Meeting Summary

Academic Freedom and the Law

Summary of the International Law Discussion Group meeting held at Chatham House on Wednesday, 8 December 2010

Speakers:

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INTRODUCTION
The event was organized to discuss the academic freedom and the law from comparative and international law perspective.

The participants included representatives of government, embassies, NGOs, media, academics and practising lawyers.

ERIC BARENDT
Introduction
The notion of academic freedom is puzzling since it appears to suggest that academic staff should enjoy special rights and privileges which are not granted to other public or private employees, such as freedom to determine how they work, in particular what and how they teach or topics and methodology of conducting research. Academic freedom is nevertheless explicitly recognized in many national constitutions, in particular in European countries such as Germany, Spain or Portugal, and it is now also protected by Art. 13 of the Charter of Fundamental Rights of the EU. Moreover, politicians and courts frequently refer to it as a fundamental principle of universities. It was prominently stated by Justice Brennan in a leading US Supreme Court case of Keyishain v. Board of Regents, that academic freedom is of a transcendent value to all persons, and as such, is a special concern of the First Amendment.

What is academic freedom and how can it be justified?
It is important to emphasize at the beginning that academic freedom is not the same as freedom of speech, which is a frequent misconception held by some university professors. Accordingly, it does not amount to an unlimited freedom of the academics to speak openly on any subject.

With regard to the differences, firstly, even within the classroom, academics are constrained by the professional criteria of relevance and pertinence to the subject. If a person is employed to teach property law, he would be rightly disciplined if he
chose to talk about public international law instead. Secondly, a lot of academic activity does not involve speech, such as work in laboratories, scientific research or even conducting polls and interviews. Admittedly, speech is an aspect of academic activity, but not the core of it. Therefore, academic freedom and freedom of speech are not the same, although they are intertwined.

In general, it is possible to identify three types of claims that can be made under academic freedom. Firstly, academic freedom can be claimed by individual scholars, as a freedom to determine how they do their work free from direction, especially how they teach and conduct their research. One of the major questions in this regard is whether and to what extent such freedom covers the right to speak freely on matters beyond the primary competence of the individual professor, in the US referred to as extramural speech. Secondly, institutional claims to academic freedom can be made by universities and higher education institutions. In the United Kingdom, this institutional aspect of academic freedom is in fact much older than the individual rights of professors. Thirdly, claims can be made by individual academics to ensure their participation in university governance, which is an important aspect of academic freedom law e.g. in Germany.

Regarding the rationale behind academic freedom, the traditional arguments made in favour of its protection offer a sound justification. They revolve around the distinctive role played by universities in conducting research and being at the centre of discovery and the search for new truths and scientific methods. Moreover, alongside the utilitarian role of universities to advance social progress, it is equally important that they encourage in young people a sense of intellectual and cultural independence. This aspect is associated with the work of John Henry Newman and has been in recent years vigorously acknowledged in particular by US legal philosopher Ronald Dworkin.
Practice of the United States

In the US, academic freedom is protected by the American Association of University Professors' Statement of Principles on Academic Freedom and Tenure, which is accepted by most universities in the US and is incorporated into individual professor's contracts of employment. The principles cover freedom to teach, to research, and most controversially, the freedom of extramural speech as long as it is exercised responsibly. In legal terms however, these principles are only considered as a form of soft law, not being enforceable in courts.

The constitutional protection of academic freedom was spelled out in a number of cases, decided against the background of the McCarthy era, when universities or individual professors were largely constrained if holding communist or left wing sympathies. Of particular relevance is the well-known statement in the separate concurring judgment of Justice Frankfurter in the US Supreme Court case of Sweezy v New Hampshire. In that case, the Attorney General attempted to have a left-wing Harvard professor answer questions about the content of a lecture he gave at a state university in New Hampshire. Formulating academic freedom as an institutional right, Frankfurter stated that universities could determine for themselves what they teach, how they do it or who may be admitted to study. Following this decision, US courts have developed the constitutional protection of institutional claims to academic freedom, within the guarantees of the First Amendment. However, as a constitutional right, it can only be asserted against a state or public authority (e.g. state university), but not against a decision emanating from a private body (e.g. private university).

Another well-known and important decision was the US Supreme Court judgment in Grutter v Bollinger. In this case, Michigan Law School's policy of affirmative action in the admission process, whereby preference was given to students from underrepresented minorities, was challenged on the ground that it violates the Equal Protection clause. The majority decision, delivered by Justice O'Connor, held that universities enjoy academic autonomy to determine their own admission policies.
Due to a variety of claims which can be made under academic freedom, courts were asked in a number of cases to resolve conflicts between institutional claims of universities and individual claims of professors. Generally, courts tend to rule in favour of institutions rather than individuals, with some notable exceptions. In *Urofsky v Gilmore*, Fourth Circuit Court of Appeals held that there is no constitutionally protected right of a professor to use university computers to access sexually explicit material, even for the purposes of research work. In *Piarowski v Illinois Community College*, it was held that although academic freedom may be asserted by both university and the individual professor, in case of conflict, university officials were permitted to require the head of the art department to remove erotic statutes placed near the campus entrance. When taking this measure, the university was entitled to protect its own interests in e.g. encouraging people to apply to the university or accommodating visitors who may be discouraged by artworks of such nature.

**Practice of the United Kingdom**

In the United Kingdom, academic freedom has often been taken for granted especially at older universities. However, it was not incorporated into a legal document until the Education Reform Act of 1988 which removed academic tenure and made it possible for universities to close departments and declare employees redundant. In exchange, its amendment incorporated a clause protecting academic freedom, whereby commissioners overseeing the drafting of university statutes should ensure that academic staff have the freedom to question and test received wisdom and to put forward new and controversial ideas without placing themselves in jeopardy of losing their jobs. In practice, guarantees of academic freedom are incorporated in academic staff's contracts of employment. If a member of staff were to be disciplined for controversial research or extramural speech, he could challenge this decision on the grounds of academic freedom before either the internal university tribunal or employment tribunal. However, no cases have so far reached the courts as universities generally try to avoid embarrassing court battles.
On the other hand, it is possible to identify a few causes célèbres associated with academic freedom. In the first case, two radical philosophy lecturers at the University of Wales were suspended because they publicly criticized standards in their department. The subsequent report prepared by Sir Michael Davies suggested that the university was wrong in its decision to suspend the professors, whose academic freedom included the right to publicly raise concerns about the department. According to the report, the university environment should be different from conventional businesses, which can fire employees who publicly disclose their concerns about internal matters.

In the second case, which represents only the tip of a very large iceberg, Aubrey Blumsohn, a researcher in the medical department in Sheffield, was suspended after publicly raising concerns over the conduct of a drug study undertaken in contract with Procter and Gamble. He argued that he had been denied full access to data, which would enable him to review the accuracy of claims made by Procter and Gamble concerning the efficacy of the drug. It is a common practice for drug companies, when entering into research sponsorship contracts with universities, to impose restrictions on the freedom of publication or data access. However, even if such clauses impose limitations on academic freedom, it is difficult to challenge them in courts due to their contractual nature.

**Practice of Germany**

In Germany, a broad constitutional protection of scientific and teaching freedom is guaranteed in Art. 5(3) of the Basic Law which exhibits a number of particularly interesting aspects. Firstly, it is a right that can be claimed by anyone and is not therefore confined to academic staff. In practice, the majority of cases would indeed include academics, but in principle, they are not granted an exclusive privilege over other potential claimants. Secondly, academic freedom, like other basic rights, is not regarded as a solely negative liberty against state interference, but it also requires the state to take positive measures to safeguard its enjoyment, such as, according to Hochschulurteil decision of the Constitutional Court, to ensure a basic financial
provision for teaching and research. Moreover, it is a general constitutional value which must be taken into account by courts when interpreting all other laws.

The German law is particularly interesting for its implications on how universities are governed. Most cases heard before Constitutional Court involved conflicts between professors and university management over the role of professors in university governance. The Court has maintained the view that on academic matters, such as allocation of research resources, academic staff have the ultimate decisive voice. Similarly, the university president's conduct is subject to overall supervision by academics and they retain the final power to recall him.

DAVID BENTLEY
While there is rich material available on academic freedom for comparative lawyers, international law as it currently stands has little to say about it. But even such absence of hard international law rules on academic freedom is indicative of which human rights international law should be protecting.

Art. 13 of the Charter of Fundamental Rights of the EU simply states that academic freedom shall be respected. Therefore, it does not possess the level of specificity suitable for court decisions. Furthermore, whilst Art. 10 of the European Convention on Human Rights guarantees freedom of expression, it does not include an express reference to academic freedom. However, the European Court of Human Rights recently delivered judgments in two cases in which it relied on the academic context of the impugned statements in finding that the applicant's right to freedom of expression had been breached.

In Sorguc v Turkey, the applicant made critical remarks, in a paper distributed at a scientific conference, about the system of appointment and promotion of academics at his university. The Court cited the Council of Europe Declaration on Academic Freedom as indicating its importance and decided the case in favour of the applicant.
The second case in which academic freedom was expressly mentioned is that of *Sapan v Turkey*. In this case, a book based on a doctoral thesis analysed the emergence of a “star” phenomenon in Turkey and, in the second part, focused on a pop-singer Tarkan. The Court emphasized the importance of academic freedom and held that the book based on the use of scientific methods could not be compared to tabloid press or gossip columns, whose role was generally to satisfy the curiosity of a certain type of reader.

These two cases show a feasible approach to recognizing academic freedom in legal disputes. However, the complexity of claims arising from academic freedom indicates why it should not be treated as a justiciable human right. As the Council of Europe noted, it is a concept for member states to protect under their domestic legislation. Academic freedom is a further illustration of the need for a cautious approach by international lawyers when calling something a human right. In this respect, the writings of two legal philosophers, James Griffin (On Human Rights, Oxford 2008, pp 32-44 and 191-211) and Joseph Raz (1(1) Transnational Legal Theory (2010), see too a reply by Pavlos Eleftheriadis at (2010) 1(3)) are particularly relevant.

**DISCUSSION**

The issue of extramural expression - the right to make remarks in public about areas outside the professor’s competence - was raised again in the discussion. Professor Barendt noted that such right is not part of the academic freedom, but is rather part of freedom of speech, which does not grant academics special privileges but applies to them in the same manner as to anyone else.

It was further discussed whether dismissal of a professor denying Holocaust should be regarded as improper limitation upon his academic freedom. It was noted that in some European countries, such as Germany or France, the denial of Holocaust is a criminal offence. In the UK however, the situation gives rise to a paradoxical result. On one hand, individuals are free to challenge the existence of Holocaust; however,
a history professor, unlike e.g. nuclear physicist, would be in breach of his professional standards if publicly holding such views. The professor's area of expertise therefore gives rise to additional special limitations upon his conduct.

It was also suggested that instead of differentiating between freedom of expression under Art. 10 of the European Convention and academic freedom, it may be a better approach to subsume academic freedom as a special type of expression protected under Art. 10, such as political or journalistic. It was noted by professor Barendt that academic freedom and freedom of expression do overlap to a large extent, as evidenced e.g. by the Turkish cases of Sorguc and Sapan. Accordingly, freedom of expression should be particularly strongly protected in an academic context. However, freedom of expression does not cover all the situations in which academic freedom claims can be made and they are therefore not identical concepts.

Lastly, it was suggested that academic freedom may no longer be as relevant as in times of Galileo. Professor Barendt concluded that it is still equally relevant, although it is now threatened from different sources. In the past, it may have been the Church or the State, while nowadays, it is posed by students, parents, drug companies and other sponsors of research as well as universities themselves, trying to ensure that what they teach is useful for their students in practice.

Summary by Monika Hlavkova