Response to Call for Submissions by UN Special Rapporteur

Academic Freedom and the Freedom of Opinion and Expression

The English Law Position

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Executive Summary

Academic Freedom of Speech is a fundamental pillar of academic freedom and a subset of the general right to freedom of expression, in particular under Article 10 of the European Convention on Human Rights (ECHR). The Council of Europe and the European Court of Human Rights have both expressly endorsed the importance of Academic Freedom of Speech to democratic society.

For most academic institutions in England, the starting point will be their governing charter / statutes. These typically enshrine the obligation 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"* (see the Education Reform Act 1988).

If the institutions breach these rules, then they may be exposed to litigation from, in particular, academics whom they employ – either in the employment tribunal or via judicial review in the High Court.

Under English law (see section 3), there are a variety of statutes which impact on Academic Freedom of Speech – primarily the duty of academic institutions to take reasonably practicable steps to ensure freedom of speech within the law for their staff, students and visiting speakers (section 43 of the Education (No 2) Act 1986). On top of that, public bodies (including universities) are required by the Human Rights Act 1998 to take into account the ECHR and its related case law.

In essence, this ECHR law establishes that the enhanced protection for Academic Freedom of Speech, once specific conditions are met, entitles an academic to the ***utmost protection*** under Article 10 ECHR, even in situations where the Article 10 rights of an ordinary citizen would otherwise be overridden by competing convention rights of another.

However, enhanced protection for Academic Freedom of Speech is not an absolute right and it comes with duties and responsibilities. Case law, notably the international jurisprudence, (see section 4) suggests that there are important limits to it, e.g. it is unlikely that any statement which amounts to a value judgment based on racial superiority/inferiority will have much, if any, protection under Article 10.

Where is the line drawn under English law between the exercise of Academic Freedom of Speech and the general right of expression available to everyone? How, in the digital age of social media and instant communication, can legitimate academic research be distinguished from material that may not conform to the standards of intellectual rigour that academic protection requires? These are important questions which are considered below.

Overall, under English law, enhanced protection for Academic Freedom of Speech is a powerful right for academics, the corollary of which is that there is a strong duty imposed on academic institutions not to transgress it, in particular when acting as employers of academics. Again, if such institutions transgress an academic's rights in this regard, then an academic may be entitled to bring legal action against the institution concerned.

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1 Universities as guardians of Academic Freedom of Speech

Universities are – both under English law and by virtue of their function in a democratic society – the guardians of Academic Freedom of Speech. They protect and promote this freedom by standing firm when it is wrongfully challenged, but also by acting decisively when it is abused.

The question of whether that line has been crossed is immensely difficult and one which – as recent high-profile English examples show – will often be subject to significant public scrutiny. While what follows gives an overview of the key questions for academics and universities and some general answers, each case will be finely balanced and highly sensitive to the facts concerned.

Overall, the combination of domestic and international law governing Academic Freedom of Speech in England means that its protection is robust. However, recent high-profile examples and the proliferation of "*chilling"* phenomena suggest that universities may not be fully aware of their obligations and the protection which academics have. If so, then they may have much more legal exposure than they anticipated when dealing with these issues (not to mention ethical considerations which root the freedom in the essence of the academy).

2 The "chilling effect" of threats to freedom of speech in English universities

During the course of the past two years there have been several high profile cases – involving Jordan Peterson and, most recently, Professor Selina Todd – that have led some to argue that Academic Freedom of Speech is under threat in England. This is an argument which matters. Ideas which challenge the prevailing orthodoxies of society, and suffer for it, can change the way we look at the universe – one need only think of Galileo, Isaac Newton or Charles Darwin.

The House of Commons/House of Lords Joint Committee on Human Rights published a report in 2018 which suggested phenomena such as trigger warnings, safe spaces, and no-platforming could also be a threat in their "*chilling effect*" on freedom of speech in universities.

One side of the debate assert that academics must have absolute freedom to challenge orthodoxies and put forward unpopular or offensive views. The other side counter that some topics are simply so toxic that discussion of them should not be allowed, even in the university environment.

These threats to their freedom have led the academy to reflect deeply upon what Academic Freedom of Speech means, when and to whom it applies, and what the limits of it are. It is important to clarify here that we are talking about a specialised subordinate of the more general right to freedom of expression and one which applies to a small – but vital – subset of society when operating in their professional capacity as academics. It does not follow that if an academic is not entitled to this special level of protection that they are being silenced as a citizen – how could that meaningfully be so in the modern internet age?

Academic Freedom of Speech brings with it a mark of quality which rightly affords the speaker and what they say a particular reverence and respect in society – it is a tremendous privilege which carries significant power, but with that comes responsibility. Just as a lawyer will face life-changing repercussions for abusing the special trust our society places in them,

academics must accept the burdens alongside the benefits if they wish to claim a special status.

Pressure on the academy continues to build up. In January 2019, the University and College Union (supported by Education International) made a submission to UNESCO and the ILO which alleged that English law provided insufficient protection for Academic Freedom of Speech, particularly when compared to (other) EU states.

February of 2020 saw the launch of a new Free Speech Union, which (among other things) intends to put pressure on academic institutions where it perceives that there has been a breach of its members' rights to speak freely. At the time of writing, the FSU has already written letters in relation to the treatment of Amber Rudd, a former UK minister, and Professor Selina Todd.

This mounting pressure suggests that the freedom is not well placed to withstand its current threats, but is that conclusion correct?

Legal protection of Academic Freedom of Speech

3 The English Law position

To answer that question, we must first consider what the position is under English Law. The starting points for this are section 43 of the Education (No 2) Act 1986, and the Human Rights Act 1998. The former requires universities to take reasonably practicable steps to ensure freedom of speech within the law, which includes producing a code of practice in order to facilitate compliance with that duty. The latter requires public bodies to comply with the European Convention on Human Rights, which includes the right to freedom of expression under Article 10.

Section 43 is central to many of the recent controversies around 'no platforming' of speakers, including prominent academics who were due to speak on issues which fell squarely within their professional expertise and competence, thereby triggering the higher level of protection afforded to academic speech under Human Rights law.

In February 2019, the Equality and Human Rights Commission, a UK regulatory body set up by statute, published a guide on the law concerning freedom of speech in the UK, specifically for universities and other institutions of higher education. This gives an overview of the law and guidance relevant to issues of free speech on campus. Unfortunately the guide does not examine in much detail the related, but still distinct, issue of *academic* freedom of speech. It defines that concept as such:

> "*Academic freedom relates to the intellectual independence of academics in respect of their work, including the freedom to undertake research activities, express their views, organise conferences and determine course content without interference*."

The guide notes that: "*as part of their duties under Article 10 and the s.43 duty, [universities] must protect the freedom of expression of academics and staff*".

In November 2018, the Charity Commission (which regulates certain higher education institutions and students' unions) also updated its guidance on freedom of speech. While it recognises, "*the important role that charities have in challenging traditional boundaries and 'group-think' as well as encouraging the free exchange of views and the educational benefits of such activities",* it similarly has almost nothing to say about *academic* freedom of speech specifically.

The lack of further commentary is perhaps to be expected given the absence of rules and guidance concerning this concept on the statute book or in the case law. Aside from the s43 duty, universities must have particular regard to academic freedom when implementing the 'Prevent' duty (see section 5 below) and the Office for Students (which regulates most universities) also has a duty to protect academic freedom in exercising its functions. However, there is little mention of the concept elsewhere.

To where then should universities turn when considering any similarly thorny issue with regard to Academic Freedom of Speech? The answer, at least initially, is likely to be their governing statutes and/or the s43 code of practice which they have been required to prepare. Many universities have enshrined adherence to academic freedom in wording which often broadly mirrors section 202(2)(a) of The Education Reform Act 1988. This required University Commissioners (a position which no longer exists) 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*."

At first glance, this may allay any concerns that academic freedom is particularly vulnerable to its threats, but note the crucial caveat "*within the law*".

On the one hand, speech may be limited if it would amount to a criminal offence (such as stirring up racial hatred or provoking violence) – this amounts to a high bar given the necessary criminal burden of proof (and the international case law should still be considered – see below). These are beyond the scope of this submission because, in our experience, they are not usually engaged in academic disputes in England. On the other, there are civil law breaches, in particular the harassment provisions of the Equality Act 2010. These prevent behaviour which creates "*an intimidating, hostile, degrading, humiliating or offensive environment*". Closely linked to this is the Public Sector Equality Duty, which requires (among other things) universities to consider the need to eliminate discrimination and harassment, encourage good relations between those from different races, and to tackle prejudice.

For those familiar with the controversial speech of Professor Finnis in particular, it is within this interaction of academic freedom and the Equality Act where much of the confusion and difficulty lies. The explanatory notes to the Equality Act require tribunals and courts in England to balance Article 10 and academic freedom against the right not to be offended in deciding whether a person has been harassed, but this does not take us much further than a careful reading of the various legislation would have done.

The precise meaning of "*within the law*" is therefore far from clear and interpreting it poses a real conundrum for universities. The considerations in any particular case will be nuanced and fact sensitive, but the English case law provides little assistance in what could be a highly controversial judgment call for a university. A call which, if they get it wrong, can lead to significant reputational damage and expose them to a variety of legal claims, including under Article 10.

4 The European Human Rights Law position

Fortunately, the case law of the European Court of Human Rights (ECtHR) has considered fundamental issues concerning the nature of Academic Freedom of Speech. It is important to note that it is through the lens of *this* case law which the domestic law must be viewed. In particular, it will be a relevant consideration as to whether any breach of the Equality Act has actually occurred.

Any institution seeking a way forward on a complex issue concerning Academic Freedom of Speech would be wise to look beyond the English Law (and associated guidance) to the ECtHR in order to fully appreciate the legal framework which any such decision they must make sits within. Such considerations are particularly apposite given the potential tensions which may exist between the ECtHR case law on Article 10 and requirements under the Equality Act.

It is not straying into hyperbole to say that these are extremely important questions, given the fundamental necessity of Academic Freedom of Speech to the proper functioning of a modern liberal democracy.

The ECtHR has said the following:

> "*There is no Chinese wall between science and a democratic society. On the contrary, there can be no democratic society without free science and free scholars".*

The Council of Europe, which helps oversee the European Convention on Human Rights (ECHR) alongside the ECtHR, considers:

> "*academic freedom and institutional autonomy as intrinsic values of higher education which are essential to the overarching values and goals of the [Council] – democracy, human rights and the rule of law*".

Academic Freedom of Speech is essential because it allows an academic, without fear of loss of their position or privileges, to put forward views antithetical to the prevailing political or academic orthodoxies, and to test received wisdom, even if those views are controversial or unpopular.

It is worth noting, before continuing, that the ECHR is separate from the European Union and so what follows will not necessarily be affected by Brexit itself (although the political situation around Brexit may precipitate the UK's withdrawal from the ECHR – see further below).

<u>The European Convention on Human Rights</u>

Article 10 of the ECHR states:

> "*1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers…*
>
> *2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society.."*

The ECtHR has spent a great deal of time on the general interpretation of those provisions, but it has given detailed consideration more specifically to a number of fundamental aspects of Academic Freedom of Speech.

As universities are public bodies, the Human Rights Act 1998 requires them to take ECtHR case law into account when making certain decisions and so it is crucial to determining the meaning of "*within the law"* and/or whether a breach of the Equality Act 2010 has occurred.

With that in mind, the answers from the ECtHR to the following questions should be of great interest to both academics and universities:

a) To whom does the protection apply?

The individual claiming the protection must be capable of being considered an academic. Most ECtHR cases have so far concerned university professors (in a loose sense) so there hasn't been detailed consideration of this point; however they suggest that an ordinary interpretation of the word is more appropriate than the stricter distinction made by some universities' statutes which seek to exclude, e.g., certain kinds of (particularly junior) researchers from the scope of Academic Freedom of Speech.

b) When does the protection apply?

Academics do not enjoy *carte blanche* to make comments on any topic they wish. In order to enjoy protection, the speech must be within their sphere of research and be based on their "*professional expertise and competence*". Once that is satisfied, however, the speech need not necessarily be in a formal academic journal in order to be protected.

However, the emphasis is important here because of obligations on academics also to comply with established standards of research ethics and integrity. Protection is at risk of being lost if those standards are compromised.

c) What level of protection is provided?

In short, the level is very high. The ECtHR has said that, in the right circumstances, academics are afforded "*the highest level of protection under Article 10*". Any interference with their right to free speech has to be strictly and narrowly construed and the fact that the speaker is an academic may mean that a comment does not infringe the ECHR rights of others (e.g. under Article 8) in situations where the same comment by a non-academic would be an infringement.

d) Can the level of protection vary?

The rationale for the protection (see above) means that topics that touch on matters of public interest are afforded higher protection when applicable – an important point given that such topics are more likely to generate controversy.

The nature of the medium in which the speech is published, and the methodological rigour which underpins it, may also affect the level of the protection.

e) Can the protection be lost?

In certain circumstances, it can be lost. It is unlikely that any statement which amounts to a value judgment based on racial superiority/inferiority will have much, if any, protection under Article 10. This is a more general public policy position of the ECtHR (many cases concern topics such as Nazism and holocaust denial), but it also applies to Academic Freedom of Speech.

f) Freedom is not "absolute"

Academics are afforded significant protection to express their views freely – arguably higher than any other member of society. However, their freedom is not absolute. Article 10(2) recognises that it comes with "*duties and responsibilities*" and that is confirmed by the ECtHR case law.

That there are limitations must be right. If there is no remedy for the exceptional case or instance of serious abuse – which history tells us cannot be avoided forever in human society – then we run the risk of the freedom itself being undermined; any law is open to being bent and abused.

The circumstances in which such a case appears should be rare – and that again must be right given the importance of the freedom – but they can and do exist. We should note, however, that none of this is to say certain topics *per se* cannot be discussed at all or that there should be absolute freedom for any speech on any topic. It merely acknowledges that the *ways* in which topics can be discussed are more complicated than such a simple dichotomy would allow. Again, the emphasis here is important.

Proposed changes to the law

However, notwithstanding the above, it is clear that there is uncertainty in the English academy as to the rights and duties of academics and institutions. Our view is that the lack of clear public guidance on the legal position around Academic Freedom of Speech has led some institutions into error and potential legal liability.

The optimistic view is that, with better guidance, institutions would properly discharge their legal (and moral) duties and, where necessary, academics and organisations supporting them can put public pressure on failing institutions to do better. However, the more pessimistic view is that the absence of more robust and explicit protection for Academic Freedom of Speech under English law is making managing disputes particularly challenging for institutions. The recent high-profile crises mentioned above involving Professors Selina Todd and John Finnis, Amber Rudd and Dr Jordan Peterson have stress-tested the boundaries of Academic Freedom of Speech.

It must also be said, before proceeding, that one need not impute bad faith or political motivation to an institution in making criticisms of their conduct. Those managing institutions, academics and non-academics, have a deeply complex web of competing legal obligations (e.g. the Equality Act, the Prevent duty, regulatory obligations) and the decisions they make are finely balanced. Despite their best intentions, we should be hesitant in criticising decision makers who, on the one hand, have explicit legal obligations and perhaps duties as trustees and, on the other, have no clear legal duty vis-à-vis Academic Freedom of Speech on which to rely. Those interested in supporting Academic Freedom of Speech need to work together.

Whether one is a pessimist or an optimist, there are reports in the media that the UK Government, in accordance with a manifesto pledge to 'strengthen academic freedom and free speech in universities', is now looking at introducing new legislation to protect freedom of speech on campus. We do also note, however, that there is discussion from time to time as to whether the UK should depart from the European Convention on Human Rights and that the politics around Brexit may precipitate that departure. As a general point, such an exit would potentially put at risk the protection afforded to academics by the ECtHR's case law – at a minimum the benefits of such jurisprudence would need to be incorporated expressly into English law to avoid it being lost.

In this part of our submission, we look at legislative steps the UK government could take to improve legal certainty concerning Academic Freedom of Speech.

5 The deficiencies of section 43

Section 43(1) requires:

"*Every individual and body of persons concerned in the government of any establishment to which this section applies shall take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers."*

Further, "*with a view to facilitating the discharge*" of that s43(1) duty, relevant establishments must "*issue and keep up to date a code of practice"* which sets out the procedures for organising and conducting meetings in respect of which the duty is engaged.

The vast majority of relevant institutions will have, no doubt, put codes of practices ("COPs") in place after s43 was introduced – the question is whether they have been adequately keeping such COPs up to date in line with their duty to do so. We have serious doubts as to whether that is the case and, consequently, whether institutions have COPs in place which can actually allow them to properly facilitate the discharge of the s43(1) duty.

One principal ground for doubt is the fact that various parts of the s43(1) duty have been subject to change and development over the years and that even a brief consideration of some leading institutions' COPs suggests that they have not been updated in line with such changes, as set out below.

First, the meaning of "*within the law*" is constantly being nuanced both by statute and case law. Since 1986, various statutes have come into force which have had an impact upon this key qualification of the duty – of primary importance are the following:

- The Human Rights Act 1998 ("HRA") gives effect to a rich seam of case law from the European Court of Human Rights concerning academic freedom of speech, as set out in section 4 above, which has a direct and fundamental effect on how "*within the law*" should be interpreted in an academic context. As recent guidance, including from the Equalities and Human Rights Commission on freedom of expression in universities, makes no meaningful mention of the case law around Academic Freedom of Speech, it would come as no surprise to see omissions in an institution's COP – however, that is no excuse for not complying with the law.

- The Equality Act 2010 ("EA") also has an impact (as set out in section 3 above) – for instance the public sector equality duty and the prohibitions on discrimination and harassment. In the explanatory notes which accompany the EA, it was explained that institutions must "*balance the rights of freedom of expression…and of academic freedom against the right not to be offended in deciding whether a person has been harassed".*

- Finally, the Counter-Terrorism and Security Act 2015 ("CTSA") imposes the often controversial 'Prevent' duty. When exercising that duty, institutions must have particular regard to "*the duty to ensure freedom of speech*" and *"the importance of academic freedom*".

If a COP takes no account of the impact of the above, in particular the enhanced protections for Academic Freedom of Speech, then arguably it is not compliant with the s43 duties.

Second, the actual wording of s43 was changed with effect from 1 August 2019 to coincide with the launch of the new Office for Students (OfS) regulatory body, which itself has various obligations to ensure academic freedom is properly protected when exercising its functions.

A small point – some institutions extract the wording of s43 into their COPs, which means they are now no longer up to date.

A larger point – the wording concerning to which establishments in England the s43 duties apply has changed. The duties no longer apply generally to any university (including any university college or college within a university) but rather to (among others) any higher education provider registered by the OfS. This is an unfortunate change as it creates an argument that certain independent institutions regulated by the Charity Commission rather than the OfS, such as the Oxford and Cambridge colleges have been inadvertently excluded from the application of the s43 duties.

In the case of the Oxbridge colleges, they probably would still be caught in some sense as their senior members are generally involved in the governance of their wider universities (which are on the OfS register) and have incorporated the s43 duties into their own governing statutes and ordinances.

However, the ambiguity is unhelpful and creates arguments as to how precisely the s43 duties apply in particular contexts, e.g. is it just in the context of the Colleges hosting University wide events and facilitating the University in complying with its duties? Legal advice is almost certainly needed by the colleges to assist the interpretation of their duties on any given set of facts.

6 Fixing section 43

The above is important to academic institutions, not only because they must of course comply properly with their various legal duties, but also because their COPs (and any associated policies) will be coming under increasing scrutiny and pressure from academics and pressure groups such as the Free Speech Union.

It is imperative, therefore, that their COPs and policies are up to date and robust enough to deal with what are often highly controversial and well publicised challenges relating to (academic) freedom of speech and ‘no platforming’. To that end, the first step must be an urgent review of their COP to ensure that it is fit for purpose.

Institutions may also want to review and update related procedures, e.g. in relation to room bookings, with the s43 duties specifically in mind, in order to head off being involved in future controversies and avoid costly and embarrassing breaches of their legal duties.

The UK Parliament could remedy the existing gaps in s43 by legislating as follows:

- Duties under s43 should be given more ‘teeth’ – this could be done by giving additional enforcement powers to the OfS. For example, the power to impose significant fines for non-compliance and other sanctions related to their functions as degree awarding bodies with access to public funds.

- An explicit statutory reference to Academic Freedom of Speech (as is the case in the CTSA and the explanatory notes to the EA) should be included and even stronger protection afforded to it. As noted above, this is a subset of the more general speech right. It would create a two tiered duty (helpful for Professor Todd, but perhaps not for non-academic such as Ms Rudd), but our view is that approach is correct as a matter

of existing law but also principle. The definition of academic freedom as contained in s202(2)(a) of the Education Reform Act 1988 might be a sensible starting point.

- The legislation could be more prescriptive as to what COPs should contain – see above, but also they could include details of what action must be taken against relevant student groups who have breached their duties (e.g. withdrawing permission for an entire event to be hosted and limiting future funding).

- Subordinate legislation, or perhaps statutory guidance, could also set out standards for the 'reasonably practicable' steps that universities must take in relation to security for speaking events and rescinding invitations to speakers.

- Oxbridge and Durham colleges should be made expressly subject to the s43 duty as institutions in their own right. Although this would lead to differing, and potentially conflicting regulatory regimes, with colleges' compliance regulated by the Charity Commission and the rest of the higher education sector overseen by the OfS, the High Court would have ultimate jurisdiction over both – this would be preferable to the current absence of s43 duties on the colleges. In addition, the Charity Commission and OfS would be free to enter into a memorandum of understanding governing their respective roles.

7 New duties on student unions

The application of free speech duties to student unions could be achieved by amending s22 of the Education Act 1994. The Act currently provides that universities must bring free speech COPs 'to the attention of all students'. A more effective safeguard would be to make the COP binding on student unions in any agreement between a student union and its host university. Institutions need to have ultimate oversight of the latter two groups at least – they have meaningful 'skin in the game' as far as compliance and enforcement are concerned, as well as deeper pockets and reputations to protect.

8 Amendment of the Equality Act 2010

The relevant statutory provisions of EA could be amended so that the explanatory notes are put on a statutory footing and institutions (and tribunals) are expressly required to consider academic freedom when deciding whether it is appropriate to conclude that harassment has occurred in the circumstances of any particular case. This could be supported by appropriate references to new and existing duties relating to freedom of speech and academic freedom.

9 A statutory academic freedom clause

The current approach is for institutions to have their own set of statutes and ordinances which prescribe the circumstances in which, and reasons for which, an academic can be dismissed and the procedures which must be followed before doing so (e.g. rights to legal representations, hearings before governing bodies of fellow academics, etc.).

Such internal rules do often make it very difficult to dismiss academics; however the issue is that they are inconsistent across the sector as a whole and sometimes effectively non-existent. This is a particular problem with regard to the exclusion of certain types of academics from an academic statute's application at one institution but not at another – this is sometimes the case with early career academics who often only have short term contracts and are engaged on an indeterminate employment status.

An obvious solution would be to regularise these internal rules across all institutions, however we would suggest that a better approach would be to modernise the system as a

whole. Historically academic statutes were introduced to protect academics and their tenure long before the development of employment law and the protections introduced in the Employment Rights Act 1996.

In the context of protecting free speech, a better approach may be to incorporate a statutory academic freedom clause, by automatic operation of law, into the contracts of academics (whether they be formerly classed as employees or workers under employment law, and whether their contractual duties involve teaching or research) to replace the protection of the academic statutes. Any dismissal in breach of such a clause could be made automatically unfair without the need for 2 years of qualifying service (it is appreciated that not all academics may be classed as workers or employees, e.g. end of career emeritus professors winding down their work, but such a clause would of course build upon the existing rules protecting academic freedom of speech).

Alongside this, academics could be protected from being subjected to a detriment because of protected speech. This would include disadvantages short of dismissal such as failure to promote or confer other benefits. Further, the detriment provisions could bite on both individuals and employers in order to give a more rounded protection and direct consequences for those seeking to illegitimately undermine academics.

The advantages of this new approach would be to allow easier (and cheaper) enforcement of the rules in the employment tribunal, a more predictable and transparent application of the rules as the case law builds publicly available precedents, a move to openness away from the arcane procedures of the traditional university environment, and a greater opportunity for compensated exits (which are often not provided for in academic statutes). There are obvious advantages both to the institution and to the academic in having better clarity, transparency and process around these issues.

However, we do still need to appreciate that academics are in some ways a special case. In dealing with cases where the academic freedom clause is an issue, suitably qualified specialist wing members (e.g. eminent academics in the relevant field) could be appointed to assist the judge in determining whether the academic in question has, *inter alia*, lived up the relevant standards of research ethics and integrity (etc.). Both claimant academic and respondent institution would be able to appoint a wing member of their choice (subject to minimum, objective standards of qualifications and experience, etc.)

10 A statutory academic freedom employment code

In order to supplement the new academic freedom clause, such a code could set out key principles and objectives with which an institution must comply when dealing with the disciplining and dismissal of academics, including in relation to handling of misconduct investigations. Courts and tribunals would be required to consider the code in deciding academic cases and an unreasonable failure to follow it by an institution could lead to an uplift in compensation for the academic concerned (cf. the ACAS code on disciplinary action and grievances in the work place). This can be accompanied by persuasive guidance, including indicative behaviours of how the principles might be achieved in practice.

In respect of the above, the devil will be in the detail and those drafting the relevant legislation will face a challenge in dealing with the academic ‘edge’ cases. If the Government is going to legislate to give very high levels of statutory protection for academic freedom of speech, then the law must describe the point at which the protection is gained and when it is lost. Flagrant abuse of the system must be prevented and a suitable release valve for use *in extremis* must, in our view, be included to maintain public confidence in the system and the integrity of the freedom itself.

Not every single utterance by every academic should necessarily be protected at an enhanced level above and beyond their ordinary speech rights (which in line with the above would in any event be enhanced in an academic context) and there should be some appropriate qualifying criteria for what will be protected academic speech. For example:

- the individual in question must be an academic. (Note: there is a debate to be had as to where line is drawn on that definition); and

- the speech should be:

    - within their professional competence and expertise;
    - flow from that expertise; and
    - the underlying basis for it must meet suitable standards of research ethics and integrity (so as to cover peer reviewed papers, but also extra mural communication of ideas (e.g. on Twitter) and value judgments).

- Certain considerations can also be expressly excluded, e.g. actual or potential subjective hurt and offence, and/or reputational concerns of the academic's institution.

The criteria suggested above are drawn in part from the ECtHR jurisprudence. As noted above, we consider it prudent to 'future proof' protection for academics from any future Government's decision to exit from the European Convention on Human Rights by expressly bringing these protections into English law.

Conclusion

It is hard to overstate the importance of Academic Freedom of Speech given the breadth of ideas – almost invariably controversial in their time – which have been protected by it. Whatever one may think of the particular ideas which today are claiming its protection, it is fundamentally an apolitical protection: times change, politics change, ideas change – society's commitment to academic freedom should not.

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