

# ACADEMIC FREEDOM: A UK PERSPECTIVE

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## Fundamental differences between the UK and the US

There are a number of fundamental differences between the UK and the US which must be appreciated before any meaningful comparison can be made as to the treatment of the issue of academic freedom in the two countries. A rather esoteric difference is to be found in the legal status of many British universities.<sup>1</sup> Indeed, while all British universities except for one<sup>2</sup> are publicly-funded,<sup>3</sup> this does not mean that they all enjoy the same status in law. Those universities and other higher education institutions (HEIs) created in or after 1992, coupled with the universities of Oxford and Cambridge,<sup>4</sup> have a status analogous to that of any other body created by Act of Parliament and are thus subject to judicial scrutiny just like any other public organisation.<sup>5</sup> By contrast, those created before 1992 - including the Oxbridge colleges but excluding the universities of Oxford and Cambridge themselves - were established by Royal Charter<sup>6</sup> which (until recently) effectively granted them the right to manage their own internal affairs<sup>7</sup> outside the jurisdiction of the courts.<sup>8</sup> Any disputes would, in the last instance, be settled by someone appointed as the university 'visitor'. Mr Justice (now Lord) Hoffmann stated the position most clearly when he held that the jurisdiction of the courts and of university visitors was mutually exclusive.<sup>9</sup> This distinction has now been abolished by section 20 of the Higher Education Act 2004, but its longevity has meant that there have been relatively few cases before the UK courts which have discussed issues of student academic freedom.

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<sup>1</sup> For a fuller account of the case law emanating from the distinctions between the types of universities, see T. Kaye, 'Academic Judgement, the University Visitor and the Human Rights Act 1998' (1999) 11 *Education and the Law* 165.

<sup>2</sup> The University of Buckingham.

<sup>3</sup> All publicly-funded institutions receive some private funding, typically in the form of sponsorships or endowments. But only one, the University of Warwick (which has many American donors), comes close to receiving half its income from private sources.

<sup>4</sup> Oxford and Cambridge Act 1571.

<sup>5</sup> See e.g. *R v Manchester Metropolitan University ex parte Nolan* [1994] ELR 380 (QBD); *R v University of Cambridge ex parte Evans* [1998] ELR 515 (QBD).

<sup>6</sup> Bodies such as the Royal College of Art and the Royal College of Music also have a Charter, but they are not universities.

<sup>7</sup> Employment issues were removed from the visitor's jurisdiction by section 206 of the Education Reform Act 1988.

<sup>8</sup> *Thorne v University of London* [1966] 2 QB 237 (CA).

Secondly, since 1988, there has been no meaningful concept of ‘tenure’ in British universities.<sup>10</sup> The law does, however enshrine the freedom of academic staff (‘faculty’ in American parlance):

“within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at their institutions”.<sup>11</sup>

But perhaps the most obvious difference between the UK and US from a lawyer’s point of view is the fact that the UK does not have a written constitution. The UK does instead have a number of unwritten conventions which, unless abrogated by domestic legislation or the laws of the European Union, are generally observed unless and until the public mood is assessed by the ‘powers that be’ as out of date. A recent classic example of this is the marriage of the Prince of Wales, Prince Charles, to Mrs Camilla Parker Bowles - despite the fact that the latter is a divorcée. Only seventy years earlier King Edward VIII had been forced to abdicate when he announced that he wished to marry Mrs Wallis Simpson once she had obtained her divorce.<sup>12</sup>

The practical effect of having no written constitution is essentially that the conventions embodied in the UK’s so-called ‘unwritten constitution’ are almost all of a procedural nature and are confined to the manner in which parliament and the monarchy go about their business. Individuals in the UK therefore enjoy no fundamental legal rights - nor do they endure any overarching obligations - which override the provisions of legislation. As a result, the highest court in the land, the Judicial Committee of the House of Lords (normally referred to simply as the House of Lords) has no power to strike down any legislation on the grounds that it is unconstitutional. Even decisions, policies or activities of public (let alone private) bodies cannot be struck down as unconstitutional since there is no meaningful constitution against which to judge them.

### **Law of the European Union**

Since 1972, however, the House of Lords has acquired two means by which it can now impugn

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<sup>9</sup> *Hines v Birkbeck College* [1985] 3 All ER 156.

<sup>10</sup> Education Reform Act 1988 s 203.

<sup>11</sup> *Ibid* s 202(2).

<sup>12</sup> Allegations have been made more recently that there may have been other factors which led to the abdication, in particular the fact that Simpson was known to be having other affairs at the time, and the FBI’s suspicion - apparently proved true during World War II - that she was passing British and American secrets to the Nazis.

an Act of Parliament or a provision within such an Act - though any analogy with US constitutional law is problematic. The first derives from the European Communities Act 1972,<sup>13</sup> according to which the UK acceded to membership of what is now generally known as the European Union.<sup>14</sup> Section 2(1) of the 1972 Act provides that:

“All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly ...”

To what extent this provision should be treated literally was the subject of much debate, but this seemed to be largely moot until the landmark case of *Factortame*,<sup>15</sup> which was finally resolved by the House of Lords in 1992. It involved a Spanish fishing company (Factortame) which complained in the UK courts about restrictions imposed upon it while fishing in UK waters by the UK’s Merchant Shipping Act 1988 (which was essentially a protectionist device designed to protect British fishermen from foreign competition). After hearings in five courts (including the European Court of Justice and two hearings in the House of Lords), their Lordships found that the Merchant Shipping Act 1988 contravened European law and struck it down. *Factortame* remains the only example of a British court striking down an Act of Parliament, but is so significant from the point of view of constitutional law that it has now spawned its own website, [www.factortame.com](http://www.factortame.com)!

Since *Factortame*, the European Court of Justice (ECJ) has held that damages may also be awarded. These may be claimed in a UK court and are payable by the UK government, provided that there is evidence of what has come to be known as a “manifest and serious breach” of the obligation to implement EU law correctly.<sup>16</sup> However, this is really only of passing interest so far

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<sup>13</sup> It is perhaps worth noting that it is very rare for legislation in the UK to include a clause requiring it to be re-authorised after a given period of time in order to remain effective. Indeed, such clauses are normally restricted only to wartime and emergency legislation such as anti-terrorism provisions. All other legislation, including the European Communities Act 1972 is thus of indefinite duration unless and until abridged, amended or repealed by subsequent legislation.

<sup>14</sup> At the time it was called the European Economic Community (EEC); the name European Union became effective in 1992.

<sup>15</sup> *R v Secretary of State for Transport ex parte Factortame Ltd* [1991] 1 AC 603.

<sup>16</sup> For a full discussion of this topic, see G. Betlem, ‘The King Can Do Wrong: State Liability for Breach of European Community Law in the Post-Francovich Era’ [1996] 4 *Web JCLI* (<http://webjcli.ncl.ac.uk/1996/issue4/betlem4.html>).

as education law is concerned, since the law of the EU has almost nothing to say on the subject.

This is partly because EU law has always distinguished between true ‘education’ on the one hand and ‘vocational training’ on the other. Whereas the Treaty of Rome originally provided (in what is now Article 150 the consolidated EC Treaty) for the implementation of a ‘vocational training policy’ throughout the Community, the Treaty gave the Community absolutely no role in relation to education. While the Treaty of Maastricht did introduce a new Article (now Article 149 of the consolidated EC Treaty) which grants some role to the EU over matters of education, it is clear that both Article 149 and Article 150 are subject to the so-called principle of ‘subsidiarity’. This means that the primary responsibility for education rests with the Member States, or with local or regional authorities within Member States, rather than with the European Council or Commission – just as education law in the US is primarily a matter for the individual states rather than the federal government.

In practice, however, the role both of US constitutional law and of the US federal government (e.g. through funding programs with strings attached) in higher education law is much greater in the USA than is the role of the EU in higher education law within Europe. This can be seen not only from the fact that Article 149(1) of the consolidated EC Treaty expressly recognises the importance of ‘cultural and linguistic diversity’, but also because both Article 149(1) and Article 150(1) “fully respect the responsibility of the Member States for the content and organisation” of education systems and vocational training. Most important of all, however, is the provision in both Article 149(4) and 150(4) which specifically prohibits the EU Council of Ministers from adopting measures designed to harmonise education and training throughout the EU. One writer has thus concluded that:

“The role of the EU institutions is to support and supplement national policies, and to promote co-operation; no more. The diversity of national educational systems is to remain unaffected by European Community law. Thus, the role of the EC is limited to the ‘carrot’ approach of funding selected projects designed to encourage the development of educational initiatives which promote the spirit and practice of European integration..”<sup>17</sup>

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<sup>17</sup> T. Hervey, *European Social Law and Policy* (Harlow: Longman, 1998).

## European Human Rights Law

The second means by which the courts can now impugn a UK Act of Parliament is to be found in the Human Rights Act (HRA) 1998, which came into force on 2<sup>nd</sup> October 2000.<sup>18</sup> The significance of HRA 1998 is that it makes many of the Articles and Protocols of the European Convention on Human Rights and Fundamental Freedoms directly justiciable in British courts. Although often mistakenly thought to be a product of the EU, the Convention has in fact no connection with the EU at all but is an entirely independent document signed by more European countries than are members of the EU. It is likely to play an increasing role in the future of education law<sup>19</sup> and, indeed, has already had a significant (albeit indirect) impact over the way in which matters of student discipline and conduct (whether academic in nature or not) are handled in the UK.

Article 2 of the First Protocol to the Convention states, for example, that: “No person shall be denied the right to education”. Although it is expressed in the negative, the European Court of Human Rights (ECHR) - a Court which is, again, entirely independent of the EU, whose rulings have to be taken into account by the UK courts<sup>20</sup> - has held conclusively in the *Belgian Linguistic Case (No 2)*<sup>21</sup> that this sentence is to be read as granting to every person a positive right to education. The ECHR also held in *Belgian Linguistic* that the meaning of ‘education’ in Article 2 was to be determined according to “economic and social circumstances”. In a “highly developed country” like Belgium or the UK, the right to education included “entry to nursery, primary, secondary *and higher education*” (my emphasis), although access to higher education could properly be restricted to those sufficiently able or qualified to benefit from it. It is probably not overstating the matter to say that Article 2 now forms the foundation of UK education law; its incorporation into domestic UK law is already playing a very powerful symbolic role.

One of the earliest questions to be addressed in connection with Article 2 was whether its

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<sup>18</sup> Human Rights Act 1998 (Commencement No 2) Order 2000 (SI 2000, No 1851) reg 2.

<sup>19</sup> For a broader discussion of this issue, see T.S. Kaye, ‘Education, Education, Education: Commodity for Sale or Property Right?’ in F. Meisel and P. Cook (eds), *Property and Protection* (Oxford: Hart Publishing, 2000).

<sup>20</sup> HRA 1998 s 2(1).

<sup>21</sup> (1968) 1 EHRR 252.

incorporation into UK law gave every British citizen<sup>22</sup> a ‘civil right’ to education. In this context the term ‘civil right’ does not carry the same connotation as it does in the US. Instead, it is a term of art taken from Article 6(1) of the Convention (and which has more to do with the possession of rights which are recognised in civil law systems). Its significance lies in the fact that, whenever a civil right is deemed to be at stake, the person(s) involved are “entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. This is effectively equivalent to the American right to ‘due process’ as regards public institutions (including HEIs) under the Fifth and Fourteenth Amendments of the US Constitution.

If the right to education were indeed to be classified within the UK as a ‘civil right’ for the purposes of the European Convention, then anyone denied admission to - or excluded<sup>23</sup> from - a public education institution (including most HEIs) must be entitled to a hearing. The first three cases to raise this point - albeit that they related to schools<sup>24</sup> rather than HEIs - were all heard together.<sup>25</sup> Two of these cases concerned appeals against exclusion; one concerned an appeal against non-admission. Giving judgement in all three, Mr Justice Newman held that the right to education in Article 2 of the First Protocol to the Convention does not constitute a ‘civil right’ within the meaning of the Convention. This interpretation meant that the right to a fair hearing in Article 6(1) could not be invoked.

There are, however, significant problems with the reasoning employed by the judge in these cases. In particular, Mr Justice Newman relied heavily on a case<sup>26</sup> whose weight is very much

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<sup>22</sup> Describing the nationality of someone from the UK is tricky. Under the British Nationality Act 1981, people born in the UK and of relevant parentage are British citizens (and not ‘subjects’, as some people still erroneously believe). This status is reflected in the passports of UK nationals. However, British anti-discrimination laws recognise the categories of English, Scottish, Welsh and Northern Irish as ‘national origins’ and each group boasts its own ‘national’ teams in various sports including association football (soccer). Even more confusingly, in the sport of rugby union, there is a team representing the non-existent ‘nation’ of Ireland, and which comprises players drawn from both the Republic and Northern Ireland, even though legally this means that the players are drawn from two different countries!

<sup>23</sup> In the UK, the term ‘expulsion’ has been replaced throughout the public sector by the word ‘exclusion’ in order to emphasize its connection with ‘social exclusion’, which the government has pledged to tackle with numerous initiatives. In the private sector, however, ‘expulsion’ remains in common usage.

<sup>24</sup> In fact, they relate to what in the UK would be called ‘state schools’, but in the US are called ‘public schools’.

<sup>25</sup> *R (on the application of B) v Head Teacher of Alperton Community School*; *R (on the application of T) v Head Teacher of Wembley High School and others*; *R (on the application of C) v Governing Body of the Cardinal Newman Roman Catholic School* [2001] EWHC Admin 229.

<sup>26</sup> *Simpson v UK* Application No 14688/89 (European Commission on Human Rights).

open to doubt because it did not actually address the merits of the issues but was concerned simply with whether it was admissible to go before the full European Court of Human Rights. Yet he completely overlooked a 1990 case,<sup>27</sup> where the European Court of Human Rights declared that: “There can be no justification for interpreting Article 6(1) restrictively”. The underlying problem is that, although the European Court of Human Rights has constantly stressed that the Convention is to be thought of as “a living instrument” to be interpreted in the light of changing social conditions and priorities, Mr Justice Newman stuck to the traditional English approach of analysing words and phrases to deduce the state of the law. The idea of using the Convention as the basis for more principled decision-making remained rather foreign to him. *Alperon* looked even weaker after the Court of Appeal’s decision in *S, T, P v London Borough of Brent*, where the Court made what it called “the perfectly tenable assumption” (without explicitly deciding) that the right not to be permanently *excluded* from school without good reason is a ‘civil right’.<sup>28</sup> The decision in *Brent*, by contrast, had considerable resonance for the UK university sector, particularly since the visitor system operated by pre-1992 universities did not seem to comply with the requirements of a fair hearing which Article 6 of the Convention laid down.<sup>29</sup>

### **The Office of the Independent Adjudicator for Higher Education**

The growing realisation that the visitor system did not pass muster under HRA 1998 and the European Convention on Human Rights became the catalyst for change. Many, but by no means all, of the pre-1992 institutions had in any event already reached the conclusion that the visitor system was indefensible whatever the precise legal position. However, the experience of the post-1992 HEIs - which did not have visitors and which were therefore open to legal challenge in the courts - led all HEIs to conclude that it would be preferable to avoid washing dirty linen in public by creating a system for dealing with complaints and disputes which avoided the need to go to court. They therefore lobbied the government for a measure that would create something analogous to an ombudsman system, which would ensure impartiality, rigour and timeliness in the handling of disputes but would at the same time act confidentially. The National Union of

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<sup>27</sup> *Moreira de Azevedo v Portugal* (1990) 13 EHRR 721.

<sup>28</sup> [2002] EWCA Civ 693 at para 30.

<sup>29</sup> The case against the visitor under HRA 1998 and the European Convention was spelt out in T.S. Kaye, ‘Academic Judgement, the University Visitor and the Human Rights Act 1998’ (1999) 11 *Education and the Law* 165.

Students also supported this idea, especially since the system being advocated would be free for students to use.

The product of this consensus is the Office of the Independent Adjudicator for Higher Education (OIA),<sup>30</sup> set up under powers laid down by section 13 of the Higher Education Act 2004. Many of its decisions are taken without a hearing and, even where a hearing does take place, it is relatively informal and conducted in private. Lawyers have no right to speak and their presence is strongly discouraged. The OIA adjudicates upon student complaints regarding the following issues:

- 1) a programme of study or research for which a complainant is or was registered;
- 2) a service provided by an HEI to a student;
- 3) a final decision of an HEI's disciplinary or appeal body; or
- 4) a programme of study or research where such programme is designated as a higher education programme and is validated or franchised by an HEI even though the student is attending an institution which is not an HEI.

Disputes over admission to an HEI are not, however, covered - and nor are issues of student employment - so that, if these cannot be resolved informally, students will have to resort to the courts. Nor will the OIA entertain complaints from students over their academic grades - but no court will consider such complaints either. "The High Court does not act as a court of appeal from university examiners."<sup>31</sup>

Students are not required to use the OIA machinery and can instead opt to bring an action in court (though they cannot do both). Since use of the OIA implies a choice by the student, there is no question of a breach of Article 6 of the European Convention because the student has effectively volunteered to give up his or her right to a fair and public hearing under that Article. Since a losing plaintiff in an English court is normally required to pay the costs of the defendant - and since any awards of damages are very low by American damages (with no possibility of punitive damages) - there is, in reality, little incentive for a student to wish to go to court rather than use the OIA (unless, of course, the OIA develops a reputation for being less than robust in its attitude to HEIs). The existence of the OIA thus means that, even after the demise of the visitor system, there continues to be a paucity of case law concerning matters of academic

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<sup>30</sup> See <http://www.oiahe.org.uk/>.

<sup>31</sup> [1966] 2 QB 237 at p 243 *per* Diplock LJ.

freedom. Indeed, the OIA will only publish its adjudications when it has (a) found against an HEI and (b) the HEI in question has failed to comply with the OIA's recommendation as to redress. In other words, it uses the publication of an annual report not only as a device for demonstrating that it has met its own mandate, but also as a means of 'naming and shaming' recalcitrant universities.

### **Judicial review**

Aside from the fact that the OIA acts independently of HEIs, there is another highly significant difference between the OIA and the visitor system. This is that, whereas a visitor acted in a sort of legal 'no-go area', so that applications to the courts to correct his or her mistakes or to speed up a long-drawn-out adjudication process would not be entertained, the OIA - as a creature of statute - is very clearly subject to judicial review. This means that the OIA must take care to apply the law correctly, which means that it must pay attention to the European Convention on Human Rights and its application by the courts in cases involving elementary and high schools. The Convention rights which are of particular significance in this context - all of which also qualify as 'civil rights' - are the following:

- (i) the right to respect for private and family life (Article 8);
- (ii) the right to freedom of thought, conscience and religion (Article 9);
- (iii) the right to freedom of expression (Article 10);
- (iv) the right to freedom of assembly and association (Article 11).

In addition, there is the highly significant prohibition on discrimination in Article 14, which does not create a free-standing right but requires that:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

By far the most important decision made by the courts so far is that of *R (Begum) v Governors of Denbigh High School*.<sup>32</sup> This was a case brought by a Muslim girl who wanted to wear the full-length *jilbab* to school in contravention of the school's school uniform requirements. While the case may seem strange and irrelevant to American eyes because (a) American public schools do not require their pupils to wear uniforms, and (b) no Western university has a uniform requirement, the case is nevertheless significant because it sets out very clearly the way in which

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<sup>32</sup> [2005] EWCA Civ 199 (CA).

the UK courts intend to address the issues of freedom of expression and freedom of religion in all educational institutions (which are, of course, the rights primarily at stake in matters of academic freedom).<sup>33</sup>

UK legislation leaves the final decision as to the appropriate form of dress for each school pupil with the school's governing body,<sup>34</sup> although no policy can be agreed or changed without both the head teacher and parents of all pupils being consulted first.<sup>35</sup> In the *Begum* case, although it refused to allow pupils to wear the *jilbab*, the school had specified a uniform that could be worn either in Western-style clothes or in the form of a *shalwar kameeze*, which most British Muslims recognise as complying with Islamic requirements regarding female dress. Indeed, the Head Teacher and four of the parent governors were themselves Muslims, as were 79% of the pupils at the school, and there had been overwhelming support for the school uniform policy during the statutory consultation with parents; it had also been approved by both the Islamic Cultural Centre and the Muslim Council of Britain. The school had chosen to adopt this policy so as to be inclusive and not divisive, and believed that the policy had contributed to the school's ethos of good behaviour and discipline. There had, in fact, been an earlier incident in the school which had involved what Lord Justice Brooke called "a very difficult and potentially dangerous situation of intransigent conflict between two groups of pupils who defined themselves along racial grounds" and the school was concerned to avoid any similar incident in future.<sup>36</sup> The governors particularly wanted the school to be viewed as a secular school and to avoid there being effectively two classes of Muslim girls, with one claiming to be 'better Muslims' than another; it was also very keen to avoid some girls being coerced by peer group pressure into wearing the strict *jilbab* against their will. Moreover, the notion of an exception undermines the very concept of a uniform, which demands precisely that all pupils should be dressed alike; and, since a uniform can be adopted only after consultation with all parents, it would also imply the undermining of a decision taken after an essentially democratic process.

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<sup>33</sup> Much of what follows is drawn from T.S. Kaye, 'Religion and Education in England and Wales' in J de Groof & G Lauwers (eds), *Cultural and Educational Rights in the Enlarged Europe* (Nijmegen, the Netherlands: Wolf Legal Publishers, 2005).

<sup>34</sup> In city colleges and Academies, the decision rests with the proprietors.

<sup>35</sup> S.S.F.A. 1998, s. 61.

Miss Begum nevertheless argued that the school uniform policy amounted to an infringement of her freedom to manifest her religion, which must, as explained above, be respected in accordance with Article 9 of the European Convention on Human Rights and the UK's own Human Rights Act 1998. Equally, she could not suffer any discrimination because of Article 14. The Court of Appeal found in favour of the pupil in this case, but only on very narrow procedural grounds. It held that, because it was clear that Miss Begum's freedom to manifest her religion did indeed require respect, the governors could not simply ignore her request to wear the *jilbab* by pointing to an inflexible policy or rule. Since they had done precisely that in this case, the decision to exclude her from school for failure to wear the correct uniform was unlawful.

However, the Court went out of its way to emphasise that someone's freedom of religion does *not* automatically trump every other consideration. The European Convention does not make freedom of religion (or freedom of expression) absolute rights. On the contrary, the law simply requires that an individual's views and religion be respected. The right that an individual has to enjoy them can therefore be qualified in a wide variety of circumstances. Lord Justice Brooke set out a five-step procedure according to which public educational institutions should approach these Convention rights. First, the student must establish that his or her actual or proposed conduct is related to one of the freedoms protected by the Convention. Those who succeed at this stage then need to demonstrate, secondly, that this right is infringed by the institution's own conduct or policy (or that its exercise is subject to discriminatory treatment). If so, the third question to be asked - according to the explicit wording of Article 9 - is whether that interference is permitted by law. This encompasses both policies based on legislation (such as school uniforms) and those founded on the common law (such as the law of defamation, which inevitably restricts freedom of speech). The fourth question is whether the interference has a legitimate aim (e.g. maintenance of health and safety, fostering of good community spirit, avoidance of social divisions, etc). If so, it will be necessary to consider a fifth and final question: is the interference proportionate?

If the school had approached the matter in right way, it would thus have had a good basis for arguing both that its uniform policy had been adopted in pursuance of a legitimate aim and that it was proportionate in its ambit. Indeed, Lord Justice Scott Baker specifically said as much:

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<sup>36</sup> [2005] EWCA Civ 199 (CA) at para 53.

“Had the School approached the problem on the basis it should have done, that the claimant had a right under Article 9(1) to manifest her religion, it may very well have concluded that interference with that right was justified ... and that its uniform policy could thus have been maintained.”<sup>37</sup>

### **Incitement to religious hatred**

Although the Court of Appeal’s decision in *Begum* was widely mis-reported and so engendered unnecessary controversy at the time, by far the most controversial issue in the UK at the moment is the Racial and Religious Hatred Bill, which the government is trying to pilot through Parliament. It seeks to criminalise the incitement of hatred on the basis of religious belief, an offence which (if the Bill is passed) will carry a maximum term of imprisonment of seven years. Previous attempts<sup>38</sup> to introduce such a law have faltered in the House of Lords precisely because of concerns - highlighted by a number of comedians such as Rowan Atkinson and Stephen Fry, well-known for their lampooning of religion - that it would unduly limit freedom of speech. Supporters of the proposed law often point to an alleged anomaly whereby the current offence of incitement to racial hatred gives legal protection to Jews and Sikhs, who are viewed as distinct racial groups as well as religions, but not to Muslims, since they are not considered to have a distinct ethnicity. However, some people have adopted a more sinister interpretation of the position of the government - which is, after all, led by a Prime Minister in Tony Blair who is seen very much as an evangelical Christian - and argue that it is seeking to re-impose the dominance of Christianity within the UK through what has been criticised as a “dangerous new blasphemy law”.<sup>39</sup> Since Christians can no more be considered a specific racial group than Muslims, a re-emphasis of the privileged position of the Christian churches necessitates the creation of a criminal offence specifically designed to protect religious faith.

The government justifies its proposal by arguing that:

“The Bill contains a range of safeguards to ensure that any interference with Articles 9 and 10 is proportionate. First, the threshold for the offences is high. It only applies to words, behaviour, written material, recordings or programmes that are threatening, abusive or insulting. Second, the material must be intended to, or likely to, stir up racial or religious hatred. Hatred is a strong term and the offences will not encompass material that just stirs up ridicule or prejudice or causes offence. Further, what must be stirred up is hatred of a group of persons defined by their religious beliefs and not hatred of the

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<sup>37</sup> *Ibid.*, para. 92.

<sup>38</sup> The Anti-Terrorism, Crime and Security Bill 2001 and the Serious Organised Crime and Police Bill 2005.

<sup>39</sup> T Jones and J Lyons, ‘Religious Hatred: Critics Condemn New Law’ [news.scotsman.com/latest.cfm?id=4669868](http://news.scotsman.com/latest.cfm?id=4669868).

religion itself. Therefore, legitimate discussion, criticism, or expressions of antipathy or dislike of particular religions or their adherents will not be caught by the offence.

Accordingly, in so far as the provisions interfere with Article 10 rights, the interference is justifiable under Article 10(2) as a necessary and proportionate measure for the prevention of disorder or crime and the protection of the rights of others. In so far as the provisions protect groups in society from hatred directed against them because of religious belief, they also may be seen as safeguarding Article 9 rights.”<sup>40</sup>

Universities are, however, among those strongly opposed to the Bill, concerned that it will limit legitimate academic debate and turn campuses into sources of numerous prosecutions. Journalist Polly Toynbee echoed the views of many in an article in the respected national newspaper, *The Guardian*.<sup>41</sup> She opined:

“The government claims that Muslims of all races need equal protection with Jews and Sikhs, who are already covered by race laws. But if Labour were advocating equality between all religions, they would repeal the blasphemy laws that only cover Christians, remove the bishops from the Lords and abolish religious state schools: 30% of state schools are religious, almost all Christian controlled. These privileges for Christianity cause great resentment among the other faiths: many think this is their blasphemy law.

This bill is not ‘closing a loophole’ as Labour claims, but marches right into dangerous new terrain. Here is an example: it is now illegal to describe an ethnic group as feeble-minded. But under this law I couldn’t call Christian believers similarly intellectually challenged without risk of prosecution. This crystallises the difference between racial and religious abuse. Race is something people cannot choose and it defines nothing about them as people. But beliefs are what people choose to identify with: in the rough and tumble of argument to call people stupid for their beliefs is legitimate (if perhaps unwise), but to brand them stupid on account of their race is a mortal insult. The two cannot be blurred into one - which is why the word Islamophobia is a nonsense. And now the Vatican wants the UN to include Christianophobia in its monitoring of discriminations.

Already this proposed law has cast a long shadow. Christians expect it to stop something like *Jerry Springer - The Opera* ever being screened. Sikhs who drove the play *Behzti* off the stage expect this law to prevent any future insult to their faith. When a *Telegraph* writer accused the Prophet of paedophilia for marrying a nine-year-old girl, Iqbal Sacranie of the Muslim Council said this was the kind of insult against their faith that made Muslims want ‘safeguards against vilification of dearly cherished beliefs’.

... the chilling effect of this law is here now. There is a new nervousness about criticising, let alone mocking, any religious belief, a jumpiness about challenging Islam or Roman Catholicism. This most secular state in the world, with fewest worshippers at any altars, should be a beacon of secularism in a world beset by religious bloodshed.

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<sup>40</sup> Explanatory Note to the Racial and Religious Hatred Bill, paras 28 and 29.

<sup>41</sup> 10<sup>th</sup> June 2005.

Instead, our politicians twitch nervously in a lily-livered capitulation to unreason.

Why? Because this clever blending between race and faith has tied all tongues. This law springs from a cult of phoney racial/religious respect that makes it harder than it ever was to dare to criticise, let alone mock. There is a new caution about 'causing offence'. What kind of offence? Not to people's race but to ideas in their head. If I want to write that I find the hijab a gesture of obeisance to the nasty notion that women are obscene and should be modestly covered up, I may offend a lot of Muslim women. I am not for banning it or tearing it off them, nor am I being racist. But that is becoming an argument that growing numbers of feminist women no longer dare articulate. Unless the Commons comes to its senses, there will be those who regard this view as religious hatred and will expect the law to stop it. (This crime attracts a seven-year sentence.)

Laws change cultural climates: it's what they are for. Religion will become out of bounds in many spheres. Schools, universities, the arts, broadcasting, will feel social pressures that induce self-censorship. A small example: if you wonder why there have been no penetrating exposes of cults like Scientology in recent years, it is because they have sued so often that the media caved in - fear of litigation outweighs the story. That is how the law cast its shadow.

The irony is that those spending most time in the courts will be the religious themselves. A similar law in Australia brought a burst of litigation and demands for arrests from one bunch of fundamentalists against another. Hate-filled evangelicals were creeping into mosques to take notes on imams' hate sermons. So extreme Jews, Muslims, Hindus, papists and Paisleyites will all challenge each other's fiery thought crimes while the Bible and the Qur'an incite enough religious hatred to be banned outright."

## **Terrorism**

Almost as controversial are the government's proposals for combating terrorism. One of the most notable features of the London bombings in 2005 was the public reaction to them. There was none. At least, no reaction greater than would have been expected towards any nationally-publicised incident which involved loss of life. Londoners continued to take public transport. Any calls for greater security at underground stations were met with derision. Brits continued to travel in and out of London (and elsewhere) just as before. There was no public anguish. We did not feel like a nation under attack. It seemed strange to many of us when we received messages of support from friends in other countries (including the US). We are not used to receiving commiserations in respect of the deaths of people whom we do not know.

The comparison with the aftermath of 9/11 could hardly be starker. But, unlike Americans, Brits (like many Western Europeans) are used to living with a terrorist threat. Until the recent peace process gained momentum, the IRA has been active in the UK for thirty years or so; Spain had ETA; Germany had Baader Meinhof and the Red Brigades (who were also active in Italy, which still has the mafia); France's extremists had issues with policy over Algeria. A favourite tactic of the IRA had been to close mainline London railway stations so as to put the public transport system into chaos; the London bombings - though they caused far greater loss of life - seemed just a step up from that. The general public mood was that, if we cherish freedom and democracy, there has to be a limit to the powers taken by the government to restrict civil liberties (especially since the bombers were not foreigners who had come to the UK with the express purpose of committing terrorist acts but British citizens who were born and raised in the UK).

Nevertheless, the government seems to feel that it must be seen to be doing something, and so it has brought forward the Terrorism Bill. But the cure seems much worse than the problem. Clause 1 makes it an offence to incite or encourage acts of terrorism, but it is difficult to think of any examples of such conduct which are not already illegal. But the really problematic issues begin with clause 2, which prohibits the dissemination of terrorist publications. This would make any politics professor who hands out copies of extremist propaganda for class discussion guilty of a serious criminal offence exposing him or her to a penalty of up to seven years' imprisonment. It seems unlikely that such a clause could be compatible with Article 10 of the European Convention on Human Rights, which protects freedom of expression. Yet HRA 1998 does not allow British courts to set aside legislation: all that they can do is to issue what is known as a 'declaration of incompatibility',<sup>42</sup> which the government may well choose to ignore.

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<sup>42</sup> Human Rights Act 1998 s 4.

Clause 6 creates similar difficulties. It prohibits what it calls ‘training for terrorism’, but the definition is so wide as to include “the making, handling or use of a noxious substance”,<sup>43</sup> which potentially outlaws all chemistry classes! The government has defended this clause on the grounds that an offence will be committed only if the professor knows that the trainee:

“intends to use the skills in which he is being instructed or trained –

(i) for or in connection with the commission or preparation of acts of terrorism or Convention offences; or

(ii) for assisting the commission or preparation by others of such acts or offences.”<sup>44</sup>

But this hardly washes because it is unclear what counts as ‘preparation of acts of terrorism’.

The Secretary of State for Education, Ruth Kelly, has been lobbied continually about these concerns and some changes have been made to the original draft of the Bill which included even vaguer language. Ms Kelly is, however, under considerable political pressure as a result of government mismanagement of other education issues and (at the time of writing) it is not at all clear that she will survive in post for much longer. Her departure may signal more flexibility from the government; if none is forthcoming, it seems likely that - rather than defending civil claims from students in the courts, which has been avoided by the creation of the OIA - universities and their faculty face the daunting prospect of finding themselves in the criminal courts instead.

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<sup>43</sup> Clause 6(3)(a).

<sup>44</sup> Clause 6(1)(b).