

ACADEMIC FREEDOM – RHETORIC OR REALITY?

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Academic freedom is a concept that has a particular significance in a University, not least in a University, which, uniquely in a British context, prides itself on its independence from the State.

My interest in academic freedom was sparked by a set of instructions received in this instance from the Government of Hong Kong. The issue in the prospective litigation was relatively simple. The Department of Education had planned some reforms. As is no more unusual in Hong Kong than it is in England, the proposals met with vocal opposition from certain academics. A senior civil servant telephoned the head of the faculty of the Hong Kong institution of Education, the focus of the controversy and – it was asserted and indeed found by a Commission of Inquiry (“the Commission”) established to investigate the affair – suggested that the turbulent teachers be disciplined.

No one disputed that this was an attempted interference with academic freedom. For a government to seek to impose sanctions on academics for expressing their views on educational matters would be a paradigm example of such interference; but the question on which I was asked to advise and in relation to which I ultimately represented the Department was more nuanced. For the civil servant had also confronted her academic critics directly, making no threats, but expressing her disagreement with their views in a manner as trenchant as that in which their views had themselves been expressed. Was this too another example of interference with academic freedom?

On the one hand it was argued – an argument upheld by the Commission – that it was. Even if the civil servant made no actual threat, statements from a person of such status carried with it the possibility of sanction. On the other hand, it was argued that the civil servant was doing no more than exercising her own freedom of expression.

In the end I persuaded the Administrative Court in Hong Kong that the Civil Servant was indeed acting within her own rights and that the Commission’s criticism was to that extent unwarranted.¹ But my preparation

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¹ *Secretary for Justice v Commission of Inquiry* on allegation relating to the Hong Kong Institute of Education [2009] HKC 102 (“HKIE case”).

for the litigation showed me how elusive is the notion of academic freedom and how little considered by the courts – at any rate in this country.²

Google – that modern short cut to – or, some would say – substitute for research, revealed no English law book devoted exclusively to the subject. It is found neither in the text nor in footnotes of *Education and The Courts*.³ Professor Eric Barendt’s “Freedom of Speech”⁴ gives it a mere 2 pages out of a total of 526 and locates it in a chapter called “Free Speech in Special Contexts”. However he informs me that he will shortly fill the lacuna in English commentary by a book devoted entirely to the topic. I can aspire in this lecture to provide a footnote for that much anticipated work.⁵

I can, however, only speculate as to where Professor Barendt will find the relevant material for I can trace only one English statutory provision which makes a specific reference to academic freedom.

The Education Reform Act 1988 (“ERA”) established a body of University Commissioners, whose main duties under Section 203 were to secure that the statutes of any institution within their remit included provision for dismissal of staff for redundancy or good cause - not, you may think, the most auspicious point of departure for protection of academic freedom, since it involved the abolition of tenure, colloquially, jobs for life for academics, long regarded as a *sine qua non* for those who taught in college or on campus. However the regime was softened by the provision of Section 202(2), that in the exercise of such function.

“...the Commissioners shall have regard to the need to (a) ensure that academic staff have freedom within the law to question and test received opinion, 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.”

² The Commission cited: (1) The First Global Colloquium of University Presidents (Columbia University, January 18-19th, 2005): Report §14.3 (pp 91-92). (2) University of Delaware Faculty Handbook (Section 4, Personnel Policies for Faculty, B Academic Freedom and Standards of Code): Report §14.7 (p 93).

³ J R McManus QC *Education and the Courts* (Bristol: Jordans, 2nd edn, 2004).

⁴ E Barendt *Freedom of Speech* (New York: Oxford University Press, 2nd edn, 2007).

⁵ In the United States, unsurprisingly the literature, at any rate periodical, is more lavish, but not necessarily more enlightening. See eg: Hofstadter and Metzger *The Development of Academic Freedom in the United States* (New York: Columbia University Press, 1955); T Haskell “Justifying the Right of Academic Freedom in the Era of ‘Powers/Knowledge’” in L Menand (ed) *The Future of Academic Freedom* (Chicago: University of Chicago Press, 1976); J Peter Byrne “Academic Freedom A Special Concern of the First Amendment” 99 *Yale Law Journal* 251.

The terms of that paragraph derived from a speech made by the Secretary of State for Education and Science in October 1987. Their inclusion in the Act, by amendment in Committee in the House of Lords, was at first resisted by Lord Hailsham, the then Lord Chancellor, who suggested that they added nothing to the provision that the Commissioners had also to have regard to the need to apply (b) “*the principle of justice and fairness*”. Whether the sub paragraph (a) was in truth redundant because of sub-paragraph (b) has never been put to proof since neither provision appears to have been subjected to judicial scrutiny. The section from ERA, does, however, reflect the conventional understanding of the concept.

Black’s Law Dictionary defines academic freedom as:

“The right (esp. of a university teacher) to speak freely about political or ideological issues without fear of loss of position or other reprisal.”⁶

CAFAS, the Council for Academic Freedom and Academic Standards, in their website suggest Academic Freedom “is increasingly under attack, particularly when staff expose instances of competition and shoddy standards” but how many, if any, academics have actually lost either job or privileges because of their nature of their opinions is not evidenced.⁷

In *R v Hull University ex p Page*⁸ the substantive issue was whether the academic’s standard letter of appointment stipulating for termination of three months notice was trumped by the University statutes which required dismissal only for “good cause” – argued to be crucial to secure the principle of academic freedom.⁹ I persuaded the House of Lords that the provisions of contract and statute could enjoy a peaceful co-existence and that the University could lawfully dispense with the services of Mr Page, a philosopher who seemed, in dress and demeanour, to have sprung straight from the pages of a campus novel about the sixties by Kingsley Amis,¹⁰ Malcolm Bradbury¹¹ or David Lodge.¹² He had not himself expressed controversial views on political or ideological issues, indeed the University’s concern was rather that he had expressed few views of any kind, and that (putting such personal matters to one side) the compulsory maintenance in

⁶ *Black’s Law Dictionary* (St. Paul: West Thomson, 9th edn, 2009).

⁷ Tenure is key to the protection of the principle of academic freedom. In *Keefe v Geanakos*: 418 F 20 359 the US Court of Appeals said pithily “Academic Freedom is not preserved by compulsory retirement even on free pay”.

⁸ [1993] AC 682.

⁹ *Ibid*, at 691 G-H.

¹⁰ *Lucky Jim* (New York: Penguin, 1954).

¹¹ *The History Man* (London: Picador, 1975).

¹² *Changing Places* (Secker & Warburg, 1975).

office of senior academics, appointed in an era of university expansion, when (unlike today) posts were more plentiful, and applicants fewer, constituted a barrier against the recruitment of livelier younger minds.

In *McKinney v University of Guelph*¹³ (“McKinney”) in which the Supreme Court of Canada held that a mandatory retirement age of 65 for the teaching of staff did not violate constitutional right to non-discrimination since universities were private bodies, La Forest LJ made the same point succinctly:

“Tenure provides the necessary academic freedom to allow free and fearless search for knowledge and the propagation of ideas.”¹⁴

adding

“Mandatory retirement not only supports the tenure system which underpins the specific and necessary ambience of university life. It ensures continuity faculty renewal, a necessary process to enable universities to be centres of excellence. Universities need to be at the cutting edge of new discoveries and ideas, and this requires a continuing infusion of new people. In a closed system with limited resources this can only be achieved by departures of other people.”¹⁵

But he also recognised that threats to academic freedom could be the product of forces external rather than internal to the University.

“The legal autonomy of the universities is fully buttressed by their traditional position in society. Any attempt by Government to influence university decisions especially decisions regarding appointment, tenure and dismissal of academic staff, would be strenuously resisted by the universities on the basis that this could lead to breaches of academic freedom.”¹⁶

In *Clark v University of Melbourne*¹⁷ Kaye J spoke of the traditional meaning of academic freedom as being the “unimpeded freedom to teach, to study, and to research without any external control either of the teaching staff or the curriculum of the tertiary institution.” This dictum also demonstrates a

¹³ [1990] 3 SCR 229.

¹⁴ *Ibid*, at 282.

¹⁵ *Ibid*.

¹⁶ *Ibid*, at 273.

¹⁷ [1978] VR 457.

further strand in the fabric of the concept: freedom as to what is taught as well as to who teaches it.

Although as Professor Barendt has rightly said: “Academic freedom... may not be confined to higher education, but clearly has more resonance in that context than it does in schools,”¹⁸ the most celebrated legal case involving academic freedom was one of the many Trials of the Century¹⁹ involved what we would call a secondary school. It turned on the Butler Act of Tennessee that prohibited the teaching in any university or school supported by public funds “of any theory that denies the story of divine creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals.” The penalty was a fine of \$500.

In 1925 John Scope, the local high school’s science teacher (and part time football coach), fell foul of this law by teaching evolution as Darwin conceived it. The prosecution instructed William Jennings Bryan, three times unsuccessful Democratic Presidential candidate, the defence Clarence Darrow, a jury advocate of remarkable gifts. Darrow actually lost the case in the Rhea County Court in Dayton because the Judge ruled inadmissible his further cross-examination of Prosecuting counsel – a bizarre procedural step which would only occur this side of the Atlantic in a novel by Jeffrey Archer.²⁰ Darrow impaled Bryan by competing him to defend the literal truth of the book of Genesis. The moral victory was his; and he won on a technical point in the Tennessee Supreme Court.²¹

But academic freedom can extend beyond the right of a school or university to decide who can teach, and what can be taught.

*Sweezy v New Hampshire*²² (“Sweezy”) was the first case in which the Justices of the Supreme Court discussed academic freedom. Frankfurter J (who was joined by Harlan J) observed that the “four essential freedoms” of a university are to determine “who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”²³

Let me then turn for what may be taught to how it should be taught. In *Merdeka University Berhad*²⁴ the Federal Court of Malaysia upheld by a majority of 4-1 the refusal of the Government of a petition to establish a

¹⁸ Barendt, above n 4, p 500.

¹⁹ D McRae *The Old Devil: Clarence Darrow: The World’s Greatest Trial Lawyer* (London: Simon & Schuster, 2009).

²⁰ See, for example, J Archer *A Prisoner of Birth* (New York: Macmillan, 2008), where a former Judge became an advocate in an English Court.

²¹ 152 Tenn 424 278 S.W. 57 (Tenn 1926).

²² 354 US 234 (1957).

²³ *Ibid*, at 263.

²⁴ (1982) 2 *Malayan Law Journal* 243; see M J Beloff QC “Minority Languages and the Law” (1987) 40 *Current Legal Problems* 139.

university where the language of tuition would be Chinese on the ground that the use of Chinese as the medium of instruction would be “for an official purpose” and so prohibited under Article 152(1)(a) of the Constitution, which enshrined Bahasa as the national language. The majority were all ethnic Malays: the dissentient an ethnic Chinese. Malaysia had recently severed its ties in matters constitutional with the Privy Council so these grave matters were never put to proof in a forum divorced from the racial tension which then – but far less so now – afflicted that beautiful country. Representing, as I did, the petitioners, I regretted that lost opportunity.²⁵

The Chinese language suffered another more recent blow in Hong Kong. The Chinese University of Hong Kong was established in 1963. It was clearly intended to complement the University of Hong Kong which had been in existence since 1912 and in which the principal language of instruction was English. The Preamble of the Ordinance under which it was created²⁶ stated: “whereas it is desirable to establish a University with a Federal Constitution in which the principal language of instruction shall be Chinese”. Times changed: and the University thought it should change with them. It was felt that unless English were to replace Chinese as the principal language of tuition its attraction to overseas students and teachers and its access to globalised scholarship would be diminished. The question was whether the University could lawfully make this switch.

Section 8 of a later Ordinance,²⁷ (“the 1976 Ordinance) currently in force, provided (so far as material) that:

“Subject to this Ordinance and the Statutes and subject also to review by the Council, the Senate shall have control and regulation of:
(a) instruction, teaching and resources”

In Statute 14 of the Statutes of the University made pursuant to Section 13 of the same Ordinance, paragraph 4 provides

“Subject to the Ordinance and Statutes, the Senate shall have the following powers and duties:
.....
(c) to direct and regulate the instruction and teaching in approved courses of study

²⁵ Lord Bingham of Cornhill (as he now is) suggested to me informally that had the matter gone to the Privy Council my clients, the Chinese secondary schools association, would have won.

²⁶ Chinese University of Hong Kong Ordinance Cap (1969) 1109 (“CUHKO”). The case itself is *Li Yin Kee v CUHK HCAL 5/200* (on appeal).

²⁷ Chinese University of Hong Kong Ordinance Chapter (1976) 1109.

In short nothing impeded the Senate in determining the language of instruction in the University, unless the Ordinance otherwise provided.

The potential source of the impediment to the proposed change of direction lay in the Preamble to the 1976 Ordinance which provides:

“WHEREAS

(c)“it is declared that the Chinese University of Hong Kong in which the principal language of instruction shall be Chinese shall continue to:

- (i) assist in the preservation, dissemination, communication and increase in knowledge;
- (ii) Provide regular courses of instruction in the humanities, the sciences and other branches of learning of a standard required and expected of a University of the highest standing;
- (iii) Stimulate the intellectual and cultural development of Hong Kong and thereby to assist in promoting its economic and social welfare.”

The Hong Kong Administrative Court held that this preamble could not be used to fossilise the way in which teaching was delivered. It held “that the relevant part of the Preamble should be interpreted in the historical context” that is to say had outlived its usefulness.

Although I have doubts about the legal soundness of the decision – and had so advised the unsuccessful claimant - it can at least be seen to be a victory for academic freedom. Infringement of University’s autonomy might have taken place if the Hong Kong Government had sought itself to compel the University to adapt another language as the principal language of instruction against the will of the University bodies (Senate and Council) who wished to retain it. But that was not this case. The solution, which would have been legally impeccable, would have been to amend the preamble. But one may readily appreciate why, given Hong Kong’s particular status as an SAR within the PRC, the obvious course was not taken. It would not be consonant with the PRC’s self-esteem for the Hong Kong legislative council to enact a measure that would suggest that English was superior to Mandarin.

The Court in reaching its decision did not itself evaluate the respective merits of tuition in English or tuition in Chinese. It is well-established that the Courts cannot review purely academic decisions, for example as to the grading of an institution²⁸ or even, for that matter of a student. An American academic has said:

²⁸ *Institute for Dental Surgery v HEFCE* [1994] 1 WLR 292 (“IDS”).

“The justification for defence is that courts are not well-equipped to second-guess the exercise of the professional scholarly standards that advance the constitutional value of democratic competence. Courts are properly concerned that judges should not be ersatz deans and educators”.²⁹

Or as Sedley J said:

“There is (no) sufficient basis upon which this Court can hold the eventual rating to be so aberrant as to call for explanation. We lack precisely the expertise which would permit us to judge whether it is extraordinary or not.”³⁰

This judicial self-restraint is itself paradoxically a guarantee of academic freedom for Courts, no less than the Executive, should render under universities things that are properly universities. Academic freedom is institutional as well as personal.

The dictum of Frankfurter J about the four essential freedoms in *Sweezy*,³¹ which I have already cited, adopted a statement of principle made by academics of certain South African universities, who identified those freedoms as indeed pertaining to the university, not to the members of its academic community.³² The same statement of principle referred to the business of university as being –

“...to provide that atmosphere which is most conducive to speculation, experiment and creation.”³³

because:

“A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest. A university is characterized by the spirit of free inquiry, its ideal being the ideal of Socrates – ‘to follow the argument where it leads’. This implies the right to examine, question, modify or reject traditional ideas and

²⁹ Robert Post “Academic Freedom and the Production of Knowledge”: Julian Rosenthal Foundation Lecture North Western University School of Law p 22.

³⁰ Above n 28, at 261.

³¹ Above n 22.

³² Statement of a conference of Senior Scholars from the University of Cape Town and the University of Witwatersrand.

³³ Cited by Frankfurter J at 354 US 234 (1957).

beliefs. Dogma and hypothesis are incompatible, and the concept of an immutable doctrine is repugnant to the spirit of a university.”³⁴

A like attachment of the concept to institution, not individual, is found too in the Basic Law of Hong Kong. The key phrase appears in Chapter VI (which bears the heading: *Education, Science, Culture, Sports, Religion, Labour and Social Services*). Article 137 provides that –

“Educational institutions of all kinds may retain their autonomy and enjoy academic freedom...”

In the *Catholic Diocese of Hong Kong v Secretary of State for Justice*³⁵ the Administrative Court emphasised the importance of such autonomy citing the United Nations Committee on Economic, Social and Cultural Rights, General Comments No 13 of 1999, dealing with the right to education under article 13 of ICESCR ” to which I shall return. It noted:

“As the General Comments No 13 pointed out, autonomy must be consistent with systems of public accountability, especially in respect of funding provided by the State and an appropriate balance has to be struck between institutional autonomy and accountability.”³⁶

and

Aided schools are heavily funded by the Government of the Hong Kong SAR. The privilege of autonomy carried with it the requirement of accountability. That must mean that the government, which provides huge funding to aided schools, has a right to regulate the management of aided schools for the purpose of accountability. Autonomy cannot therefore be an absolute right.”³⁷

and

That has always been the case prior to July 1997 given that aided schools were under the control of the Education Ordinance and the applicable codes of aid. The government and the Legislature have always possessed the right to enforce changes regarding the

³⁴ Cited by Frankfurter J *ibid*, at 263

³⁵ [2007] 4 HKLRD 483.

³⁶ *Ibid*, at para [246].

³⁷ *Ibid*, at para [247].

management of aided schools. Article 137(1) only guarantees the right to ‘retain’ institutional autonomy. It does not confer a new or improved right of autonomy on educational institutions. It does not require a greater degree of independency to be conferred upon them.”³⁸

This analysis reflected economic reality, not political bias. Much the same had been said by Le Forest CJ in *McKinney*:

“[t]he universities’ fate is largely in the hands of the government and ... universities are subjected to important limitations on what they can do, either by regulation or because of their dependence on government funds.”³⁹

A different reality is reflected in the relationship between university and staff. It is the very freedom of the University that has, in the USA, been widely deployed to restrict an individual academic’s rights in respect of freedom of grading and curriculum content.⁴⁰ I recall that, when a visiting professor in International Sports Law at the University of Tulane in New Orleans – my course lasted a bare fortnight! – I found out that I was obliged to allocate so many students to a particular grade, irrespective of my view as to their actual merit, and that this was not unusual on an American campus.

In *Edwards v California University of Pennsylvania*⁴¹ the Court held:

“[The] First Amendment does not allow a university professor to decide what is taught in the classroom, but rather protects the university’s right to select the curriculum.”

Professor Barendt has noted that:

³⁸ Ibid, at para [248]. Article 136 of the Basic Law permits and enables the government of Hong Kong to formulate policies on the development and improvement of education, “including the language of instruction”.

³⁹ Above n 13, at 272.

⁴⁰ See for example *Urofsky v Gilmore* 216 F 30, 401, 414 (4th Circuit 2000), *Wozniak v Comy* 236 F 3888, 891 (7th Circuit 2001), *Brown v Armenti* (274 F 30, 69 (3rd Circuit 2001).

⁴¹ 156, F 30 488, 491 (3rd Circuit 1998). In *Parducci v Rutland* USDC for the Middle District of Alabama Northern Division 316 F Supp 352 the Plaintiff’s teacher obtained reinstatement after she had been dismissed for assigning a short story by Kurt Vonnegut which the Principal had described as “literary garbage”. The Court held that: “However wide the discretion of school officials, such discretion cannot be exercised so as to deprive teachers of their First Amendment rights” (Another exception is *Parate v Isibor* 868 F 23, 821, 827-828 (6th Circuit 1989)).

“...a teacher has no right to decide what subject he teaches in a particular class. He is employed to teach, say mathematics or French, and the syllabus subjects are prescribed.”⁴²

It follows that someone employed to lecture in law cannot consistently with his contractual obligations, teach languages (even were he competent to do so).

This is not to say that freedom in research and teaching (subject always to funding and terms of engagement), is not a derivative of institutional autonomy, Commentators on the South African Constitution have written:

“while the constitutional protection of academic freedom may come down in favour of the institution in conflict with academics concerning certain curricular and grading issues ... a general principle that academic freedom is exclusively that of institutions and not of individual academics cannot hold under our constitution.”⁴³

So while academic freedom may be a chameleon concept it is at least clear that it does not enable either academic institutions or individuals to do so whatever they choose in performance of academic functions or in pursuit of academic goals. It is not a trump card which overrides all others. Both institution and individual are subject to the constraints of the law and of resources.

Charles Clarke MP, when Secretary of State for Education, spoke dismissively of the value of classical and medieval studies. The issue, however, as framed by him was as to whether the State should fund such studies, directly by supporting the institutions where it was taught, or indirectly by supporting the students who receive the tuition. He did not suggest that the teaching of classical studies should be banned.⁴⁴

Yet the call to purge the content of universities courses is not unknown even in the democratic world. Sandra Day O'Connor,⁴⁵ former Supreme Court Justice and Chancellor of the University of North Carolina at Chapel Hall, recalls that, in her cancellarial, not judicial role, she had to defend the University and its faculty from fierce attacks from the political right over the choice of books chosen for the first year reading assignment, including (in the

⁴² Above n 4, at 496 (for US and Canadian cases). See ditto at 498-499.

⁴³ Woolman et al *Constitutional Law of South Africa* (South Africa: JUTA Law, 2nd edn, 2002) pp 42-61.

⁴⁴ See his letter to *The Guardian* of May 10th 2003.

⁴⁵ “Unchallenged Orthodoxies” speech delivered at a conference in Austin, Texas in 2008.

wake of 9/11) one about the Koran (said to be unconstitutional as breaching the separation of church and state) and another about the life of a low paid worker in the USA, (said to be an attempt to indoctrinate socialism).

We naturally and instinctively rebel against the notion that constraints, other than legal or financial, can be imposed on study and research, but even here the picture is not painted in black and white, but in shades of grey.

Take the corollary of the Scopes trial. Should students be able to consider the case in favour of intelligent design, or should it be banned from the academic agenda, as Richard Dawkins, the distinguished scientist and militant atheist, suggests?⁴⁶ Should it be permissible to inquire into whether certain forms of intelligence is unevenly distributed between different ethnic groups, the thesis of the late Hans Eysenck,⁴⁷ or classes, the proposition espoused by Charles Murray⁴⁸ or whether women are intrinsically less gifted than men in the exact sciences, the speculation of the former President of Harvard, Larry Summers, now restored to the inner economic councils of a Democratic President?⁴⁹ Much of the contemporary debate over university admissions has, as its premise, that substantial numbers of potential students lose out in the battle for scarce places to innately less gifted competitors, who enjoy advantages of superior schooling and more advantageous backgrounds; but how large the numbers are is a matter for speculation, not statistics.

My own view is that, as articulated by the great US judge and jurist, Oliver Wendell Holmes echoing John Stuart Mill, and adopted by Lord Steyn.⁵⁰

“The best test of truth is the power of thought to get itself accepted in the competition of the market place.”⁵¹

Accurate information should inform political judgment – although it need not necessarily constrain it. Alan Johnson MP the then Home Secretary, sacked Professor David Nott as Chairman of the Advisory Council on the Misuse of Drugs for saying in a lecture that cannabis was less dangerous than

⁴⁶*The Guardian* September 1st 2005. In September 2008 the Royal Society, Education Director, Professor Michael Reiss, was compelled to resign for advocating the teaching of creationism alongside evolution in school science classes.

⁴⁷ H Eysenck *Race Intelligence and Education* (London: Temple Smith, 1971).

⁴⁸ C Murray and R J Herrnstein *The Bell Curve* (New York: Free Press, 1994).

⁴⁹ “Summers Remarks on Women Draw Fire” *The Boston Globe* January 17th 2005.

⁵⁰ *Simms v Secretary of State for Home Department* [2000] 2 AC 115 at 126.

⁵¹ So too Lord Nicholls observed in *Reynolds v Times Newspaper*, “the high importance of freedom to impart and receive information and ideas has been stated so often and so eloquently that this point calls for no elaboration” [2001] 2 AC 127 at 200.

alcohol. No doubt the Minister could justify his own claim that even were that so, it did not inexorably compel the legalisation of cannabis.⁵²

More insidiously the tilt towards sponsorship of research by corporate bodies risks impairing academic freedom, not positively by prohibiting forms of research but negatively by channelling them into areas of profit for sponsors pharmaceutical oil companies. It has been calculated that 70% of published articles in the biosciences had in part been written by corporate PPs.⁵³

But the law itself sets limit to free speech in a variety of ways and for a variety of reasons: which apply as much as to what is said inside as outside a university. For example, holocaust denial is a criminal offence not only in Israel but in many European countries: and no one could shelter behind the shield of academic freedom if he used the lecture theatre to preach racial incitement, or to defame his political colleagues, although more controversial were the libel proceedings brought by the British Chiropractors Association against Simon Singh for casting doubt on efficacy of their treatment described by him as “bogus”. The case raised issues as to the dimensions of the defence of fair comment,⁵⁴ fortunately resolved in favour of Mr Singh in judgment of the Court of Appeal, adopting a dictum from an American case “Scientific controversies must be settled by the methods of science rather than by the methods of litigation.”

Now in this *tour d’horizon* I stress that the law on academic freedom touches on the issue allusively rather than directly. Academic freedom is not found as a discrete right in the US Constitution’s First Amendment,⁵⁵ the New

⁵² Lord Rees of Ludlow “Scientific Advice Must be Respected Even When Rejected” *The Times* November 5th 2009.

⁵³ Jonathan Hari “Peter Mandelson’s Assault on Science” *The Independent* November 17th 2009.

⁵⁴ [2010] EWCA Civ 350. See also “*BCA v Singh*: The Story So Far: Sense About Science” *Sunday Times* June 3rd 2009. Peter Wilmsburst, a consultant cardiologist at Royal Shrewsbury Hospital is being sued by NMT for casting doubt on the efficacy of their device Startfax as a cure for migraine; *The Times*, November 26th 2009, p 22. See too on the case brought by Mr Thomason a Danish radiologist warning about risks of one of its drugs. “Drug giant uses libel law to gag doctors” *Sunday Times* December 20th 2009. Alternative therapists and makers of medical devices are using the UK courts to silence critics and libel laws stifle health doubts. *Sunday Times*: November 1st 2009 which suggested that “Scientists and Specialists who question medical treatments and alternative therapies are being gagged by firms using Britain’s draconian libel laws”.

⁵⁵ The Constitution of the United States makes no mention of “academic freedom”. However, free speech is guaranteed by the First Amendment to the United States Constitution (“First Amendment”), which reads: “Freedom of Religion, Press, Expression: Congress shall make no law respecting an establishment of religion, or

Zealand Bill of Rights the European Convention on Human Rights, the Canadian Charter of Rights and Freedoms, the Malaysian Constitution, the Indian Constitution, the Israeli Basic Law: Human Rights and Dignity, or the law of Australia which is entirely devoid of a bill or charter of rights.

Indeed in the USA academic freedom is given no special status. In *Keyishian v Board of Regents*⁵⁶ Brennan J (speaking on behalf of the Supreme Court) held that teachers and professors had the same free speech and political privacy rights afforded to other citizens, stating that academic freedom "... is a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."⁵⁷

The Court of Appeal (10th circuit) re-affirmed *Keyishian* by refusing to construe the First Amendment as giving professors a "special constitutional right of academic freedom not enjoyed by other governmental employees."⁵⁸

Academic freedom does not exist on its own in a vacuum, but is therefore a sub-set of the individual academic's right to free speech under the First Amendment. Accordingly, those who claim violations of their right to "academic freedom" under the First Amendment have to pass all of the tests that would entitle them to relief in First Amendment actions.⁵⁹

The general procedure in relation to this is as follows. The Plaintiff first has to establish that the speech in question is within the scope of expression protected by First Amendment - this is because the First Amendment does not protect certain categories of speech, including defamation, incitement, the lewd and obscene, and pornography produced with real children.⁶⁰ The Plaintiff then has to establish that (s)he has standing to sue under the First Amendment. The Plaintiff does not need to prove that governmental action (which may not be statutory) has had a direct effect on the exercise of First Amendment rights. However it must have caused or must threaten to cause a direct injury to the Plaintiffs' interests.

The injury alleged is usually a "chilling effect" on the individual's right to free speech under the First Amendment. The mere knowledge and fear that the government might take in the future some other action detrimental to that

prohibiting the free exercise thereof; or **abridging the freedom of speech**, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

⁵⁶ 385 US 589 (Supreme Court, 1967).

⁵⁷ Ibid, at 603.

⁵⁸ *Robert W Schrier v University of Colorado* (2005) 427 F 3d 1253 (10th Circuit, (2005).

⁵⁹ *Oladele Oladotun Omosegbon v Richard H. Wells* (2003) 335 F 3d 668 (7th Circuit, 2003).

⁶⁰ *Ashcroft v Free Speech Coalition* 535 US 234 (Supreme Court, 2002) at 245-246 per Kennedy J delivering the opinion of the Court. This was touched on also in Report 14.1.

individual will not suffice. Furthermore, allegations of a “subjective chill” “are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm”.⁶¹

Evidence of a “cognisable injury” will, however, be accepted to establish standing, such as the risk that an exercise of the Plaintiff’s freedom under the First Amendment would be detrimental to his or her reputation.⁶² Reprimands for statements by an employee which may be “construed to convey the message that like comments in the future would put the [the employee] in danger of discharge” was held to be of “constitutional significance.”⁶³

The Plaintiff must then show that the injury must be “fairly traceable” to the Defendant’s allegedly unlawful conduct and that it is “likely to be addressed” by the requested relief.⁶⁴ If however the “chill” has passed, for example where it is based on a regime no longer in existence, the Court may be reluctant to grant nominal damages on which to hang a declaration, as the latter remedy would only have effect as to future dealings between the parties.⁶⁵

Once standing has been established, it is a separate question as to whether the action has in fact violated the First Amendment.⁶⁶ A threat would clearly be sufficient to suggest such violation.

In *Trotman v Board of Trustees of Lincoln University of the Commonwealth System of High Education*.⁶⁷ The Plaintiffs (former and current faculty members of a state university) sought, inter alia, judicial censure of a course of conduct that they considered to have violated their constitutional right to engage in spirited criticism of administrative policies with which they disagreed.⁶⁸ The Court of Appeal of the 3rd Circuit found that certain letters and telegrams threatening disciplinary action against the plaintiffs, which the District Court at first instance had prevented them from adducing:

“...would have been relevant to their claim of specific present objective harm, and hence presents a far different claim than... ‘generalised allegations of chill’... Since evidence of chill would be relevant to the plaintiffs’ claim that defendants’ activities did in fact

⁶¹ *Laird v Tatum* 408 US 1 (Supreme Court, 1972) particularly at 11-15.

⁶² *Meese v Keene* 481 US 465 (Supreme Court, 1987) at 472-474.

⁶³ *Yoggerst v Stewart* 623 F 2d 35 (7th Circuit, 1980).

⁶⁴ Above n 62, at 476.

⁶⁵ *Morrison v Board of Education of Boyd County* 521 F 3d 602 (6th Circuit, 2008) at 608-610.

⁶⁶ Above n 62, at 479.

⁶⁷ 635 F 2nd 216 (3rd Circuit, 1980).

⁶⁸ *Ibid*, at 225.

result in an unconstitutional restraint on protected speech and conduct, the District Court erred in excluding the plaintiffs’ proffered evidence”.

The Court further held that the District Court had also:

“...overlooked the fact that those letters contained language sometimes explicitly and other times implicitly threatening discipline up to dismissal if plaintiffs continued to engage in speech or other protected activity such as picketing. They therefore do not stand on the same level as letters written by adherents of opposing viewpoints on an internal dispute. They were written by a state official in a position of authority with the power to impose discipline. They are therefore state action which must be exercised in compliance with the mandate of the First Amendment and cannot be dismissed as merely part of an academic debate.”⁶⁹

It is also “axiomatic” that any system of prior restraint of expression comes to court bearing a “heavy presumption against its constitutional validity” since it seeks to exclude speech from the “marketplace of ideas.”⁷⁰

But even in the United States, it is well-recognized and established that the protection of the first Amendment does not extend to everything claimed to be “freedom of expression” or “academic freedom” under the First Amendment:

So academic freedom is not a “licence for uncontrolled expression at variance with established curricular contents and internally destructive of the functioning of the institution.”⁷¹

and

Generally conduct that involves “substantial disorder or invasion of the rights of others is not immunised by the guarantee under the First Amendment.”⁷²

Academic freedom is not absolute and may also be balanced against competing interests, including those of the government. It has been

⁶⁹ Ibid, at 228.

⁷⁰ *Alderman v The Philadelphia Housing Authority* 496 F 2d 164 (3rd Circuit 1974) at 168 -170 citing numerous authorities.

⁷¹ *Clark v Holmes* (1972) 474 F 2d 928 (7th Circuit 1972) at 931.

⁷² *Tinker v Des Moines* 393 US 503 (Supreme Court 1969) at 513.

suggested, with reference to *Keyishian and Sweezy*, that in such circumstances, the interests have to be strong, and the extent of intrusion carefully limited.⁷³

One area where a balancing act is required is in relation to the freedom of a state employee to speak. In such a case, there is little to support the imposition of a restraint on all the speech of public employees, even concerning a particular topic⁷⁴ and Government workers are constitutionally protected from dismissal for publicly or privately criticising their employer's policies on matters of public concern. In this context academic freedom balances the

“interests of the employee as a citizen in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employers.”

Such cases therefore call for a fact-sensitive and sophisticated weighing of competing values.⁷⁵

Certain legitimate interests of the State may limit a teacher's right to say what he pleases, for example: the need to maintain discipline or harmony among co-workers; the need for confidentiality; the need to curtail conduct which impedes the teacher's proper and competent performance of his daily duties; and the need to encourage a close and personal relationship between the employee and his superiors, where that relationship calls for loyalty and confidence.⁷⁶

Traditionally, Academic Freedom and freedom of expression can only be relied on where the communication in relation to which the claim is brought is made qua citizen and on a matter of public concern.⁷⁷

However, the Supreme Court recently held in a 5-4 judgment⁷⁸ that Government employees who make statements of public concern outside the course of performing official duties retain some possibility of First Amendment protection; whereas the same employees who make statements pursuant to their official duties, are not speaking as citizens for First

⁷³ *Dow Chemical Company v Allen*, 672 F 2d 1262 (7th Circuit 1982) at 1274-1276.

⁷⁴ Above n 70, at 174.

⁷⁵ *Pickering v Board of Education of Township High School District 205, Will City* 391 US 563 (Supreme Court, 1968) at 566-574; *Board of County Commissioners, Wabaunsee County v Keen A Umbehr* 518 US 668 (Supreme Court, 1996) at 672, 676.

⁷⁶ Above n 71, at 931 citing *Pickering*.

⁷⁷ Above n 75, at 568.

⁷⁸ *Garcetti v Ceballos* 547 US 410 (Supreme Court, 2006).

Amendment purposes and can be disciplined (if necessary) for articulation of such views.

Furthermore, the Court took pains to clarify that the analysis would not necessarily apply in the same manner to a case which, unlike the one before it did not involve speech related to scholarship or teaching.”⁷⁹

So there is a difference between an academic qua academic and an academic qua citizen.

Furthermore, such statements or criticism, if false, will not be protected if there is proof that they were knowingly or recklessly made.⁸⁰ The First Amendment does not clothe a person with immunity vis à vis statements are shown to be false and inaccurate and whose truth could be easily ascertained.⁸¹

The exceptions to this rule of silence on academic freedom where Constitutions are concerned are the German Constitution in which freedom of research and teaching is guaranteed by a separate clause of the freedom of expression provision⁸² and the South African Constitution which provides that:

- (1) *Everyone has the right to freedom of expression, which includes -*
- (a) *Freedom of the press and other media;*
 - (b) *Freedom to receive or impart information or ideas;*
 - (c) *Freedom of artistic creativity; and*
 - (d) *Academic freedom and freedom of scientific research.'*

New Zealand has, like the United Kingdom, embedded academic freedom in a non-constitutional statute ie the Education Act 1989.⁸³

⁷⁹ Ibid, at 424-425.

⁸⁰ Above n 71, at 1738 (although it seems the comment was obiter).

⁸¹ *Megill v Board of Regents of the State of Florida*, 541 F 2d 1073 (5th Circuit 1976) at 1085-1086.

⁸² Article 5(3).

⁸³ S 160 Education Act 1989 is the objects clause of the relevant part and provides as follows:

“Object: The object of the provisions of this Act relating to institutions [which includes universities] is to give them as much independence and freedom to make academic, operational, and management decisions as is consistent with the nature of the services they provide, the efficient use of national resources, the national interest, and the demands of accountability”
(emphasis added)

Ss 161 Education Act 1989 provides as follows:

“Academic Freedom –

Judicial review of a suspension of statutory processes relating to Unitec (a polytechnic's) application to be reconstituted as a university under s 162 of the Education Act 1989⁸⁴ went on appeal. The Court of Appeal⁸⁵ held that:

“[63] We see ss 160 and 161 as fulfilling two primary roles. First, they are a parliamentary admonition to ministers and others on the importance of academic freedom and the need for public tertiary institutions to have autonomy (see, in that regards, s 161(4)). Secondly, they tell institutions how they are to act (see s 161(3)). In that regard, the sections stand with ss 180 and 181 (which address the functions and duties of councils of institutions). We also accept that ss 160 and 161 may be important when the disestablishment of an institution is contemplated.”

There was, however, no discussion of the academic freedom whose importance they recognised.

(1) It is declared to be the intention of Parliament in enacting the provisions of this Act relating to instructions that academic freedom and the autonomy of institutions are to be preserved and enhanced.

(2) For the purposes of this section, academic freedom, in relation to an institution, means –

(a) The freedom of academic staff and students, within the law, to questions and test received wisdom, to put forward new ideas and to state controversial or unpopular opinions:

(b) The freedom of academic staff and students to engage in research:

(c) The freedom of the institution and its staff to regulate the subject-matter of courses taught at the institution:

(d) The freedom of the institution and its staff to teach and assess students in the manner they consider best promotes learning:

(e) The freedom of the institution through its chief executive to appoint its own staff.

(3) In exercising their academic freedom and autonomy, institutions shall act in a manner that is consistent with –

(a) The need for the maintenance by institutions of the highest ethical standards and the need to permit public scrutiny to ensure the maintenance of those standards; and

(b) The need for accountability by institutions and the proper use by institutions of resources allocated to them.

(4) In the performance of their functions the Councils and chief executives of institutions, Ministers, and authorities and agencies of the Crown shall act in all respects so as to give effect to the intention of Parliament as expressed in this section.⁸³ (emphasis added)

⁸⁴ *United Institute of Technology v Attorney-General* [2006] 1 NZLR 65.

⁸⁵ *Attorney-General v United Institute of Technology* [2007] 1 NZLR 750.

Finally in an unreported decision Denis Asher of the Employment Relations Authority, *Lally v The Vice Chancellor Victoria University of Wellington WA*,⁸⁶ seems to have adopted the Respondent’s contention that “...consistent with s 161 of the Education Act 1989, in general academic freedom is primarily exercised within the sphere of expertise of academic staff ... and involves a corresponding responsibility and is not to be interpreted as equivalent to an uninhibited licence”⁸⁷ – in that instance the broadcasting to outsiders of concerns about the University’s disciplinary process.

While under Article 34 of the Basic Law in Hong Kong all persons have the “freedom to engage in academic research, literary and artistic creation and other cultural activities”, the phrase “academic freedom” does not appear in Chapter III of the Basic Law which lists the fundamental rights of Hong Kong residents.

Those majority jurisdictions which do not recognise academic freedom as being an autonomous, or fully self-contained freedom, see it rather as a constituent part of the broader right to freedom of expression.⁸⁸ This has obvious implications from the perspective of the law.

First in every jurisdiction – even, I repeat the USA – freedom of expression is qualified. The European Convention on Human Rights (“ECHR”) Article 10 (now part of the fabric of our domestic law by reason of the Human Rights Act 1988 (“HRA”): allows for restrictions “prescribed by law and necessary in a democratic society”. In support of interests, including “for protection of the reputation or rights of others and for preventing disclosure of information received in confidence.” Second, academics have no special right to legal protection.

⁸⁶ WA 140/06 5030767 (October 18th 2006).

⁸⁷ At [33], citing also *Rigg v University of Waikato* [1984] NZLR 149.

⁸⁸ The Commission made reference to three US decisions concerning the ambit of freedom of expression.

- (1) *Baumgartner v United States* (1944) 322 US 665, concerning a citizen’s right to criticise civil servants and public policy: Report 14.8 (p 93).
- (2) *Lewis v Harrison School District No.1* (1986) 805 F (2d) 310 (8th Circuit), concerning the protection of free speech by an academic even where it is bluntly worded and directed at specific government officials: Report 14.9 (p 93).
- (3) *New York Times Co v Sullivan* (1964) 376 US 254, confirming the right to free speech under the US Constitution does not turn on the truth, popularity, or social utility of the ideas and beliefs offered: Report §14.12 (p 94).

The US jurisprudence demonstrates, as I have already shown, that academic freedom is not *per se* a fundamental right for individuals in its US constitutional context.⁸⁹

There are other examples from elsewhere which make the same point. Mr Riggs was a Senior Lecturer in the University at Waikato who had co-authored an article in the student newspaper alleging that inadequate supervision of the University's biology isotope laboratory had probably resulted in students dying of cancer: that this had been covered up: and contained a challenging line "students are evidently dispensable". There being, as it turned out, no basis for his allegations, his contract was terminated.

The Visitor said in *Riggs v University of Waikato*:

"...we are unable to accept the notion, as propounded to us by Mr Rigg, that there is some kind of freedom of expression, relevant to the present case, which cannot be correctly defined as academic freedom of expression in the strict sense yet is enjoyed by academics when speaking in their capacity 'as members of the university community' or 'citizens of the university' and is greater than any freedom of expression enjoyed by ordinary citizens in ordinary life."⁹⁰

"The only justification which we can see for a special right to freedom of expression in a university environment is the need for academics, whether teachers or students, to feel free to pursue the search for knowledge and learning and truth without fear of institutional disciplinary action being used to divert them from these purposes in order to force conformity with views held by the university authority."

And the Court in the Hong Kong case which I cited at the outset expressed its conclusions in the same way.

"Whatever the perception may be, academics today are not cloistered in ivory towers divorced from the realities of the world. To the contrary, academics work in association with both the private sector and the public in all areas of advancement. This applies not only in respect of scientific and technological innovation but in areas of law reform, social welfare and the like. Academia, with its intellectual

⁸⁹ *Keyishian v Board of Regents* 385 US 589 (Supreme Court, 1967); *Schrier v University of Colorado* 427 F.3d 1253 (10th Circuit, 2005) at 1265-1266 and see above n 71.

⁹⁰ Above n 87, at 207.

rigour, also plays an important role in analysing and, if necessary, criticising the nature and effectiveness of public policies and measures.

To misunderstand the Commission (which came to its findings within the context of very particular facts) and to suggest that senior public administrators and academics should never be able to privately engage in robust debate over matters of opinion and policy, the one criticising the other, is, in our view, not only artificial and stultifying, it has no basis in law. We do not see that it would be improper for a senior official to privately engage an academic in order to state Government's views, even to the extent of arguing that the academic should in the result change his or her views. That is all part of the ebb and flow of free debate.

Accordingly, the fact that a senior public administrator privately confronts an academic to criticise that academic's published opinions on any particular matter does not itself constitute a violation of Art 137 or the academic's own right to freedom of expression. It only does so when the confrontation contains, directly or by implication, a threat of sanction of the kind we have described earlier in this judgment. That, as we see it, is the position in law."⁹¹

Nor is Academic Freedom given any special status in international law. It is obliquely vouched for, not in International Covenant on Civil and Political Rights ("ICCPR") but in the International Covenant on Economic, Social and Cultural Rights (ICESCR") both of which were adopted by the United Nations in 1966) and came into force in 1976.⁹²

Article 13 which recognises the right of everyone to education, is in itself silent on academic freedom but has been the subject of commentary by the United Nations Committee on Economic, Social and Cultural Rights in UN Committee on ESCR, General Comment No.13 (1999) [as noted in the Hong Kong Catholic Schools case], which suggests that academic freedom is inherent in the very concept of the right to education, and itself cross-refers to the UNESCO Recommendation Concerning the Status of Higher-Education Teaching Personnel (1997).⁹³

⁹¹ Above n 1, at [75-76].

⁹² In 1976, the Government of the United Kingdom ratified the two covenants in respect of the United Kingdom and its dependent territories.

⁹³ Adopted by the General Conference of UNESCO at its 26th Plenary Meeting on November 11th 1997.

So in the context of international law academic freedom is relegated to a footnote in a comment!⁹⁴ These instruments are in large part hortatory and aspirational but there is a telling phrase in the Comment that academics must not be exposed to fear of repression by the state “or any other actor”.⁹⁵

In 2008 I was (with a colleague at Blackstone Chambers) asked to advise the legal implications of a motion to be debated (as indeed it was) at the annual National Congress of the University and College Union on May 28 – 30th 2008.

The Motion having expressed, by way of preface, a strong critique of Israel’s policies on the West Bank and Gala invited Congress to resolve that, amongst other matters:

- Colleagues be asked to consider the moral and political implications of educational links with Israeli institutions, and to discuss the occupation with individuals and institutions concerned, including Israeli colleagues with whom they are collaborating;
- The Ariel College, an explicitly colonising institution in the West Bank, be investigated under the formal Greylisting Procedure.⁹⁶

We advised that the resolutions, if acted on, would offend against various provisions of outlawing racial discrimination legislation but was also outside the Union’s constitutional powers.

We noted that under Rule 2.1 of the Rules the primary aims and objects of the Union are to “...promote the professional interests of members individually and collectively...”; and under Rule 2.2 a further aim and object is to “promote Adult, Further and Higher Education and research”. We noted the Union had also committed itself on its website to the principle of academic freedom and the need to resist attempts to erode academic freedom. Against this background, we did not see how it could be consistent with the Union’s Rules to pass a resolution mandating certain actions by its members including potential severance of links with other academic institutions. Such quasi-boycott, in our view, did nothing to promote the interests of members at professional level or to promote academic freedom. Indeed it pointed in the opposite direction. As a result of our opinion, the Union retracted and

⁹⁴ See too The Lima Declaration on Academic Freedom and Autonomy of Institutions of Higher Education, which recalls, in its Preamble, the extensive set of international standards in, amongst other things, the ICESCR and makes various proclamations on academic freedom and autonomy of institutions of higher education. Proclaimed in Lima by the 68th General Assembly of World University Service on September 10th 1988.

⁹⁵ Para 38.

⁹⁶ Grey listing being a precursor to black listing.

retreated.

I have spoken so far of rights of university teachers. But rights of free expression are for students as well as staff. In the USA it has been held that Universities infringe free speech rights if they attempt to control content of student journals⁹⁷ or to discriminate in support student societies on grounds of society's beliefs.⁹⁸ In South Africa 1987 regulations which required universities to take steps directed towards the prevention and punishment of student political activity were set aside on grounds of vagueness.⁹⁹ So academic freedom is expressly protected, albeit again as a subset of freedom of belief and opinion.

This applies not only to what students can say, but whom they must hear. The Education Act (No.2) (1986) s.43(1) imposes an obligation on universities and colleges of further and higher education¹⁰⁰ to take steps that "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"¹⁰¹.

This affects gown, but not town. It has been held that the risk of disorder outside university premise is not a ground for refusing permission to a visiting speaker,¹⁰² where the controversial invitee to the Liverpool University Conservative Association was a South African diplomat of the era of apartheid.

Let me return last to the Malaysian case *Merdeka University Berhad*.¹⁰³ The majority considered – counter-intuitively - that a private university would nonetheless be a public authority for the purpose of that provision, but also observed that universities were:

“...an instrument for bringing about one nation out of the disparate ethnic elements in our population.”¹⁰⁴

The minority noted too in his coda

⁹⁷ *Hosty v Carter* 325 US F 30 945 (7th Circuit 2003).

⁹⁸ *Rosenberger v University of Virginia* (1995) 515 US 819.

⁹⁹ *University of Cape Town v Ministers of Education and Culture*: (House of Assembly and House of Representatives [1988] 3 SA 203.

¹⁰⁰ But not in other fora eg town hall (outside the context of elections) s 43 (2). Barendt op cit fn 4 supra p.501

¹⁰¹ See C.R. Evans “Campus Speech Codes” *Education Law Journal* 2010 Vol 11 Issue 2 p.95

¹⁰² *R v Liverpool University ex p* [1991] 1 QB 124.

¹⁰³ Above n 23.

¹⁰⁴ *Ibid*, at 252.

“...it is not out of place to state that the activities of modern universities embrace a wider scope than mere teaching. When sufficiently financed, research and experimental work of great value to the public and nation is constantly being carried out in them.”¹⁰⁵

The majority observation was more eloquently stated than the minority one: but both said something of extreme importance about the place of universities in a nation's life.

In particular in England which is now, like Malaysia a multicultural country – albeit with radically different proportions and indeed characteristics of the constituent ethnic groups – universities, the intellectual finishing schools of the best and brightest of the population, provide a unique opportunity for sharing the fruits of different background and collaborating in the genesis of shared values. This may not be itself an aspect of academic freedom, but that opportunity would be much diminished if academic freedom did not exist. And, even if the spirit of inquiry ought not to be cribbed and confined, by a need to produce work of strictly practical benefit, there is little doubt that, as the minority Merdeka judge observed, whether by design or accident, such work is generated: and, even where it is not, the study of philosophy, literature and history - both process and product – are essential to the maintenance of a civilised society.

Academic freedom, whether the perquisite of institution or of individual, but as I would prefer to say, of both, underpins those benefits. Next time there is an attempt to redefine in legal forms our fundamental rights and freedoms – and the Conservative party promised, if elected to introduce a British Bill of Rights¹⁰⁶ – it should not be overlooked.

¹⁰⁵ Ibid, at 255.

¹⁰⁶ Something that may not be highest on the agenda of the Coalition government.