic Freedom and Tenure* (AAUP, 2006), is widely accepted within most American universities, and there is an extensive litany of judicial decisions on the interpretation of the First Amendment of the US Constitution which relate to



academic freedom. Consequently, the acceptance of the AAUP Statement is so widespread that it is now deemed to 'constitute a professional "common" or customary law of academic freedom and tenure' (Finkin, 1972, 577). At present there is no comparable document, or a similar sponsoring association (e.g. a European Association of University Professors) within the European Union. However, Karran (2009) has produced a working definition, based on the constitutional and legislative protection for academic freedom and on legal regulations concerning institutional governance and academic tenure in the EU, that goes beyond traditional discussions of academic freedom by specifying not only the rights inherent in the concept but its necessary limitations and safeguard and which, he suggests, could form the basis for a European *Magna Charta Libertatis Academicae*. The adoption of such a document by (inter alia) the EUA and the national academic professional associations would do much to raise the salience and awareness of academic freedom among h.e. staffs in Europe's universities.

Writing forty years ago, and long before the present indignities suffered on academia, especially in the UK, Bissell (1969, 184) observed: 'The irony is that the university, by history and inclination, will often tolerate what may ultimately destroy it. The time has come, as it must to all liberal institutions, when it must resolve this contradiction. The resolution will not come by retaliatory force (although this may be unavoidable), but by the compulsion of an aroused community.' If we, as academics, believe that academic freedom is important, not only to academia but to the world at large, then we must rouse ourselves and others to seek its protection. For staff in the medieval universities of Europe, winning academic freedom was a lengthy and arduous process in which lives were lost, and careers wrecked. Europe was the cradle of the *Studia Generalia*, of the Humboldtian research university and also of the philosophical concept of academic freedom, which have subsequently been emulated across the globe. Academic freedom was derived from the *libertas philosophandi* - the essential right to think for one's self and express one's views openly. Failure to nurture the concept of academic freedom within universities more especially by those European nations whom first promulgated this basic right, threatens to undermine this, and other basic associated human rights, both within Europe and, by imitation, in other nation states where it is already considerably fragile. Such liberties, once lost, will be infinitely more difficult to reinstate than they were to achieve in the first place.

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**Table 1 Examples of the approach adopted.**

	Are the institutions legally autonomous?	Is academic freedom protected either in the constitution or in law?	Do the academic staff elect the majority of representatives to decision making bodies?	Does academic tenure exist?
Compliance	<p>Estonia            Constitution of 28th June 1992            Article 38: (2) Universities and research institutions shall be autonomous, within the limits prescribed by law</p>	<p>Czech Republic            The Higher Education Act No. 111/1998 (Amended And Consolidated up to Act No. 624/2006) Section 4: Academic Freedoms and Academic Rights.            The following academic freedoms and rights are guaranteed at higher education institutions:            a) freedom of scholarly, scientific, research and artistic activities as well as publication of the results thereof;            b) freedom of teaching, in particular with regard to openness to different scientific and scholarly views, scientific and research methods and artistic movements;            c) the right of learning, which includes the free choice of specialization within the framework of degree programmes as well as the freedom to express one's views during classes;            d) the right of members of the academic community to elect their representative academic bodies;            e) the right to use academic insignia and to hold academic ceremonies.</p>	<p>Latvia            Law On Higher Educational Establishments, Consolidated 3 June 2004            Section 13. Constitutional Assembly            (1) The Constitutional Assembly is the highest collegial representation and management body and decision-taking body authorised by an institution of higher education. The Constitutional Assembly shall be elected by secret ballot from: (a) professors and other academic staff; (b) students; and (c) other staff groups.            (3) The proportion of representatives of the academic staff in a Constitutional Assembly shall not be less than 60 per cent and the proportion of students – not less than 20 per cent.</p>	<p>Higher Education Law 2005            Article 121 (2)            Appointment shall be for an indefinite or specific period of time.            Article 127: 1. The employment relationship of appointed academic staff shall expire by virtue of law in the case of: 1) an appointment found to be based on false or invalid documents; 2) a valid court judgement depriving an academic staff member of civic rights; 3) a valid disciplinary penalty depriving an academic staff member of the right to practise the profession of academic teacher either permanently or for a specific period of time; 4) a valid penal measure prohibiting an academic staff member from holding a specific position if the judgment imposing the measure concerns the performance of duties of an academic teacher; 5) the expiry of a three-month period of absence from work due to preventive detention; 6) an academic staff member serving a sentence of imprisonment or restricted liberty; 7) the</p>

				<p>expiry of the appointment period; 8) the death of an academic staff member.</p> <p>2. The employment relationship of appointed academic staff holding the position of professor zwyczajny (full professor) or profesor nadzwyczajny (university professor) shall expire at the end of the academic year in which they reach the age of 70.</p>
Qualified Compliance	Not Applicable	<p>Greek Constitution 11 June 1975</p> <p>Article 14: (1) Every person may express and propagate his thoughts orally, in writing and through the press in compliance with the laws of the State.</p> <p>(3) The seizure of newspapers and other publications before or after circulation is prohibited. Seizure by order of the public prosecutor shall be allowed exceptionally after circulation and in case of:</p> <p>(a) an offence against the Christian or any other known religion.</p> <p>(b) an insult against the person of the President of the Republic.</p> <p>(c) a publication which discloses information on the composition, equipment and set-up of the armed forces or the fortifications of the country, or which aims at the violent overthrow</p>	<p>Luxembourg</p> <p>A – N° 149: Law of 12 August 2003 Section I: The Governing Council: Art. 18. Functions determines the University's general policy and strategic choices and exercises control over the University's activities</p> <p>Art. 19. Composition and Function</p> <p>(1) The Governing Council comprises seven members of which four or more have exercised university responsibilities. The members of the Governing Council are not able to exercise any other function close to the University. They are chosen on the basis of their competence in the large areas of teaching and of research developed in the university, and they are nominated by the Grand Duke on the recommendation of the Government in council.</p> <p>Section 3 The University Council. Art. 26. Functions: The university council assists the Rectorate in drawing up the</p>	<p>Lithuania</p> <p>Law On Higher Education 21 March 2000 No.Viii-1586</p> <p>Article 31. Procedure for Appointment to the Positions</p> <p>1. Positions of higher education establishment teachers and research workers shall be occupied by way of open competition for a period not longer than five years (term of office).</p> <p>2. Two months before the termination of the term of office of a higher education establishment teacher or research worker, an open competition shall be announced for holding such position. The person who holds that position may also take part in such competition.</p> <p>3. If a professor wins a competition for the third term of his office, he shall acquire the right to hold to hold this</p>

		<p>of the regime or is directed against the territorial integrity of the State.</p> <p>(d) an obscene publication which is obviously offensive to public decency, in the cases stipulated by law.</p> <p>Article 16: (1) Art and science, research, and teaching are free and their development and promotion constitutes a state obligation.</p> <p>Academic freedom and the freedom to teach do not override the duty to obey the Constitution</p>	<p>development plan and, through its decisions, it determines the University's educational and scientific affairs</p> <p>Art. 27. Composition: The university council is composed of: a) Two representatives of the teachers/researchers per faculty elected by the teachers/researchers; b) two representatives of the students per faculty elected by the students; c) one representative of the administrative and technical personnel per Faculty, elected by the administrative and technical personnel; d) a representative of the teaching and research assistants in each faculty, elected by the personnel of the teaching and research assistants in each faculty; e) one representative from the library, elected by library personnel; f) two directors of interdisciplinary centres, elected by those working in interdisciplinary centres; g) a delegate for the promotion of women.</p>	<p>position in that higher education establishment without any competition until he reaches the age of 65 years.</p> <p>4. By the decision of the senate (academic council), an extraordinary performance evaluation of a higher education establishment teacher or research worker may be carried out. The higher education establishment teacher or research worker who receives a negative performance evaluation, shall be dismissed in accordance with the procedure established by law.</p>
Non-Compliance	<p>Denmark</p> <p>Act on Universities May 28 2003</p> <p>Part 2 Degree Programmes</p> <p>3. -(1) The university is free to decide which research-based degree programmes it wants to offer within its academic scope.</p> <p>Pursuant to section 4 (1 (articles 1 and 2)) and section 5 (1) of this Act, the degree programmes offered by the university shall be subject to the approval of the Minister of Science, Technology and Innovation.</p> <p>(2) The Minister may revoke the approval of a programme offered pursuant to subsection (1), if it is</p>	<p>U.K.</p> <p>Education Reform Act 1988 202 (1) There shall be a body of Commissioners known as the University Commissioners who shall ... have regard to the need (a) to ensure that academic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing</p>	<p>Denmark</p> <p>Act on Universities May 28 2003</p> <p>10 (1) The Board is the highest authority of the university.</p> <p>12 (2): The Board shall be composed of external members and members representing the academic staff of the university, which includes PhD students with university contracts, the technical and administrative staff and the students. The Board shall comprise a majority of external</p>	<p>U.K.</p> <p>Education Reform Act 1988 para 203</p> <p>the statutes of each qualifying institution include—</p> <p>(a) provision enabling an appropriate body, or any delegate of such a body, to dismiss any member of the academic staff by reason of redundancy</p>



	<p>no longer necessary for the university to offer the programme concerned, or if the programme no longer lives up to the high standard of quality applicable at all times to research-based education.</p> <p>(2) The Minister lays down the rules concerning the acquisition of the doctoral degree.</p> <p>7. Subject to the approval of a second Minister, the university may offer programmes in accordance with rules laid down by the Minister concerned.</p> <p>8. The Minister lays down general rules governing education, including grading and quality development, cf. sections 4 and 5, on the titles connected to education, and cf. section 6 on admission requirements.</p> <p>Part 3 Governance Regulations</p> <p>(8) The Board shall enter into a performance contract with the Minister.</p>	<p>themselves in jeopardy of losing their jobs or privileges they may have at their institutions; (b) to enable qualifying institutions to provide education, promote learning and engage in research efficiently and economically; and (c) to apply the principles of justice and fairness.</p> <p>[The protection under the Act was granted only to staff in universities established before 1992, moreover the last Statutory Instrument, (No. 604) which confirmed the powers and duties of the University Commissioners until 1st April 1996, was issued in 1995, none has been issued since.]</p>	<p>members. The Board shall elect a chair from among its external members.</p>	
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**Table 2 Compliance with the Recommendation on Institutional Autonomy.**

Compliance	Qualified Compliance	Non Compliance
Austria, Belgium, Bulgaria, the Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom	N.A.	Cyprus, Denmark

**Table 3 Compliance with the Recommendation on Academic Freedom.**

Compliance	Qualified Compliance	Non Compliance
Austria, Bulgaria, the Czech Republic, Finland, France, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Poland, Slovakia, Slovenia, Spain	Cyprus, Denmark, Estonia, Germany, Luxembourg, Netherlands, Portugal, Romania, Sweden	Malta, United Kingdom

**Table 4 Compliance with the Recommendation on Self Governance.**

Compliance	Qualified Compliance	Non Compliance
Bulgaria, the Czech Republic, Estonia, Finland, Greece, Hungary, Italy, Latvia, Lithuania, Poland, Portugal, Romania,	Austria, Belgium, Germany, Ireland, Luxembourg, Malta	Cyprus, Denmark, France, Netherlands, Sweden, United Kingdom

Slovakia, Slovenia, Spain		
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**Table 5 Compliance with the Recommendation on Tenure.**

Compliance	Qualified Compliance	Non Compliance
Belgium, Bulgaria, Cyprus, the Czech Republic, Finland, Greece, Hungary, Ireland, Poland, Portugal, Romania, Slovenia, Spain, Sweden	Austria, Denmark, Estonia, France, Germany, Italy, Latvia, Lithuania, Luxembourg, Netherlands, Slovakia	Malta, United Kingdom

**Table 6 Summary Table**

	Are the institutions legally autonomous?	'Is academic freedom protected either in the constitution or in law?3.6	'Do the academic staff elect the majority of representatives to decision making bodies?	Does academic tenure exist?3.6
Austria	Compliance	Compliance	Qualified Compliance	Qualified Compliance
Belgium	Compliance	Qualified compliance	Qualified Compliance	Compliance
Bulgaria	Compliance	Compliance	Compliance	Compliance
Cyprus	Non Compliant	Qualified compliance	Non Compliance	Compliance
the Czech Republic	Compliance	Compliance	Compliance	Compliance
Denmark	Non Compliance	Qualified Compliance	Non Compliance	Qualified Compliance
Estonia	Compliance	Qualified Compliance	Compliance	Qualified Compliance
Finland	Compliance	Compliance	Compliance	Compliance
France	Compliance	Compliance	Non Compliance	Qualified Compliance
Germany	Compliance	Qualified Compliance	Qualified Compliance	Qualified Compliance
Greece	Compliance	Compliance	Compliance	Compliance
Hungary	Compliance	Compliance	Compliance	Compliance
Ireland	Compliance	Compliance	Qualified Compliance	Compliance
Italy	Compliance	Compliance	Compliance	Qualified Compliance
Latvia	Compliance	Compliance	Compliance	Qualified Compliance
Lithuania	Compliance	Compliance	Compliance	Qualified Compliance
Luxembourg	Compliance	Qualified Compliance	Qualified Compliance	Qualified Compliance
Malta	Compliance	Non Compliance	Qualified Compliance	Non Compliance
Netherlands	Compliance	Qualified Compliance	Non Compliance	Qualified Compliance
Poland	Compliance	Compliance	Compliance	Compliance
Portugal	Compliance	Qualified Compliance	Compliance	Compliance
Romania	Compliance	Qualified Compliance	Compliance	Compliance
Slovakia	Compliance	Compliance	Compliance	Qualified Compliance
Slovenia	Compliance	Compliance	Compliance	Compliance
Spain	Compliance	Compliance	Compliance	Compliance
Sweden	Compliance	Qualified Compliance	Non Compliance	Compliance
United Kingdom	Compliance	Non Compliance	Non Compliance	Non Compliance