

The Sustaining of Expressional Rights: A British Perspective

**David Palfreyman, Fellow of New College, University of Oxford, and
Director, Oxford Centre for Higher Education Policy Studies (OxCHEPS)**

INTRODUCTION

This Essay is about the degree to which English Law protects the ability of individuals and groups connected with universities/colleges (hereafter HEIs, higher education institutions) to express their views and opinions freely and without fear of reprisal from the HEI in terms of its power to use against students disciplinary procedures under the student-HEI contract to educate or similarly to use against faculty and other employees disciplinary procedures under the employee-HEI contract of employment.

The British citizen has certain expressional rights protected either by the common law or by statute (notably the Human Rights Act 1998 (HRA) and its incorporation into English Law of the European Convention on Human Rights (ECHR) – specifically Articles 9 and 10 re freedoms of expression, of thought, of conscience and of religion – and the Public Interest Disclosure Act 1998 re ‘whistleblowing’). Moreover, a British citizen is subject to common law constraints in relation to defamation and also to legislation restricting his/her freedom of expression where such expression would constitute, say, obscenity or sexual harassment, or be discriminatory, or incite racial hatred. There is no special treatment for students, faculty or other HEI employees. Such individuals within the campus community have under English Law exactly the same expressional rights and precisely the same restrictions upon their freedom of expression as citizens beyond the campus, and as outlined above. The debate about

such ‘expressiorial rights’ dates back to J.S. Mill’s On Liberty (1859); with modern contributions notably from Barendt, Freedom of Speech (1987), along with Rawls, Dworkin, Hart, etc.

The key issue for this Essay is the extent to which freedom of expression linked to academic freedom is specifically protected against the HEI attempting to curtail such expression. So just what is ‘academic freedom’ and how is it protected under English Law? Does it extend to students or faculty or any HEI employee criticising the HEI’s governance and management or, say, UK involvement in the War on Iraq; and can it cover a Professor of Physics challenging the HEI’s outsourcing of the campus catering or a Chemistry Lecturer sounding off about UK Government policy on care for the elderly? (On the basis of the New Zealand case of *Rigg v University of Waitkato* [1984] 1 NZLR 149 it would seem that the Professor of Physics can criticise the University management and invoke academic freedom in doing so: ‘the concept of academic freedom applied to University affairs generally and not simply to the discipline in which the academic was engaged’ (at 151), providing such criticism is ‘reasoned and fair’, and is expressed ‘with integrity, scholarship and a sense of responsibility’.)

ACADEMIC FREEDOM

The only formal protection of academic freedom in English Law is under s202(2)(a) Education Reform Act 1988: 'to ensure that academic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at their institutions'. But s202 applies only to the 'pre-1992' royal charter HEIs as one half of the UK HE system and not to the former polytechnics that became the 'new' statutory universities of 1992. There is also s32(2) Higher Education Act 2004 which, in creating the Director of the Office for Fair Access, puts upon the Director 'a duty to protect academic freedom including, in particular, the freedom of institutions – to determine the contents of particular courses and the manner in which they are taught, supervised or assessed; and to determine the criteria for the admission of students and apply those criteria in particular cases...'. (See generally Farrington & Palfreyman, The Law of Higher Education, 2006 forthcoming, Oxford University Press.)

Tim Birtwistle ("Academic freedom and complacency: the possible effects if 'good men do nothing'", 2004 *Education and the Law* 16(4) 203-216) considers these (and other rather random) statutory references to be 'nothing of substance that actually provides a definitive statement'. He notes the references to the significance of academic freedom in the 1988 Magna Charta of European Universities (www.cepes.ro) and in various UNESCO pronouncements, as well as detailing how a number of other countries seek to protect academic freedom either as itself a constitutional right or by way of a right enshrined within a Higher Education Law, before calling for the UK to overcome its 'complacency' and 'act now to give a

proper statutory framework to academic freedom' (perhaps as part of the Bologna Process creating by 2010 the European Higher Education Area; and citing as a model the wording within the higher education legislation in Latvia).

There is also some protection for freedom of expression on the campus in the form of s22(4) Education Act 1994 which requires that HEIs issue students with a copy of the HEI's code of practice drawn up in accordance with s43 Education (No 2) Act 1986: HEIs must 'take such steps as are reasonably practicable to ensure freedom of speech for students and employees of the HEI and for visiting speakers'. The case of *R v University of Liverpool, ex p Caesar-Gordon* [1990] 3 All ER 821 clarifies that the HEI can ban a political group from holding a meeting and certain inflammatory speakers they may have invited if it has good reason to fear disruption on its premises, but the HEI should not take into account possible public disorder beyond the campus (that is for the Police to worry about). This legislation was prompted by the then Conservative Government believing that right-wing student political groups were being silenced on HEI campuses by the prevailing left-of-centre orthodoxy among students generally (and also among faculty). Similar legislation exists, and, for similar political reasons, is still topical, in Australia.

In contrast, USA case law seems pretty clear as to what academic freedom is and in (to an extent) giving it a constitutional basis: Justice Frankfurter in *Sweezy v New Hampshire* 354 U.S. 234 (1957) declaring 'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of university to determine for itself on academic grounds who may teach, what may be taught, how it

shall be taught, and who may be admitted to study' (at 263). Justice Powell in *Board of Regents v Bakke* U.S. 265 (1978) reinforced Justice Frankfurter and specifically noted that the four essential freedoms 'constitute academic freedom' (at 312). Justice O'Connor in *Grutter v Bollinger* 539 U.S. 306 (2003) echoes these earlier cases concerning the special role of HEIs in American society. (See [2004] *Journal of College & University Law* 30(3) and the Hiers article re institutional academic freedom and the Stoner/Showalter one re judicial deference to educational judgement.)

THE FIVE CHALLENGES TO ACADEMIC FREEDOM

Academic freedom is likely to be challenged for one of five main reasons: first, the HEI is too dependent on one key source of funding (usually the State/Government/taxpayer) and is compromised by needing to be politically accountable via external micro-management to the one who pays the piper being able to call the academic tune; second, the HEI being compromised by a commercial/market relationship with a financial sponsor of the HEI generally or of particular research which expects the 'right' academic output or to block output that is inconvenient/too revealing; third, and linked to reason two above, the HEI's own management are compromised by being over-enthusiastic about 'the entrepreneurial university' model; fourth, the conflict between freedom of academic expression and any prevailing orthodoxy of political correctness; and, fourth, pressure upon the HEI to silence faculty or students speaking or acting against the political consensus as determined by powerful funders or politicians claiming to represent 'the silent majority'. These reasons can, of course, overlap in some complicated cases/scenarios.

With reference to the first threat (State control) and as the UK expanded HE in the 1960s, Lord Robbins (the architect of that expansion) warned in a Lecture entitled Of Academic Freedom (6 July 1966, British Academy/Oxford University Press) that university autonomy and academic freedom ('a very special kind of freedom which, in some ways at least, transcends our normal conceptions of freedom in society and, because it involves exceptional privileged, also demands exceptional justification' – see also Kennedy, Academic Duty, 1997, Harvard University Press and Evans, Calling Academia to Account: Rights and Responsibilities, 1999, Open University Press) would be in danger if HEIs became too dependent on State subsidy and such funding increasingly came with demands for value-for-money and with ever-greater micro-management via excessive bureaucratisation ('men of goodwill who are inadequately informed of what is at stake... are apt to believe that academic freedom means academic anarchy... are prone to fall for all sorts of grandiose half-baked plans for alleged reform and reorganisation'). Back in 1922, H.A.L. Fisher, Warden of New College, Oxford, and sometime Minister of Education, had commented: 'The State is, in my opinion, not competent to direct the work of education and disinterested research which is carried on by Universities, and the responsibility for its conduct must rest solely with their Governing Bodies and teachers'. Some three decades later after Lord Robbins, Lord Russell in Academic Freedom (1993, Routledge) saw recent legislation in the form of excessive bureaucracy that Robbins had predicted as 'a further significant erosion of academic freedom', and called for Oxford and Cambridge to break away from State-funding, to become truly private corporations, as 'the only way any universities [worth having] might continue to exist in Britain' (see the 2004 OxCHEPS Report on financing the privatisation of Oxford University at oxcheps.new.ox.ac.uk, Papers Page, Item 14, for the same issue surfacing a decade

later). The paradox is that State micro-management of HEIs increases as taxpayer funding declines, and HEIs (in the UK at least) lack the political will and effective leadership to grasp their own collective destiny.

The second threat by way of inappropriate pressure from commercial sponsors is ever-present, as disputes in the USA, Canada, and Australia and the UK have shown and as discussed in Bok (2003) Universities in the Marketplace (Princeton University Press). Indeed, arguably ‘American concern with academic freedom began at the end of the last century [19th] when Leland Stanford’s widow demanded that the president of Stanford University should sack the economist E.A Ross... [whose great offence] was to urge that no more Chinese migrant workers should be allowed into California, and then to suggest that natural monopolies such as railroads should be taken into public ownership. Leland Stanford had made his money from railroads built with coolie labor. Ross was sacked...’ (Ryan, Liberal Anxieties and Liberal Education, 1998, Hill & Wang). It was a similar story at the University of Wisconsin (R.T. Ely ‘tried’ by the Regents in 1894 for speaking favourably of strikes), at the University of Chicago (E.W. Bemis), at Brown University (President E. Benjamin Andrews): ‘Economic nonconformity was the great and abiding sin of the professors who were involved in these key cases of academic freedom in the 1890s and early 1900s’ (Rudolph, The American College and University: A History, 1962, p414; see also Hofstadter & Metzger, The Development of Academic Freedom in the United States, 1955).

The third reason is often linked to the second, and is explored in such critiques as that by Marginson and Considine (2000) The Enterprise University: Power, Governance

and Reinvention in Australia (Cambridge University Press), as well as in the managerialism: collegiality or shared values: corporatism debate (see the OxCHEPS Bibliography Page for several relevant texts and Chapter 1 of Tapper & Palfreyman, Oxford and the Decline of the Collegiate Tradition, 2000, Woburn/RoutledgeFalmer).

The fourth reason is explored in many texts, perhaps notably by Allan Bloom (1987) The Closing of the American Mind: How Higher Education has failed Democracy and impoverished the Souls of today's Students (Penguin); and, rather more polemically, in A.C. Kors and H.A. Silverglate (1998) The Shadow University: the Betrayal of Liberty on America's Campuses (HarperPerennial). The current debate in a dozen US States about an 'Academic Bill of Rights', proposed by Horowitz and the Center for the Study of Popular Culture, and designed to protect students against allegedly force-feeding of liberal ideology in the lecture room, further illustrates the issue and links across to the fifth element explored below: see also the campaign 'Students for Academic Freedom' (source: New York Times, 25/12/05, p22, 'Professors' Politics Draw Lawmakers into the Fray'). As Ryan comments: 'If you don't like having your beliefs questioned, don't go to college' (Liberal Anxieties and Liberal Education, 1998, Hill & Wang).

The fifth reason, being the one most topical in the UK at present, I now want to discuss in the rest of this Essay.

THE CONSCIENCE AND CRITIC OF SOCIETY: SPEAKING OUT AGAINST THE POLITICAL TIDE

In pursuing academic freedom, defined most comprehensively perhaps in the Canadian Association of University Teachers statement as below, the HEI itself, the academic and occasionally a student will bump up against convention, orthodoxy and conservatism if it is to be the conscience and critic of society:

‘The common good of society depends upon the search for knowledge and its free exposition. Academic freedom in universities is essential to both these purposes in the teaching function of the university as well as in its scholarship and research.

Academic staff shall not be hindered or impeded in any way by the university or the faculty association from exercising their legal rights as citizens, nor shall they suffer any penalties because of the exercise of such legal rights. The parties agree that they will not infringe or abridge the academic freedom of any member of the academic community. Academic members of the community are entitled, regardless of prescribed doctrine, to freedom in carrying out research and in publishing the results thereof, freedom of teaching and of discussion, freedom to criticise the university and the faculty association, and freedom from institutional censorship. Academic freedom does not require neutrality on the part of the individual. Rather, academic freedom makes commitment possible. Academic freedom carries with it the duty to use that freedom in a manner consistent with the scholarly obligation to base research and teaching on an honest search for knowledge.’

Such clashes have occurred in most countries over many decades (if not centuries), as illustrated by three Australian examples typical of their type. One was Professor Marshall-Hall, University of Melbourne, 1890s, who wrote to the HEI’s Council:

‘The notion that such expression by a Professor not ex cathedra but as a private citizen can be injurious to the University is possible only by forgetting that the greatest service a University can render to the community is to be the model of toleration in opinion and the champion of freedom of thought. There is no toleration, and no freedom where men must echo conventional views of life, religion, or politics, or hold their peace. I am aware however that there are some who think that freedom is inconsistent with the interests of the University; with them must rest the grave responsibility for a determination inimical to its highest functions.’

Another was Professor Wood, University of Sydney, also 1890s, who wrote to the University’s Senate: ‘I received my historical education at two great English universities, the Victoria University of the North of England, and Oxford University... It was therefore natural that I should take perhaps too much for granted those principles as to freedom of speech which have in modern times been respected in these and, I think, in most if not all other British Universities. When I became a candidate for the Chair of History in Sydney University, I was a member of the University in which Professor Freeman was the Regius Professor of Modern History; and I was connected with two colleges, Balliol and Mansfield, presided over respectively by Professor Jowett and Dr Fairbairn. Under such circumstances it became a habit of mind with me to imagine that at University teacher was free to criticise the policy of the British Government; and it was not likely to occur to me that such criticism would be taken as evidence of lack of patriotism, and “anti-British sentiment”. Even during the present heated controversies, the principle of liberty of speech has been guarded with the utmost jealousy in both of the two great English Universities with which I am connected.’

The third was Dr Heaton, University of Adelaide, 1920s, who wrote to ‘The Adelaide Advertiser’: ‘And if you ban teaching on controversial subjects outside the university, you must shut down such teaching inside as well, for ideas and books will get about, not matter how you try to prevent it. You must stop the teaching of philosophy, for it discusses questions which border on theology; you must abandon history, for people have theories and interpretations of history; chemistry must be taboo, for it teaches things which are of use in making poison gases for the next war; biological studies must be stopped, for they are groping round trying to upset our old ideas about the origin of life; and sixty years ago geology would have been anathema just as all talk of evolution is to some folk in Kentucky today. Even literature is a bit suspect, for Milton had strange views about freedom of speech, Carlyle and Ruskin said unpleasant things about modern industry, and most modern writers are socialists.’

Similarly, at the University of Birmingham (UK) Karl Wichmann, the Professor of German, in the midst of World War I ‘was effectively blackmailed into resigning his chair by a vote of the City Council Finance Committee, which made continuation of its regular payment of £13,000 a year to the University subject to the University Council ‘not retaining the services of any pre-war unnaturalised German’...’ (Ives, The First Civic University: Birmingham, 1880-1980, 2000, University of Birmingham Press, pp 169/170). Whatever unpleasantness may have occurred in modern times at Australian, USA and UK HEIs, it is, however, not quite as dramatic as events at New College, Oxford (and at other Oxbridge colleges), in its interactions with Henry VIII, Mary and Elizabeth I, during the Reformation when Protestant Fellows were expelled (and, in one case, a Fellow, the Lutheran Peter Quinby, locked in the Bell Tower by the Catholic Warden London, until he starved to death!) and Catholic texts in the

College Library were destroyed – the College C14th stained-glass in the Chapel was, however, not replaced with plain glass and hence survives to this day, but the Reredos was destroyed along with various altars and images. Similarly, at the time of the Civil War, Warden Pincke was arrested by Parliamentary forces (led, ironically by a New College alumnus, Lord Saye and Sele), but returned when the Royalists took control of Oxford and New College became the King's main arsenal (happily the Cloisters survived being a gunpowder repository to feature in the latest Harry Potter film!). The College duly suffered when Oliver Cromwell triumphed and at least fifty Fellows were expelled, with a Parliamentary loyalist being imposed as Warden: but, then, of course, the Restoration of the monarchy in 1660 led to the expulsion of the 'intruded' Cromwellian Fellows and the restoration of some of the deprived Royalist Fellows... Meanwhile, also in the 1660s, the New College Fellow, Thomas Hobbes (but not he of Leviathan, 1651), presumably invoked academic freedom in refusing to get out of bed to perform teaching duties during the winter months! (See Buxton & Williams (1979), New College, Oxford, 1379-1979; and Rashdall & Rait, New College, 1901.)

And so to the present day in the UK where Professor Furedi (University of Kent, UK), writing in the AUT Bulletin, commented on Government demands that HEIs clamp down on extremist campus groups: 'Policing discussion is inconsistent with academic freedom and campus democracy. The issue is not whether or not we agree or disagree with the view of organisations like Hizb-ut-Tahir but whether we think that clarity can be gained from a clash of opinion. Academics must not allow themselves into becoming too scared to defend free speech.' This is politically charged territory, especially in the context of two opinions from the House of Lords (the UK's Supreme Court) that, as Government would see it, tend to undermine the 'War on Terror' and

the legislation passed since 9/11: one ruled that the detention without trial policy was contrary to the HRA/ECHR (*A and others v Secretary of State for the Home Department, X and another v Secretary of State for the Home Department* [2004] UKHL 56 (NB 9 Law Lords sitting rather than the usual 5), [2005] 2 AC 68 (downloadable, as is case below, from the House of Lords website:

www.parliament/index.cfm - then click 'Judicial work' and next 'Judgements'); and another found that evidence obtained by torture is not admissible in a British court (*A and Others v Secretary of State for the Home Department (no 2)* [2005] UKHL 71, 8 December 2005 (NB 7 Law Lords rather than the usual 5), on appeal from [2004] EWCA Civ 1123) (2005) The Times 9 December). In the latter, Lord Bingham noted: 'From its earliest days, the English common law set its face firmly against the use of torture. That rejection, in contrast with the practice prevalent in continental Europe, was hailed as a distinguishing feature, the subject of proud claims by English jurists and admiring comment by foreign authorities' (his Lordship was also clear that the use of torture contravened article 3 ECHR as well as public international law).

The 2005/06 Terrorism Bill proposes to create an offence of the 'indirect encouragement' (colloquially, the 'glorification') of 'the commission or preparation (whether in the past, in the future or generally) of terrorist acts or offences' and to ban the dissemination of terrorist publications. Many in HE worry that the teaching of certain courses and the supply of certain reference material could leave faculty and library staff exposed. At the same time as this row has unfolded, an academic (Professor Anthony Glee, Brunel University) produced a controversial report ('When Students Turn to Terror') asserting that lax controls had turned UK HEIs into a risk to national security (see The Social Affairs Unit, www.socialaffairsunit.org). Then the

President of the Middlesex University Student Union was suspended by the University because the Union was organising a political meeting to which Hizb-ut-Tahrir, an Islamic political party, was invited. Writing in The Times Higher (30/9/05, p16) the President comments that his suspension ‘raises all sorts of questions about the autonomy of student unions, academic freedom within universities and wider issues of Islamophobia and the role of vice-chancellors in the implementation of government policy’.

Indeed, the UK vice-chancellors (HEI presidents, in US terms) were asked to be vigilant at a speech made on 15 September 2005 by the Rt Hon Ruth Kelly MP, Secretary of State for Education and Skills, in which she said: ‘We all want universities all over Europe to be places where ideas and people of many opinions and nationalities mix and advance knowledge. Following the London bomb attacks in July, we are all having to re-examine certain policies. One is how to respond to those using the freedoms of our society to promote terrorism and violence. This is not straightforward. We value diversity and multicultural and free society. Freedom of speech or expression is one of the most fundamental rights that individuals enjoy. And Higher Education is a bastion of those values. Part of its reason for existence is to teach people to think for themselves, and express themselves, and to listen to and consider the opinions of others. However, freedom of speech does not mean tolerance of unacceptable behaviour. I believe the HEIs need to confront unacceptable behaviour on the premises and within their community. They should be alert and be unafraid to set their own boundaries – within the law and with the law in support – in consultation with their own community and the wider community. That means informing the police where criminal offences are being perpetrated or where there

may be concerns about possible criminal acts. HEIs have a duty to support and look after the moderate majority as they study and develop their own ideas and knowledge, to ensure that those students are not harassed, intimidated or pressured.’

The legal problems and risks for HEIs, of course, in ‘clamping down’ on supposed campus extremism are: first, falling foul of anti-discrimination legislation covering race/colour/nationality/ethnicity; second, breaching the Human Rights Act 1998 (freedom of expression and assembly); third, failing to comply with s43 Education (No 2) Act 1986, as already discussed; fourth, conceivably being accused of defamation by students seemingly labelled as extremists if the HEI has not good cause to identify any particular students; and, finally, the HEI’s security staff may be accused of assault under certain circumstances when, say, attempting to close down an ‘illegal’ meeting/rally. There are similar debates going on in Australia and Canada in the context of their anti-terrorism laws and academic unions fearing a return to a McCarthy witch-hunt era. While in France there is protest from history academics over a new law that requires them to emphasise the positive role of French colonialism in North Africa... Who would be a HEI administrator – manager (or his/her legal adviser), even if it is in 2006 probably less risky than being a Warden of New College between the 1530s and the 1650s given the potential for conflict with Henry VIII, Elizabeth I or Oliver Cromwell.

