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Academic Freedom in the European Context

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Freedom of Research in Austria

Magdalena Pöschl

1 Introduction

There is almost nothing that powerful men fear as much as the truth, with the exception of perhaps political satire and art. It is not by chance that authoritarian states always try to keep something of a rein on science and art while at the same time steer the direction in which these things go. But even in democracies, there have always been tensions between science and the state because the latter needs the knowledge science brings but at times may feel threatened by it. In Hungary for example, these tensions recently reached such a level that the Central European University was forced to abandon its campus in Budapest and relocate to

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Vienna.[1] But even in Austria, freedom of research can sometimes be perceived as fragile. In view of the density of constitutional guarantees of such freedom, this may seem surprising. In this regard, the freedom of research in Austria has been guaranteed no less than three times. Indeed, since 2008 the constitution has even contained an institutional guarantee for public universities, and since 2013 Austria has declared applied and basic research to be a national objective. This body of law will be briefly presented in Sect. 2, in order to then explain in more detail in Sect. 3 the five doctrinal components of the freedom of research. The first three components are largely uncontroversial, namely the subjects of the freedom, the addressees and its scope of protection. However, it is contested as to when interference with the freedom of research occurs and under what conditions this interference is justified. This uncertainty arises to some degree from Austria's current science policy, which could be described as "smart research governance": It consists of many individual low-impact measures, which act in concert to noticeably steer science, but do so in a much more sophisticated way than conventional command and control instruments. It is no coincidence that these low-impact measures are less tangible than common state interferences and that they accordingly frequently evade traditional justification schemes. The difficulties this more subtle approach creates will be demonstrated using three examples of such measures employed in Austria—the duty of universities to subject research to ethical assessment, qualified research funding as well as the recording and evaluation of scientific performance at universities (4). Finally, in light of these observations, the situation regarding the freedom of research in Austria will be assessed (5).

2 Constitutional Guarantees for Research

Freedom of research and its relevance for public universities is invoked by Austrian constitutional law in a wide variety of legal documents:[2] These laws and documents vary greatly by age and source, ranging from being

[1] See Novak (2019); Walker (2019).

[2] The Austrian constitution does not contain any requirement for incorporation of constitutional provisions in one single document; therefore, in addition to the original document—the Federal

very recent to over 150 years old and with some being purely national in origin while others stem from international or European Union law. This colourful mixture of laws forms the seemingly robust constitutional framework that creates the environment within which research is currently being conducted in Austria.

2.1 Three Guarantees of Freedom

The first of these legal guarantees comes from Art. 17 of the State Basic Law of 1867 (*Staatsgrundgesetz*, StGG) which declares research and its teaching to be free. The StGG covers a catalogue of fundamental rights originally dating from Habsburg times that is still valid in Austria today.[3] The second guarantee ensuring freedom of research is derived from the freedom of opinion in Art. 10 of the European Convention on Human Rights (ECHR),[4] which also enjoys constitutional status in Austria.[5] The final guarantee arises from Art. 13 of the Charter of Fundamental Rights (CFR) which, according to the jurisprudence of the Austrian Constitutional Court (*Österreichischer Verfassungsgerichtshof*, VfGH), must be treated as if it had constitutional status.[6]

When examining these three guarantees, it is striking that the oldest and only purely Austrian law explicitly refers to the freedom of research.[7] Art. 17 StGG clearly states that "science and its teaching are free". Furthermore, in contrast to most of the other freedoms covered by the

Constitutional Law (B-VG)—there are a large number of other constitutional laws, treaties of constitutional rank, and even constitutional provisions in simple laws.

[3] The Basic Law of 21 December 1867, on the general rights of citizens for the kingdoms and countries represented in the Imperial Council, Imperial Law Gazette 1867/142, was adopted in 1920 from the monarchy's body of law with the rank of a constitutional law, see Art. 149(1) B-VG.

[4] At least that is the jurisprudence of the European Court of Human Rights, see with further references § 23 at 14 in Grabenwarter and Pabel (2021).

[5] Art. II(3) Federal Constitutional Law of 4 March 1964 amending and supplementing provisions of the 1929 version of the Federal Constitutional Act on international treaties, Federal Law Gazette for the Republic of Austria (*Bundesgesetzblatt für die Republik Österreich*) 1964/59.

[6] *Ausgewählte Entscheidungen des Verfassungsgerichtshofes* (VfSlg), which is a collection of the findings and most important decisions of the Austrian Constitutional Court, 19.632/2012.

[7] This was by no means a normal standard in the nineteenth century. Presumably the StGG was in this respect inspired by the *Paulskirchenverfassung*, in more detail see para. 2 in Hammer (2016).

StGG, freedom of research is not subject to an explicit legal reservation. In this respect, the ECHR uses a broader brush as it guarantees scientific freedom simply because it falls within the scope of freedom of opinion, which in turn (as with most of the freedoms provided for under the ECHR) is subject to legal reservation. The CFR charts a course between the reservation free Art. 17 StGG and the restrictable Art. 10 ECHR in that it dedicates an independent guarantee to the freedom of research in Art. 13, but subjects this freedom to a legal reservation in Art. 52. Perhaps somewhat surprisingly, it is the oldest guarantee of these three that carries the most weight in Austria. For this reason, legal scholars and jurisprudence use Art. 17 StGG alone when measuring the state's research governance for its conformity with fundamental rights. Art. 17 StGG is, therefore, the sole focus of the following sections, but with academic opinion playing a major role in all this because there is little case law on this guarantee.

2.2 An Institutional Guarantee for Public Universities

In the 1970s, Austria abandoned the traditional university hierarchy that was so heavily dominated by professors: academic administration was no longer to be reserved purely for full professors but was to be undertaken with the participation of associate professors and the like as well as student bodies. The Constitutional Court had no objections to this change, although it proved to be a bitter pill to swallow for many full professors who were used to the traditional system.[8] According to the Constitutional Court, Art. 17 StGG only serves to fend off unjustified state interference on research, but it is not an impenetrable bulwark as it contains no institutional reference whatsoever. In particular, it does not oblige the state to take any positive precautions, for example, to ensure that full university professors can always overrule other members of the university thereby having the greatest influence on academic administration.

[8] VfSlg 8136/1977.

Some forty years later, public universities were finally given an institutional guarantee, which appeared in the most important of constitutional documents, the Federal Constitutional Law (*Bundes-Verfassungsgesetz*, B-VG).[9] Since 2008, Art. 81c B-VG has guaranteed the role of public universities as "places of free scientific research, teaching and the appreciation of the arts" which act autonomously within the framework of the law. Although this guarantee provides no more protection to universities from organisational changes than Art. 17 StGG does, it contains three statements essential to the universities' existence: they are now not only entitled to conduct research but research is their constitutional duty.[10] In order to be able to fulfil this duty, Art. 81c B-VG grants both public universities the right to set research goals independent from governmental instructions[11] as well as obliging the state to support these universities by positive measures in the fulfilment of their tasks.[12]

2.3 A Commitment to Applied and Basic Research

Even though freedom of research in Austria is guaranteed by the three legal sources mentioned above (Art. 17 StGG, Art. 10 ECHR and Art. 13 CFR), and enjoys an institutional guarantee applicable to public universities (Art. 81c B-VG), it stands to reason that this freedom must also have limits as it cannot infringe the rights of other individuals and groups within society. For example, consider medical research which is limited by the right to life and the physical well-being of test subjects, or of the limits placed on biobanks which collect a variety of human genetic materials for preservation and use at a future point in time. However, research can also conflict with public goods, such as animal welfare or environmental protection, to which Austria has committed itself in constitutional law since 2013.[13] Interestingly, the same constitutional law that

[9] Federal Law Gazette 1930/1 (Re-Enactment) as amended by Federal Law Gazette 2021/107, the aforementioned amendment is based on Federal Law Gazette I 2008/2.

[10] For more details see para. 35 in Kucsko-Stadlmayer (2011).

[11] See paras. 17 and 41ff. in Kucsko-Stadlmayer (2011).

[12] See para. 36 in Kucsko-Stadlmayer (2011); paras. 17ff. in Hammer (2016).

[13] §§ 2 and 3 Federal Constitutional Act on Sustainability, Animal Welfare, Comprehensive Environmental Protection, Water Security and Food Supplies and Research, Federal Law Gazette I 2013/111 as amended by Federal Law Gazette I 2019/82.

elucidates these commitments acknowledges only a few provisions later "the importance of basic and applied research",[14] an inclusion that was probably made to clarify that the commitment to animal protection does not exclude animal experiments.[15] Legal scholars rightly doubt that such a tempering qualification was really necessary, because the right to undertake such experiments is already provided for in the freedom of research under constitutional law and can be enforced, unlike state objectives.[16] A secondary benefit of this commitment to research could be that Austria has now constitutionally committed itself not only to applied research—which is currently strongly promoted in political circles—but also explicitly committed itself to basic research.

3 Components of Freedom of Research

3.1 Persons Entitled to the Freedom

According to today's prevailing academic opinion, freedom of research has long since protected not only professors[17] but the entire academic staff at universities, non-university research institutions, as well as doctoral students and freelance researchers who are not employed at any such institution.[18] Industrial researchers are now also regarded as protected

[14] § 6 *leg.cit.*

[15] This is only hinted at in legislative preparatory documents: "Mit dieser Bestimmung soll im Hinblick auf die anderen Staatsziele die Bedeutung der Forschung hervorgehoben werden." (Engl.: This provision is intended to emphasise the importance of research in relation to the other state objectives; p. 2 in Ausschussbericht 2383 der Beilagen zu den Stenographischen Protokollen des Nationalrates, 24. Gesetzgebungsperiode); but it becomes clearer in the plenary debate of the National Council when, for example, Member of Parliament Vock called § 6 a "compromise" (see p. 155 in Stenographisches Protokoll, 207. Sitzung des Nationalrates der Republik Österreich, 24. Gesetzgebungsperiode, 13 June 2013) and Member of Parliament Brunner then complained that § 6 has the consequence that animal protection does not take precedence in animal experiments (see p. 157 ibid.), whereupon delegate Gerstl emphasised: "it is not the case that animals are above everything" (see p. 159 ibid.) which led to delegate Spadiut again complaining that § 6 restricts animal protection (see p. 160 ibid.).

[16] See p. 74 in Budischowsky (2014).

[17] On the status of the earlier opinion, which sometimes took this position, for further references see p. 117 at n. 145 in Pöschl (2010).

[18] Cf. e.g. the findings in VfSlg 14.485/1996, 18.559/2008, and 18.763/2009, which grant scientific freedom to any person who conducts scientific research or teaches.

according to academic opinion[19] and rightly so, if only because the boundaries between purely university-funded and third-party funded research have become increasingly blurred since the government has started to heavily promote cooperation between science and industry. It is now also politically desired that science is more open towards society in general: Within the framework of *Citizen Science*,[20] a programme which promotes public participation in scientific research, professional researchers involve citizens in specific research projects, meaning that citizens can also be subjects of the freedom of research. In short, all who do research—whether at public institutions, in private industry or independently on their own initiative, whether permanent staff, short to mid-term contractors or even the self-employed—such individuals enjoy the protection of the freedom of research.

3.2 Addressees

While the subjects of the freedom of research who can invoke Art. 17 StGG are becoming ever larger and more diverse, the obligations arising from this freedom continue to bind only the state, albeit at the federal, state and municipal levels. This applies by extension to public universities as well, even if they are autonomous vis-à-vis the state.[21]

The prevailing academic opinion is that freedom of research does not have a direct third-party effect, i.e. is not binding for private individuals.[22] When the StGG was enacted in 1867, there were indeed private actors who were putting research under massive pressure, a prime example being the church, which had controlled the direction and nature of research for centuries. Nevertheless, at the time, the state legislator did not want to bind the church directly to freedom of research obligations, rather the legislation

[19] See para. 25 in Hammer (2016); p. 170 in Pöschl (2017); more narrowly, see p. 73 in Budischowsky (2014).

[20] See for example Finke (2014).

[21] See for example p. 45 in Berka (2008); for further references see also paras. 102 et seq. in Kröll (2014).

[22] See paras. 88 and 94 in Kröll (2014); para. 14 in Hammer (2016); on the indirect third-party effect, see for example pp. 134 et seq. in Berka (2002); paras. 94 et seq. in Kröll (2014); p. 171 in Pöschl (2017).

was designed to ensure that the state protects research against interventions from such private actors in the future.[23]

With the notable exception of theological studies,[24] the church today no longer poses a threat to research. With time, however, other private actors have started to exert strong influence in the research sector: for example, industry has gained influence because of its significant financial contributions which allow it to set research goals based on commercial interest. This has an impact not only on researchers directly employed by such actors,[25] but increasingly on all third-party funded scientists and, at times, such private sponsors even contractually oblige scientists to keep their research results secret.[26] Publishers also have considerable influence on research as they decide which scientific works get published.[27] Perhaps somewhat ironically, even the broader *scientific community* has gained in influence over itself and the research it conducts as it partially self-regulates its activities through standards of good scientific practice and recommendations on research ethics.[28] The final two parties worth singling out for mention in this section are the media and an ever-increasingly well-informed public. Both of these actors can play at times a pivotal role if they mobilise against certain scientific projects or goals in such a way that researchers "voluntarily" refrain from undertaking such activities.[29] As private actors, all of those mentioned above are not directly bound by the obligations associated with the freedom of research. However, Article 17 StGG obliges the state to protect researchers from excessive interference with their freedom to conduct research by such private actors.[30]

[23] See para. 5 in Hammer (2016).

[24] The Concordat allows the Catholic Church far-reaching control over scientific doctrines at Catholic faculties; this control can basically be justified by the (collective) freedom of religion, but is not always proportionate in detail, further detail see para. 69 in Hammer (2016).

[25] The VfGH has already clarified in VfSlg 8136/1977 that industrial researchers cannot invoke Art. 17 StGG vis-à-vis their employers, see also p. 73 in Budischowsky (2014).

[26] With further references see pp. 165–166 in Pöschl (2017).

[27] See below 4.2. at n. 86–89 and pp. 203 et seq. in Pöschl (2018).

[28] See pp. 208 et seq. in Pöschl (2018).

[29] An Innsbruck research team, for example, was forced by strong media criticism to stop experiments on pigs that were subjected to an avalanche under anaesthesia in order to determine when death would occur and how much time a search party would have to look for avalanche victims: see Albrecht (2010).

[30] That freedom of research also has protective effects against social forces other than the church is undisputed in academia, see the evidence in para. 5 in Hammer (2016).

3.3 Scope of Protection

In the 1950s, the Austrian Constitutional Court described the scope of the protection under freedom of research as the "search for new knowledge"[31] and the "consolidation of older knowledge".[32] It is recognised that research not only seeks the "truth" but also aims to develop new technologies that may well have significant real-world impacts. According to the prevailing view in legal science, this also is part of the scope of the protection of the freedom of research.[33]

In all this, Art. 17 StGG conveys freedom in the field of scientific activity and work: researchers are basically free to determine for themselves which course to pursue, which methods they will use for this purpose, which experiments they will carry out and how they will evaluate the results of their research. They are equally free to decide whether and, if so, how to disseminate their findings to legal scholars, other experts and the public.[34]

Naturally, it goes without saying that in addition to these freedoms to pursue research, scientists also need the resources to actually do so. In the 1970s, the Constitutional Court categorically rejected the idea of deriving a state duty to take proactive measures from the freedom of research.[35] The Constitutional Court would probably no longer formulate this so succinctly today, especially as it has since the 1990s affirmed in principle the state's duty to protect (and that means: take proactive measures) against excessive private interference into the freedom of research.[36] Nevertheless, Art. 17 StGG does not create any state obligation to finance science per se. According to current academic opinion, however, Art. 17 StGG when read in conjunction with the principle of equality obliges the

[31] VfSlg 3191/1957.

[32] VfSlg 3191/1957; 15.617/1999.

[33] With further references see pp. 172–173 in Pöschl (2017).

[34] See for example p. 24 in Rebhahn (1982); paras. 39–40 in Kröll (2014).

[35] VfSlg 8136/1977.

[36] On this understanding of fundamental rights see Holoubek (1997), who, however, is sceptical about the institutional content of Art. 17 StGG in particular (pp. 204 et seq.); similarly paras. 56 et seq. (see para. 63 regarding Art. 17 StGG) in Kucsko-Stadlmayer (2014); generally on the ECHR see § 19 in Grabenwarter and Pabel (2021).

state not to exclude researchers from resources for subjective reasons,[37] that is to say, that if the state grants research funds at all, it must distribute them according to objective criteria.

It is different only with public universities: According to the Constitutional Court, the state is responsible under Art. 81c B-VG for ensuring that an "appropriate amount" of "autonomous research" is financed at public universities. Research is "autonomous" only if it is not subject to any influences on its content and not subject to anything other than intrinsic incentives.[38] This is a strong statement at a time when researchers often feel themselves to be subject to external pressures. It is true that Art. 81c B-VG does not protect the individual researcher but only public universities, therefore it is the duty of these universities to demand the public funding described above. Having said this, it cannot be ruled out that the Constitutional Court will, at some point, transfer its understanding of "autonomous" research developed for Art. 81c B-VG to Art. 17 StGG. If this were to occur, staff members of public universities would possibly also gain the right to request of the state—mediated by the universities—that such autonomous research is adequately funded.

3.4 Interference

The first three components of the freedom of research—the subjects, the addressees, and the scope of protection—do not create any academic consternation in Austria. However, it has become unclear when exactly a state measure interferes with the freedom of research and thus requires justification. In the absence of such justification (and only then), the interference violates the freedom of research. There is only agreement on such interference in three scenarios:

It is undisputed by legal scholars that there is interference when the state orders or prohibits the research of a certain question, the use of a certain method, the performance of an experiment or the evaluation of

[37] See pp. 190–191 in Eisenberger (2016); para. 37 in Hammer (2016).
[38] VfSlg 19.775/2013.

research results in a certain way. Nevertheless, such interferences do still occur in Austria,[39] even though it is extremely rare.

The existence of interference is equally undisputed by legal scholars if the state prohibits or orders the dissemination of research results. Interferences of this kind are not as far-fetched as they initially sound, but they are nevertheless rare: a ban on publication is conceivable, for example, in the case of dual-use research.[40] A publication requirement ultimately boils down to creating an environment that is aptly described by the credo *publish or perish*.[41]

There is no doubt that interference is ultimately at hand when researchers are instructed to withdraw a publication, correct it or apologise for it. The latter occurred in Austria, for example, when the head of a university asked a researcher to apologise publicly for a plagiarised publication: The Administrative Court (*Verwaltungsgerichtshof*, VwGH) rightly regarded this as interference with the freedom of research.[42]

Beyond these clear cases in which the state orders or prohibits research or its dissemination, a wide range of official measures remain in a somewhat grey area still vigorously discussed by legal scholars and not yet ruled upon by the judiciary: By way of example in this regard, one could ask whether the rules of good scientific practice interfere with the freedom of research because they dictate how science is to be conducted. Or do these rules only specify what is meant by "research", so that any action contrary to the rules cannot claim the protection of the freedom of research from the outset? Issues such as this are still open to dispute. In one of its decisions, the VwGH at least indicates that rules of good scientific practice can in principle interfere with the freedom of research, however, it left open as to whether this applies to all or only some of these rules.[43] In my opinion, the answer can only be determined by examining the content of the rule.[44]

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[39] For further references see pp. 181–182 in Pöschl (2017).

[40] See pp. 163–164 and 182 in Pöschl (2017).

[41] On publication pressure in science see pp. 635 et seq. in Pöschl (2013).

[42] *Sammlung der Erkenntnisse und Beschlüsse des Verwaltungsgerichtshofes* (VwSlg), which is a collection of the findings and most important decisions of the Austrian Administrative Court 18,449 A (administrative law part)/2012.

[43] See n. 42.

[44] See pp. 122 et seq. in Pöschl (2010).

Assessing whether or not the freedom of research has been interfered with when an ethics committee classifies research as "unethical" is also problematic. As such an ethical vote results in neither an order nor a prohibition to ban the research, one may be inclined to deny that this is interference. However, a negative ethics vote can have significant consequences for researchers—ranging from a third-party (i.e. the head of a university) prohibition on their research project or refusal of research funds through to a publication ban and media ostracism. Given this scenario, one is again left pondering to what extent it is sufficient to regard such an ethics vote as an interference.[45]

As mentioned previously, resources are essential to research and denying funding can hinder or make research impossible without explicitly prohibiting it. In such cases, it is equally questionable whether, or under what conditions, such a refusal encroaches on the freedom of research.[46]

Similar uncertainty arises if a member state or EU body recommends funding organisations not to fund certain research, such as military or human enhancement projects.[47] On the one hand, such a recommendation is not an imperative, but on the other hand, it will undoubtedly have an effect, i.e. it will at least make the research more difficult to undertake as it becomes less palatable for financiers, indeed, if funding then becomes completely unavailable, would this be an interference after all?[48]

Unsurprisingly, the state is not the only actor that can be active in this grey area. Research can also be steered in the desired direction if a university records and evaluates scientific achievements and includes certain results in its databases while omitting others. The same applies if some forms of publication or research are valued more highly than others and assigned greater academic prestige. Whether this is sufficient to qualify as an interference with the freedom of research is again unclear.[49]

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[45] See also below 4.1.

[46] See 4.2. below and pp. 189 et seq. in Eisenberger (2016); for the discussion in Germany see pp. 627 et seq. in Trute (1994).

[47] See e.g. Commission Recommendation of 7 February 2008 on a Code of Conduct for Responsible Nanosciences and Nanotechnologies Research, C (2008) 424 final, Annex, points 4.1.15, 4.1.16, according to which human enhancement research should not be funded.

[48] See pp. 184–85 in Pöschl (2017).

[49] See also below 4.3.

3.5 Justification

The question of when a state measure becomes an interference is important because not every side effect of a measure sufficiently disturbs the freedom of research to qualify as such and thus requires justification. However, what exactly qualifies as a justified interference is also disputed in Austria.

According to its wording, Art. 17 StGG guarantees the freedom of research but does not contain any legal reservation. Nevertheless, there is agreement among legal scholars that this guarantee does not override other interests and provide researchers with an overly privileged position. Accordingly, the Constitutional Court stated that general laws, i.e. laws that address every human being, may also restrict researchers in their freedom.[50] Since causing bodily injury is prohibited under criminal law, researchers are also not allowed to injure test subjects. If a university researcher proves to be unfit for work, the university may respond in the same way as it would for any of its non-research employees. Research facilities must comply with building regulations, and scientific experiments must comply with the full range of health and safety regulations. There is virtually universal agreement in Austria that if these general laws are relevant—such as those typically found in the penal code, service law, building bylaws as well as health and safety regulations, etc.—researchers must abide by them.[51]

What is disputed, however, is what requirements are to be placed on research-specific standards, i.e. on laws which only address researchers or which specifically regulate research: One line of argument in this regard is that research-specific laws violate the freedom of research if they are issued with the sole intention of restricting research. However, such standards are acceptable if they pursue an objective that goes beyond the research restriction and are proportionate.[52] This position is opposed by some who claim that it does not sufficiently take into account the

[50] VfSlg. 1777/1949; 3565/1959; 4732/1964.

[51] See e.g. p. 264 in Kopetzki (2011); pp. 127–28 in Pöschl (2017).

[52] See pp. 269 in Stelzer (1991); p. 200–1 and 234 in Eisenberger (2016).

unconditional granting of research freedom.[53] Since, realistically, no interference is made solely for the sake of simply restricting research, this standard of justification does not differ from the standard applicable to other fundamental freedoms subject to the law.

According to a second position,[54] the fact that Art. 17 StGG lacks an explicit authorisation to make legal reservations is only taken seriously if state interference is merely permitted for reasons equivalent to the constitutional right to research. Therefore, it is not sufficient that interference pursues some public interest and is proportionate; it must also be required by a constitutionally protected legal right or national objective. This position is countered by the argument that the Austrian constitution protects national objectives without a discernibly systematic approach; therefore, the coincidence of a legal position having constitutional protection cannot be the decisive factor to justify interference.[55]

A third position holds that more consistent solutions can be found by focusing not on the reason for the interference but on its threat potential. A research-specific law would therefore only violate the freedom of research if it infringed on the autonomy of research, i.e. if, for example, researchers could no longer freely choose where their interest in new knowledge goes, which hypotheses they put forward and which methods they use.[56]

If one confronts current research policy (assuming that it qualifies as an interference) with these three different opinions of justification, one gets into certain difficulties: According to this third position, the current research policy would have to be unconstitutional from the outset because it constantly tries to manipulate the direction of research—through its ethical controls, funding policy and evaluations as discussed previously. The prerequisite demanded by the second opinion mentioned above is also difficult to meet because it is not easy to find a constitutional position that requires these manipulative measures. Should we therefore completely reject the current research policy as unconstitutional simply

[53] See p. 178 at n. 86 in Pöschl (2017).

[54] See pp. 264–265 in Kopetzki (2011); pp. 130–131 in Pöschl (2017).

[55] See pp. 198–199 in Eisenberger (2016); para. 53 in Hammer (2016).

[56] See para. 56 in Hammer (2016).

because it prioritises certain research? This appears to be excessive and seems to make the first opinion the most viable, according to which current research policy—assuming it is proportionate—can be easily justified since it is not done solely for the sake of restricting research. The objection remains that this standard does not sufficiently take into account the specific need for protection of research (and thus also the fact that Art. 17 StGG does not specifically contain a legal reservation). Having said that, the first opinion would not have a problem with a state research policy that directs research even more strongly in a certain direction than is currently the case. Given these difficulties, it seems that all three opinions concerning justification mentioned above struggle to stand up to a practical test.

One way out could be the formula which the Constitutional Court has developed for "free research" within the meaning of Art. 81c B-VG and which it may at some point transfer to Art. 17 StGG. Research-specific standards would then have to overcome two hurdles: Firstly, as with any interference with freedom, they must be proportionate, i.e. suited to achieving a legitimate aim, necessary and not disproportionate to that aim. Secondly, in order to meet the specific requirements of the freedom of research, these standards should not reduce autonomous research to an inappropriate level. In the end, this would amount to a mitigation of the third opinion of justification: An intervention in the autonomy of research would not be forbidden, however, it should not exceed a certain level, which would have to be specified in more detail. With regard to the scope, a differentiation would probably also have to be made according to the profile of the respective research area, i.e. whether it is carried out by a public university, a university of applied sciences or on behalf of a company.

Whether the Constitutional Court will ever transfer its understanding developed for Art. 81c B-VG to Art. 17 StGG is completely uncertain, as is the question of when it will have the opportunity to do so since complaints about a violation of the freedom of research are rare. This may also be due to the fact that research in Austria is usually not controlled by command and control but by more subtle, smarter means against which one can hardly take legal action.

4 Smart Research Governance

4.1 Ethical Assessment

Regulatory Steps

One example of smart research governance is ethical assessment which, in substance, is intended to prevent unethical research primarily by ethics committees which are to be set up *ex lege* at medical universities[57] and are voluntarily established by many other universities in their statutes.[58] These university ethics committees charged by law or by the university statutes determine whether specific research projects are, in simple terms, "ethically justifiable", however, what this actually means is sometimes left open by the laws mentioned. In order to concretise these vague guidelines, some university commissions then seek refuge in the research-ethical recommendations of the *scientific community*, particularly frequently in the Declaration of Helsinki,[59] a catalogue of rules that the World Medical Association—a private association—has drawn up for medical research.[60] It contains a large number of guidelines which are somewhat more specific but which do not have the clarity and consistency that one would expect from state laws.[61]

This makes understanding the consequences of an ethics committee's vote that a research project is ethically questionable or unjustifiable, whatever that means, all the more pressing. Some universities rely on coercion in this respect, i.e. their statutes empower the university head to prohibit research classified as unethical.[62]

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[57] § 30 Universities Act 2002 (*Universitätsgesetz*, UG), Federal Law Gazette I 2002/120 as amended by Federal Law Gazette I 2021/20; in addition, there is a wide variety of non-university ethics committees, which are not considered here, for details see pp. 253 et seq. in Kneihs (2019).

[58] See p. 207 in Pöschl (2018).

[59] The current text is available at https://www.wma.net/policies-post/wma-declaration-of-helsinki-ethical-principles-for-medical-research-involving-human-subjects/ (accessed 24 September 2021).

[60] On the origin, development, and content of this declaration see Schmidt and Frewer (2007); Ehni and Wiesing (2012).

[61] See pp. 223–224 in Pöschl (2018).

[62] This applies, for example, to the Universities of Graz and Salzburg: § 6(2) of the Ethics Committee Bylaws of the University of Graz, available at https://static.uni-graz.at/fileadmin/Rechtsabteilung/

A second model can be found at the University of Natural Resources and Life Sciences, Vienna (BOKU). The established ethics platform discusses ethically sensitive research university-wide and issues non-binding recommendations on this basis.[63] Unsurprisingly, any researcher acting against such recommendations has to expect a loss of reputation because their research has been branded as "unethical". If the media becomes aware of such research, the negative effects may even intensify. Accepting funding from a source such as the US Department of Defense,[64] might then cause public criticism even if the money is used for research that has no military connection whatsoever, e.g. breast cancer research.[65]

A third model is found at the University of Vienna where its ethics committee has not been established as a control body but as a kind of service institution that responds to the fact that researchers in many disciplines require a positive ethics vote for publication commitments and research funding. Consequently, members of the University of Vienna are entitled but not obliged to submit scientific projects to the ethics committee, however, if choosing to submit their project they have to justify why they are doing so.[66] The most commonly cited reason given by applicants is that they need the ethics committee for a publication or grant, meaning that the ethics committee is aware that if it classifies a research project as unethical the consequences will likely be that the project is denied funding or publication by another body. An ethics committee based on this model was also established at the BOKU.[67]

Ethikkommission_20081223.pdf; § 148(3) of the Bylaws of the University of Salzburg, available at https://www.plus.ac.at/wp-content/uploads/2021/03/Satzung_konsolidiert_-_26022021.pdf (both accessed 24 September 2021).

[63] § 13(7) of the Bylaws of the University of Natural Resources and Applied Life Sciences, Vienna, available at https://boku.ac.at/fileadmin/data/H01000/H10220/homepage/Satzung/Satzungskompilation_01.01.2021.pdf; § 1 Rules of Procedure of the Ethics Platform of the University of Natural Resources and Applied Life Sciences, https://boku.ac.at/fileadmin/data/H99000/H99100/Ethik/GO_EthikPlattform2106_2.pdf (both accessed 24 September 2021).

[64] See e.g. Strunz and Figl (2014); Figl (2014, 2016).

[65] See e.g. Figl (2014a).

[66] § 3(1) of the Bylaws of the Ethics Committee of the University of Vienna, available at https://satzung.univie.ac.at/alle-weiteren-satzungsinhalte/ethikkommission/ (accessed 24 September 2021).

[67] §§ 13a–13g of the Bylaws of the University of Natural Resources and Applied Life Sciences, Vienna.

All three ethics control models steer science with different resources: the first model relies on classical coercion (prohibition of research), the second model on the loss of reputation, and the third model is effective because research classified as unethical loses funding or publication options. Each of these steering methods work; coercion's effectiveness is self-evident, and with regard to the other two, the reason for their effectiveness is readily grasped: researchers are dependent upon funding, publication options and reputational opportunities, meaning they will respond accordingly.

Interference and Justification

Another question is whether these ethical controls interfere with the freedom of research, and if so, whether this is justified. In the coercion model, the question of interference is easy to answer: If a university head prohibits research that is determined to be unethical, he or she clearly interferes with the freedom of research.

However, it is questionable whether or not interference has occurred in the second model used at the BOKU, in which delicate research is discussed by a commission in a relatively public forum and then general recommendations are formulated. The mere obligation to put ethically sensitive research up for discussion probably does not hinder research significantly enough to be classified as an interference with the freedom of research. This would be different only if the project could not be started before the ethics review is completed: the researcher would no longer be free to decide when to start a project; in addition, such delays can form significant disadvantages in scientific competition.[68] Whether the resultant ethical recommendations qualify as an interference ultimately depends on how one defines an interference. If one understands by this only measures which are unilateral, imperative, of a certain relevance and directly effective,[69] an interference in the case of mere recommendations would have to be denied simply because of the lack of imperative. If, on the other hand, interference is defined as any significant infringement into the freedom of research from the perspective of the researcher, the

[68] See p. 50 in Thurnherr (2014).

[69] See in general pp. 17 et seq. in Holoubek (2007); para. 84 in Kucsko-Stadlmayer (2014); paras. 292 et seq. in Kingreen and Poscher (2017).

social consequences for the researcher also come to play a role: an interference would not have occurred if it were only up to the conscience of the researcher to decide whether or not to take the recommendations of an ethics committee into account. Freedom of research does not protect researchers from being confronted with ethical objections to their projects. If, on the other hand, a researcher who does not follow the recommendations is stigmatised within the university or even throughout the broader *scientific community*, thus noticeably impairing his or her standing, this would qualify as interference.

It is difficult to assess whether or not interference has occurred in the third model, which does not oblige but entitles researchers to submit their projects to an ethics committee: This alone is certainly not interference, nor is it if private parties refuse to finance or publish projects classified as "unethical" following an ethics vote. This is because private parties are not obliged under the freedom of research, and similarly, even state funding agencies are not obliged to finance specific research projects, as mentioned above,[70] according to the currently prevailing academic opinion. So does an ethics vote itself interfere with the freedom of research? Again, this depends on what is meant by interference. If it is defined narrowly, the ethics vote does not constitute an interference because it neither directly causes a restriction on the freedom nor commands one.[71] Indeed, there is not even a legal disadvantage connected to the vote as no law obliges private funding agencies or publishers to demand a positive ethics vote; such private parties do so only of their own free will. For this reason, researchers may be able to make use of publishers and funding agencies—even if less prestigious ones—that facilitate publication or funding without an ethics vote. If, however, such funding agencies and publishers can no longer be found by a specific discipline, a negative ethics vote is tantamount to a funding or publication ban: In my opinion, interference would have occurred in such cases, even if one uses the narrow definition. If, on the other hand, interference is defined as a foreseeable and major disruption to the use of the freedom for which the state is responsible it would have occurred earlier, namely, when the

[70] See 3.3.

[71] See p. 150 in Eberhard (2011); p. 132 in Novak (2018).

project applicant needed a positive vote to have a particular funding or publication option. This is the case because a negative vote would mean that the researcher loses the accessible counterpart whose cooperation is required to make exercising his or her freedom possible.[72]

Under certain conditions, and depending upon the applied definition of interference, a vote on ethics can thus interfere in the freedom of research in all three models. This leads to the question of whether such interference is justified: This would be answered in the affirmative as long as the ethics committee's ethical review only protects the rights of third parties, in particular the physical and mental integrity of the participants, their self-determination and the confidentiality of their personal data.[73] In my opinion, however, it is not justifiable if ethics committees are authorised to examine projects for their "ethical standards" without further specification as this is far too vague to justify an interference into the freedom of research.[74]

Legal Protection

The complexities of the foregoing make the question of legal protection all the more pressing. The level of legal protection improves in situations that involve a clear case of interference: If a university head forbids a researcher to carry out a certain research project, the person concerned can seek recourse under labour law. Although, in the course of such a procedure, the viability of the relevant ethics vote on which the prohibition is based would also have to be reviewed by the court.

Things are different with the second model (BOKU's ethics platform): there are no legal recourses to combat mere recommendations. This is probably why Austrian legal scholars only exceptionally qualify non-imperative measures as interference: A generous, effect-oriented understanding of interference is of little use if the enforcement of freedom

[72] See on the comparable problem of state warnings and recommendations paras. 97 et seq. in Tschannen (1999).

[73] This is the standard of review applied by the Ethics Committee of the University of Vienna and the Ethics Committee of the BOKU.

[74] See p. 143 in Pöschl (2010).

ultimately fails because of a lack of legal protection. There is legal protection against disparaging media coverage, which recommendations in the second model may fall under,[75] but it is not very effective because it usually comes too late and the stigma remains. Rapid public defence of the university would be more effective, however, in Austria there is no right to claim this and, hence, no legal recourse to ensure a university does so.

There is also no legal protection against negative ethics votes in the third model employed by the University of Vienna, which once again lacks imperatives: As simple sovereign administrative acts, they could only be combated in Austria if the legislator set up a separate legal process for this purpose.[76] This has not happened for ethics opinions delivered under the third model, nor with the recommendations given under the second model.

Overall, ethical controls serve to noticeably steer research in Austria, although if this qualifies as interference is, at times or even often, questionable. Nevertheless, even if interference has occurred, its justification would be doubtful if the standard of ethical control applied is vague or the legal protection against these controls is deficient.

4.2 Research Funding

Regulatory Steps

The second aspect of Austria's smart research governance is the current system of research funding.[77] This is designed to promote quality research, stimulate politically desirable research and curb, if not eliminate, undesirable research. Some funding providers in Austria are private but the majority of funding comes from state sources,[78] however, only the latter are bound by fundamental rights.[79]

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[75] See the overview on legal protection in the case of defamation of honour in (online) media provided on pp. 115 et seq. in Karner and Pehm (2018).

[76] Art. 130(2)(1) B-VG, "Verhaltensbeschwerde", in detail see e.g. Holoubek (2014); Müller (2018).

[77] In detail see p. 690 in Mitter (2019).

[78] See pp. 200 et seq. in Pöschl (2018).

[79] See in general pp. 130 et seq. and pp. 145 et seq. in Berka et al. (2019).

The state steering strategy is essentially based on a series of incremental steps. The initial step is that the state stops increasing, or even reduces, the overall budget made available to universities in line with their increases in students and academic staff.[80] At the same time, academics are encouraged to accept project-oriented research funding. This steering method is particularly effective in disciplines which require much more than a quiet workspace and access to a library for their projects, such as natural sciences which often require expensive equipment. Researchers from these funding intensive disciplines in particular must present their project proposals, whether they like it or not, to underfunded state funding agencies which decide how much of the funding such researchers will receive.

The second step is that the state and the EU offer calls for specific projects[81] that researchers may not normally pursue of their own accord, but which they would pursue if research funds are made available to do so. This has resulted in many researchers answering these calls by steering their research towards the demands of the state and the EU.

The third step applied is the Matthew principle—"For to him who has, more will be given, and he will have an abundance": The more third-party funding a university receives, the more budgetary support the university can expect from the state.[82] This motivates universities to encourage their academic staff to acquire third-party funding or even to demand such funding in new employment contracts that are offered.

In the fourth and final step, those scientists securing third-party funds are provided with a reputational boost by being celebrated as successful researchers[83] and are more likely to advance in terms of professional

[80] See pp. 180 in Pöschl (2017).

[81] Cf. for Austria the Austria Science Funds programmes: https://www.ffg.at/themen; for the EU see "Horizon Europe" with a separate pillar for predefined research programmes, available at https://ec.europa.eu/info/research-and-innovation/funding/funding-opportunities/funding-programmes-and-open-calls/horizon-europe_en (both accessed 24 September 2021).

[82] Cf. § 12(4)(2) lit. b) and last sentence, as well as § 12a(2)(2) lit. b) UG, according to which up to 20% of the state research budget may be remarked using a "competitive indicator", taking into account third-party funding from various sources (see § 5(1) University Funding Ordinance, Federal Law Gazette II 2018/202 as amended by Federal Law Gazette II 2019/216).

[83] See pp. 9 and 13 in Hirschi (2018).

progression[84] and are also better competitively placed for professorships.[85] In this way, the key need of researchers for reputation is cleverly diverted into a quest for money, ideally money that will serve to advance research favoured by the state.

Interference and Justification

Does the refusal of funding interfere with the freedom of research? As mentioned above,[86] this cannot be deemed so in principle as long as—as is currently the case in Austria—the freedom of research does not translate to a claim to the financing of concrete research projects. This restrictive position should only be reconsidered in disciplines that are so dependent on external funding that a funding refusal amounts to a factual research ban.

If the refusal of research funds remains below the interference threshold, as is usually the case, the only question left to ask is whether government agencies grant research funds in accordance with the principle of equality. This itself leads to questions surrounding the criteria according to which project-related research funds are awarded.[87] Unsurprisingly, the most important criterion is the scientific excellence of the researcher. It is measured on the basis of the submitted project proposal and previous publications, which makes sense. What is more problematic is that some (and important) funding agencies consider only two types of publications to be of substantive value: First, those publications with an *impact*

[84] For example, the acquisition of third-party funding is routinely required in contracts with those having a tenure-track professorship, see for example p. 6 in "Tenure Track-Professuren an der Universität Wien: Verfahrensdokument" of 30 July 2019, available at: https://www.qs.univie.ac.at/fileadmin/user_upload/d_qualitaetssicherung/Dateidownloads/20201223_Tenure_Track_Verfahrensdokument_DE.pdf (accessed 24 September 2021). Similarly, within the process of appointing former university lecturers and associate professors as full university professorships pursuant to the simplified procedure (§ 99(4) UG), experience in the acquisition of third-party funding is routinely assessed, see p. 101 in Lang and Lichtmannegger (2017).

[85] For example, the University of Graz explicitly mentions "third-party funding" as an evaluation criterion in appointment procedures, see https://static.uni-graz.at/fileadmin/Rechtsabteilung/Berufungsverfahren_AEnderung.pdf (accessed 24 September 2021).

[86] See above 3.3.

[87] For further details see pp. 698 et seq. in Mitter (2019).

factor that the agency considers to be sufficient, i.e. in indexed journals with high distribution and citation frequency.[88] Such journals tend to only accept exceptional research[89] so that those who carry out less attention-grabbing or small-scale research have less opportunity to be published there. The second set of publications with substantive value are those journals requiring articles to be *peer-reviewed*.[90] Experience shows that they tend to favour mainstream research[91]—meaning those who carry out unconventional research are consequently less likely to be published in such journals. Another important award criterion is the international visibility of the research—those who carry out research with only regional significance are thus less favoured. The social benefit of the research is also decisive when trying to secure funding, as the latter is often tied to the direct practical impacts of the research results[92]—meaning again that those who carry out basic research are probably less successful here. Finally, a frequent award criterion is the ethical soundness of the project,[93] which introduces the consequence of the problems of some ethical controls mentioned previously, namely the vague standards and deficient legal protection. These two issues now extend into research funding and become even more palpable.

[88] See the self-descriptions of two of the largest scientific publishing groups: https://clarivate.com/webofsciencegroup/journal-evaluation-process-and-selection-criteria/; https://www.elsevier.com/solutions/scopus/how-scopus-works/content/content-policy-and-selection (both accessed 24 September 2021).

[89] Illustrative (with historical references): Buranyi (2017).

[90] For details see Hirschi (2018).

[91] See p. 386 at n. 101 in Geis (2010); pp. 21–22 in Council of Science and Humanities (2017); pp. 125–126 in Gamper (2018).

[92] See § 1(2)(3) of the Research Organisation Act, Federal Law Gazette 1981/341 as amended by Federal Law Gazette I 2020/75, according to which one of the objectives of federal funding of science and research is to ensure that the results of science and research are quickly utilised (and disseminated).

[93] See p. 9 at n. 3 of the "Application Guidelines for Individual Projects" of the Austrian Science Funds, available at https://www.fwf.ac.at/fileadmin/files/Dokumente/Antragstellung/Einzelprojekte/p_antragsrichtlinien.pdf, with reference to European Commission, Ethics for researchers, 2013: https://ec.europa.eu/research/participants/data/ref/fp7/89888/ethics-for-researchers_en.pdf (both accessed 24 September 2021).

Do these award criteria serve justifiable objectives and are they suitable for achieving these objectives? In some respects clouds of doubt certainly arise, not about the objectives—it is certainly appropriate that public funding bodies only finance high-quality research—but doubts about the means by which this is done. Nevertheless, it is questionable whether research quality can be accurately determined by journals using *impact factor* or *peer review* because these journals tend to exclude low profile and unconventional research which can still be of high quality. The aim of prioritising socially useful research is certainly justifiable; however, it is questionable to measure societal benefit in terms of the immediate usability of research results as this would leave basic research, and thus the basis of applied research, underfunded. The goal of prioritising internationally visible research is not in itself objectionable, but only if resources are still made available for regionally significant research so as to prevent entire disciplines being starved of opportunity despite the quality of their findings.[94]

Legal Protection

In view of these concerns, legal protection needs further discussion. Can the financing decision of a state funding agency be challenged on the grounds that it is based on unobjective award criteria or that it applies objective criteria but assesses them incorrectly? In theory, an award decision can be challenged by means of a civil lawsuit,[95] but this legal procedure is seemingly never used in Austria. There can be a number of reasons for this: Perhaps state funding agencies are perceived as too powerful to challenge; perhaps researchers bow to the *scientific community's* expectation that rejection should be met with a "sporting gesture" and a new funding application made instead of going to court. A final hurdle to overcome in pursuing this path may be the difficulty of proving that one's own project is of higher quality than the projects actually financed by the

[94] This is not least applicable to legal science: a commentary on the Vienna Building Regulations will generate little interest outside of Vienna and be of no interest whatsoever outside Austria; nevertheless, it can be of value that this law of this area is subject to research.

[95] In greater detail see pp. 703–704 in Mitter (2019).

funding agency, especially given that a court is unlikely to agree to summarily examine any projects in question.[96]

The bottom line is that while there is legal protection for researchers against interference stemming from funding issues, it is not particularly effective. This is not necessarily a terminal shortcoming, because (and as long as) rejected project applicants can obtain a new evaluation for their project and have the possibility of financial support from alternative funding sources. These alternative funding sources are, in comparison to the first funding choice, perhaps not as prestigious, but at least the project will be funded and therefore the outcome is comparable to a successful legal remedy but with the financial resource simply coming from a different origin. A project may be funded on its second or third submission, but if this does not happen, the project may indeed have the quality deficiencies which the declining funding agency communicates to the project applicant along with the rejection. This gives a researcher the options of either further refining the research proposal or—if the deficiencies are too fundamental—abandoning it completely.

This multi-stage application process replaces to a certain extent the lack of legal remedies, however, it does not entail that a court reviews the award criteria for objectivity. Thus, Austria's current research funding policy steers science gently, but largely unchecked, in the desired direction. In short, anyone wishing to obtain funding and the reputational

[96] This is demonstrated by the experience made in Switzerland, where funding decisions are reviewed by the courts; however, the courts are noticeably reluctant to do so, see e.g. the ruling of the Federal Administrative Court of 4 March 2019, B-5179/2018, para. 3(2): "Das Bundesverwaltungsgericht auferlegt sich Zurückhaltung bei der Überprüfung von verweigerten Forschungsgeldern, soweit sich die Rügen auf die Beurteilung der wissenschaftlichen Qualität des Projekts und der wissenschaftlichen Qualifikation der Gesuchstellenden durch die Vorinstanz beziehen […]. In Bezug auf die Beantwortung von Fragen, die besonderes fachtechnisches Wissen voraussetzen, weicht es daher nicht ohne Not von der Beurteilung durch die erstinstanzliche Fachbehörde—beziehungsweise durch deren Fachgremien—ab. Es schreitet hier erst ein, wenn die Behörde sich von sachfremden oder sonst wie offensichtlich unhaltbaren Erwägungen hat leiten lassen, so dass ihr Entscheid als nicht mehr vertretbar erscheint." (Engl. Translation: The Federal Administrative Court self-imposes restraint when reviewing research funds that have been refused, insofar as the complaints relate to the assessment of the scientific quality of the project and the scientific qualification of the applicant by the lower court […]. In answering questions that require special technical knowledge, it therefore deviates not without reason from the assessment of the first-instance authority—or its expert committees. It only intervenes if the authority has been guided by irrelevant or otherwise obviously untenable considerations, so that its decision no longer appears justifiable.)

boost that goes with it would be well advised to direct their research towards projects that are ethically sound, internationally visible, directly exploitable, fit into government programmes and are either high profile in some way or mainstream.

4.3 Evaluation of Scientific Achievements

Regulatory Steps

A third example of Austria's smart research governance is the practice of universities to record and evaluate scientific achievements.[97] This is also undertaken through a series of small steps: First, the legislator obliges the universities to define research priorities in a development strategy,[98] i.e. topics that are to be researched intensively at the university. Secondly, on the basis of this strategy, the university concludes a "performance agreement" with the responsible ministry using a public-law contract in which the university commits itself to certain services and for which the state will provide a budget.[99] Thirdly, the university then breaks down these contractual obligations into individual target agreements with its various organisational units.[100] In order to determine whether these units are fulfilling their obligations, the university records their performance in predefined databases[101] that can include certain research outcomes and not others. Some databases then weight these outcomes and steer significantly by, for example, putting a monograph on the same level as a *peer-reviewed* article in a professional journal. These databases are ultimately used to evaluate both organisational units and individual researchers,[102] and if the evaluation is positive, there is the prospect of access to increased

[97] In detail see pp. 119 et seq. in Gamper (2018); pp. 258 et seq. in Maier (2018).

[98] § 13b in conjunction with § 13(2)(1) lit. b) UG; for examples see pp. 115 et seq. in Maier (2018).

[99] § 13 UG; see also para. 4 in Kucsko-Stadlmayer (2018).

[100] § 20(5) UG.

[101] For example, the University of Vienna operates the portal "u:cris" (https://ucris.univie.ac.at/ [accessed 24 September]); on such databases in general see pp. 258 et seq. in Maier (2018).

[102] § 14(2) and (7) UG; for the evaluation of university organisational units, see § 4 of the Bylaws of the University of Vienna, Quality Assurance Section of the Statutes, available at: https://satzung.univie.ac.at/alle-weiteren-satzungsinhalte/qualitaetssicherung/ (accessed 24 September 2021).

resources[103] and a gain in reputation. Conversely, a negative evaluation may initially result in a loss of reputation, but after two consecutive negative evaluations, it may even lead to the termination of the researcher's employment contract.[104]

Interference and Justification

Where in this long chain of legal acts is interference into the freedom of research to be found? Is it as early as in the recording of achievements, later in the performance evaluation based on these recorded achievements, or right towards the end when the consequences that are linked to this process come to bear fruit?

The simple recording of research achievements is not interference if one uses a narrow definition of what interference is because it is not coercive and the causal chain between recording and the consequences of the evaluation is too long and too uncertain. Claiming that interference has occurred in the context of the consequences is plausible in the case of employment termination because it is unilaterally done by the university. However, the same cannot be said if a negative evaluation results in no increase in resources or no gain in reputation as the individual has no claim to be allotted additional resources or reputational increase. This suggests that when it comes to the recording and evaluation of scientific achievements by universities, interference is most likely to be located mid-process, i.e. at the evaluation stage,[105] which is both obligatory and forms the basis for further measures to be taken by the university's head, who is a state agent.

If interference has occurred, one must also ask what standards were used to evaluate scientific achievements and whether these standards corresponded to those applicable to ensuring the freedom of research. Here,

[103] University bodies shall base their decisions on evaluation results (§ 14(8) UG); on the forms of financial rewards for positive results see pp. 265 et seq. in Maier (2018).

[104] For full university professors see § 25(5) and (6) Collective Agreement for University Employees 2021, version with 12th supplement; see pp. 119–120 in Gamper (2018).

[105] This is the case with academia in Switzerland, see for example para. 12 in Biaggini (2017) with further references.

old acquaintances return when the focus falls again on the quality of research, measured by impact factor, peer review and third-party funding, the international visibility of the research, its immediate usability and, finally, the research's contribution to the priorities of the university. This reinforces what was mentioned previously, namely that those who do not conduct high profile research, those who conduct unconventional research, those who do not raise third-party funds, those who conduct regionally applicable research, those who are more at home in basic research and those who contribute little to the university's research priorities will probably come off worse.

This intensive interference with the autonomy of research is incompatible with two of the three justifications that legal scholars have developed to protect research.[106] Although interference would be justified under the third standard, this standard is unable to prevent much more far-reaching interference anyway. The real weakness of this recording and evaluating policy is more likely to be exposed by those who ask with the Constitutional Court: Is it still possible to carry out research to an *appropriate* extent that is not subject to any influence on content or that is only subject to intrinsic incentives?

Legal Protection

There is, of course, effective legal protection against unfair dismissal in Austria,[107] however, it will probably not be necessary to resort to using it as a result of interference into the freedom of research. At least for the time being, it seems unlikely that a university researcher will be dismissed because he or she is not conducting research in the preferred areas, if he or she is researching at all. As the situation currently stands, it is more likely that conducting research outside of preferred areas "only" affects the distribution of funds and reputation—two measures that cannot be remedied by legal action.

[106] See above 3.5.

[107] For an overview see paras. 449 et seq. in Brodil and Risak (2019).

5 Conclusion

If one reflects back on the three mechanisms discussed above—ethical assessment, research funding and performance evaluation—it becomes clear that the Austrian state is noticeably steering research. On the one hand, ethical assessment that can result in negative recommendations is intended to prevent certain research, in part however, according to relatively unclear standards. On the other hand, financing and evaluation measures are used to try to steer research in certain directions by means of positive recommendations.

It is difficult to judge whether these mechanisms interfere with the freedom of research because traditional requirements of interference are unilateral, imperative, of a certain relevance and directly effective—but these requirements are neither always clear nor always present in the Austrian context: Many steering instruments are not unilateral, for example, voluntarily requested ethics votes, performance and target agreements, employment contracts or research funding. Many of these mechanisms are not imperative, as can be seen with the determination of ethical unjustifiability, the recommendation rather than a command to follow ethical guidelines and the recording of scientific achievements which creates pressure but leaves options. In many of these mechanisms, the processes take place in several steps, each of which is low-impact by itself and may only reach the intensity required to qualify as interference when they are combined. This then leaves one asking when does interference actually occur? With the first, sometimes almost imperceivable act, or only at the end of a process when all of the pieces have been brought into play? It is precisely because these guiding mechanisms are broken down into several incremental steps that the chain of causality between specification and reaction can ultimately be relatively long, indeed, in some cases it is even open whether causality exists at all. For example, perhaps the funding of a project classified as unethical would have failed anyway because it lacks scientific quality? What is clear is that the mechanisms described are highly effective when they work in concert. This has, in turn, allowed the state for a considerable period of time to refrain from the use of coercion, and instead exert control with money, publication

opportunities and reputational opportunities, i.e. with the very lifeblood on which researchers depend.

If one were to qualify these measures as interference in the freedom of research because of their overall effect, one would have to ask whether they are justified. Two out of three standards of justification developed by legal scholars especially for the freedom of research do not allow for the effects of such mechanisms. From this one can either conclude that the measures are excessive or that the two standards of justification are too strict. With regard to the third line of reasoning on justification developed by legal scholars, this seems too permissive as it does not sufficiently protect the autonomy of research. A useful approach for a new standard could be provided by a statement made by the Constitutional Court on Art. 81c B-VG in which the bench noted that the state must ensure that autonomous research, i.e. research that is uninfluenced in its content and is purely intrinsically motivated, is financed at public universities to an "appropriate extent". Although this would have to be specified in more detail to have meaningful real-world impacts.

As previously noted, it may still take some time before the Constitutional Court even has the opportunity to apply this formula *mutatis mutandis* to the freedom of research guaranteed in Art. 17 StGG. This is by and large due to the fact that according to conventional understanding many of the existent steering mechanisms either do not interfere with the freedom of research or at least not to the extent that interference can be legally remedied. As a result they cannot be efficiently legally remedied and will therefore not find their way to the Constitutional Court. Perhaps this is also the reason why the Constitutional Court made the above-mentioned statement on Art. 81c B-VG only by way of *obiter dictum*. In any case, from the perspective of legal doctrine, the current research regulatory regime gives reason to reconsider the conventional understanding of interference and the standards of justification that allow it. From a legal policy point of view, the current situation makes it evident how deficient legal protection is when it is based—as is the case in Austria—on imperative legal acts rather than on the claim that rights have been infringed.

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