

ACADEMIC FREEDOM AND UNIVERSITY SPEECH CODES

Bernice Schrank*

The long struggle to achieve recognition for the principle of academic freedom in Canadian universities is not a familiar story to most of us. Unfortunately, dismissal from university positions on political grounds was not a McCarthyite invention, practised exclusively south of the border. Such dismissals, along with firings on other equally suspect grounds, were a continuing feature of the Canadian academic landscape until the second half of this century. Fortunately, such arbitrary dismissals are now somewhat harder to affect. The primary instrument for this change was the Canadian Association of University Teachers (CAUT), an organization which fights many battles on behalf of academic freedom in Canadian universities. In 1977, the organization codified its views on academic freedom as follows:

The common good of society depends upon the search for knowledge and its free expression. Academic freedom in universities is essential to both these purposes in the teaching function of the university as well as in its scholarship or research. Academic staff shall not be hindered or impeded in any way by the university or the faculty association from exercising their legal rights as citizens, nor shall they suffer any penalties because of the exercise of such legal rights. The parties agree that they will not infringe or abridge the academic freedom of any member of the academic community. Academic members of the community are entitled, regardless of prescribed doctrine, to freedom in carrying out research and in publishing the results thereof, freedom of teaching and of discussion, freedom to criticize the university and the faculty association, and freedom from institutional censorship. Academic freedom does not require neutrality on the part of the individual. Rather, academic freedom makes commitment possible. Academic freedom carries with it the duty to use that freedom in a manner consistent with the scholarly obligation to base research and teaching on an honest search for knowledge.¹

This definition of academic freedom seems to be a very powerful statement on behalf of freedom of thought and freedom of expression within the university. Of course, it is not an unlimited right; but on those Canadian university campuses on which some version of it has been adopted, it has been shown to bestow very generous rights of free speech on Canadian academics.

The CAUT's formulation of academic freedom makes a number of assumptions, among them that knowledge is not a fixed and static commodity, but a dynamic and gradually unfolding process. Knowledge advances through the activities normally associated with university teaching and research, at least one of

*Of the Department of English, Memorial University of Newfoundland (St John's), and former chair, Canadian Association of University Teachers Academic Freedom and Tenure Committee. This paper was presented at the "When Rights Collide" conference held at the University of New Brunswick (Fredericton), 28-29 September 1994.

¹R.W. Kerr, R. Leger & V.W. Sim, eds., *C.A.U.T. Handbook of Policy Statements and Model Clauses*, 4th ed. (Ottawa: C.A.U.T., 1986) at 4.

which is the expression of differing versions of "truth". But free expression can be deeply threatening when it challenges either government policies or social practices, as attested by the difficulties encountered by Professors Frank Underhill and Frank Scott, both articulate left-wing academics and social critics who chose to express their opinions in public fora.

The pressure toward political conformity and quietism can still be found on Canadian campuses. Memorial University was to date the last university in Canada to be censured by CAUT. Censure was imposed on the senior administration for failing to renew the probationary appointment of a professor in the School of Social Work. The reasons for non-renewal were political so CAUT found the administration had violated her academic freedom. She was a strident Marxist in the Albanian configuration and was regarded by the administration, many of her colleagues and members of the provincial government as an all-round pain in the neck – an outside agitator who had come to Newfoundland to brainwash the young and mobilize the poor. Censure was finally lifted at Memorial University when the faculty association and the administration completed negotiations for their first collective agreement which put in place a broad anti-discrimination clause, a comprehensive grievance procedure and a strong academic freedom clause.

Today administrations are less prone to over-react to the threat of the Red Menace, partly because the "Evil Empire" has collapsed. Of course, this does not in any way diminish the need for academic freedom because the possibility for giving offense continues even as the grounds shift. Another recent example comes from Memorial University. As many are aware, the premier of Newfoundland is attempting to privatize Newfoundland Hydro, a project that has generated ferocious and wide-spread opposition in the province. The Newfoundland government states that privatization will improve the economic picture of a province whose economy is probably the shakiest in Canada since the collapse of the cod fishery two years ago.

According to one Memorial economist, the government's position is profoundly flawed on economic grounds. This view was aired in the local newspapers, radio and television. As might have been anticipated, the economist received a great deal of unpleasant attention from government bureaucrats. They attempted to demolish his economic arguments in the same public fora that he had used, resting their rebuttal on *ad hominem* attacks on his competence. Like the professor of social work, this professor of economics was regarded as an all-round pain in the neck. Although he felt uncomfortable in the face of these public attacks from members of the provincial government, he did not receive any negative feedback from the University administration. This example illustrates two things: (1) it is possible to generate impressive amounts of hostility without being a Marxist; and

(2) the academic freedom clause in Memorial University's collective agreement has teeth.

Clearly, academic freedom is important because it lessens the possibility of arbitrary dismissal. But it is also important because without it the discourses of dissent within the academy – and to the degree that the university intersects with society, within the political and economic world – would be even more restricted than usual. This is so because academics are not cast in the heroic mould.

Perhaps this lack of heroism arises because professors are in a good position to appreciate that the quest for knowledge can be a dangerous business. They may recall that yesterday's heretic and blasphemer often becomes tomorrow's saint, particularly if they teach Shaw's *Saint Joan* or *The New Testament*. But they may be forgiven if they take little consolation in the joys of such a transformation when the method usually involves a real or metaphoric pyre. In that long period known as "the bad old days", intellectual activity was often a life-threatening activity. Galileo, for example, found that he might publish and perish more or less simultaneously.

The academy is not the hospitable place for new ideas it would like to believe it is. Academic freedom has become the means of providing a space in which dissent can occur, even in circumstances in which it is not fully welcome. Unfortunately, today academic freedom is being threatened. A brief article by The Hon. John Sopinka, of the Supreme Court of Canada appeared in the April 1994 *University Affairs*, the publication of the Association of Universities and Colleges of Canada (AUCC). He points to what he regards as a growing problem on Canadian and American university campuses:

In the last decade there has developed a phenomenon known as the demand for political correctness. Certain segments of society who are justifiably seeking equality for their particular interests have extended their demands so far that they threaten the freedom of others. They not only criticize the expression of views that do not accord with their own but demand that contrary views be suppressed.²

So on American campuses and also on some Canadian campuses, there have been calls for speech codes to curtail such things as criticism of the anti-pornography lobby, affirmative action programmes and reports of chilly climate committees. It would be encouraging to think that the honourable Justice is mistaken, but recent experiences in both Ontario and Nova Scotia suggest that attempts to control speech in Canadian universities are increasing.

The recent controversy over the Ontario Framework Document provides a clear example of the attempt to protect equality rights at the expense of the rights

² J. Sopinka, "Freedom of Speech Under Attack" *University Affairs* (April 1994) at 13.

of individuals to express themselves freely. In Ontario universities, the Framework Document was understood as a serious assault on academic freedom. The Ontario government committed itself to a catch-phrase, "zero tolerance", which was intended to capture its determination to create policies that would eliminate sexual and racial harassment and discrimination in the workplace. To this end, the government issued a vaguely worded but comprehensive set of proposals, known as the Ontario Framework Document, in which an attempt was made to define sexual and racial harassment and suggest punishments for offenders. While the intentions of the framers of the Ontario Framework Document were undoubtedly admirable, their achievement would encourage the very intolerance they were seeking to eliminate should the policies advocated in that document ever be implemented. One concern was that the document indicated that harassment existed when an individual was made to feel uncomfortable by any action, including even a single comment that the individual believed had unacceptable sexual content. Such vague and elastic definition could make almost any statement fall within the parameters of forbidden speech.

It is painful to be a victim of harassment or discrimination. However, creating a satisfactory environment for all workers is not achieved by advocating excessively narrow definitions of harassment and discrimination, taking a punitive stance in relation to alleged offenders by suggesting that charges should be laid with frequency and ease, and then promulgating definitions and policies on harassment in a simplified rhetoric. Words and phrases like "warm", "welcoming", "comfortable", "negative environment" and "chilly climate" are troubling when applied to the classroom situation.

Therefore it did not come as a great surprise when professors from Ontario universities objected to the Framework Document and began a highly publicized campaign of opposition to it on the grounds that if implemented, it would undermine academic freedom. It was correctly argued that to create a welcoming environment for some, it appeared to be necessary to create an inhospitable climate for others. Many Ontario professors expressed the view that if the test of harassment is solely the subjective reaction of an individual, then faculty members would purge their reading lists of all material that might give any offense so as to avoid unnecessary hassles. They would also have to monitor all their statements for the same reason. Self-censorship would become even more prevalent than before, resulting in an undesirable condition known as "the mildew of discretion". The result may or may not eliminate sexual and racial harassment or discrimination, but it would certainly infringe on the traditional academic freedom rights of professors and it would undoubtedly create a universal mediocrity in which only time-servers and yes-persons could function without fear of reprisal.

While some academics in Ontario advocate unrestricted freedom of speech for the professorate, others do not. Canada is not the United States; it does not have the equivalent of the American First Amendment right to virtually unfettered

freedom of speech and expression. The *Charter*³ is a more cautious document and certain kinds of hate speech that might be allowed in the United States are forbidden in Canada. For example, faculty cannot use its position in the Canadian classroom to systematically denigrate Blacks, Muslims, Jews, Christians, women, men or homosexuals. Professors are not free to refer to the Black students in their classes as "niggers", or to persistently tell their classes that women are inferior to men. Students of colour or women might reasonably doubt that professors who say such things are capable of grading their papers fairly. It may well be that these kinds of hate speech are illegal in Canada. They are certainly inappropriate in a classroom.

Academics do not have greater legal rights to free speech than other Canadians by virtue of their university employment. Academic freedom is not a legal right, and it exists within a legal context in which hate speech is proscribed. But resorting to legal sanctions or to restrictive codes as advocated in the Ontario Framework document is an extreme method of control within the academy. There are more appropriate sanctions without either recourse to law or to codes that have provisions for restricting speech. Racist and sexist professors can be dealt with in the same manner as other professors who fail to discharge their professional obligations for different reasons.

It would be difficult to find a collective agreement, special plan or terms and conditions of employment in a Canadian university that does not have a section on discipline. Provided that discipline is fairly applied and subject to grievance and arbitration provisions, there is no reason why disciplinary action should not be taken by university administrators when they judge that professors, by their conduct, have abused their positions in the classroom.

But many proposed and actual speech codes are not about overt and persistent hate speech. These codes often are intended to prohibit a single comment that may be considered offensive or inappropriate, and are aimed at making such isolated remarks the subject of penalties. One serious problem with such an approach is the over-reliance on the subjective reaction of a single person who may not have fully understood the remark on which the complaint is based. Another serious problem is distinguishing between "illegitimate" offensiveness and legitimate offensiveness. Legitimate offensiveness can arise when discussing any matter about which there may be more than one opinion. There are religious fundamentalist students who will find any discussion of Darwin and evolution deeply offensive, whether in a biology class, history seminar or discussion of literary naturalism. Subjective judgments of this sort cannot become the measure

³Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

of appropriate classroom discourse, or the entire enterprise of advanced learning will most assuredly crumble.

University professors have the right to be controversial and to discuss controversial matters both in and out of the classroom, whether these matters involve theories of race and IQ, the reasons for anti-Semitism, or the high prison rate of First Nations' peoples. They have the right to use controversial books and documents, material that some may consider racist or sexist, where the curriculum suggests their relevance. Professors should still feel free to teach from a long list of offensive, frightening and delightful material that includes, but is not limited to, Salman Rushdie's *The Satanic Verses*, Shakespeare's *The Merchant of Venice*, Hitler's *Mein Kampf*, and two favourites from the "ban the book brigade", James Joyce's *Ulysses* and Mark Twain's *The Adventures of Huckleberry Finn*.

Unless we become clones of one other, many different things will disturb many different people. Moreover, it is hard to imagine a learning process that is not disturbing. The images of Archimedes leaping out of the tub and shrieking "Eureka, I've got it" at the moment when he had penetrated the Pythagorean mysteries, or Newton comprehending the law of gravity by being hit on the head by an apple, or the Zen initiate reaching a moral and intellectual awakening by being smacked by a Zen master suggest the degree to which popular culture continues to keep alive the association between profound learning experiences and intense disturbance. Disturbing students in the classroom situation is often a preliminary to making them think. It is not a bad thing.

It has been argued that academic freedom is merely the privilege associated with a ruling elite. We are told that speech codes are necessary to protect the powerless students. In this view, the classroom is a structure based on the unequal distribution of power in which the teacher controls the students through the process of grading. So while teachers may be free to express disturbing ideas, students who might like to challenge them are inhibited by their powerlessness (i.e. by their belief that teachers will give them bad grades because they expressed opposition). There is an element of truth in this perception, but universities have long ago recognized that there are legitimate reasons for challenging grades, and it would be surprising to discover a Canadian university that did not provide mechanisms for re-reads and grade appeals. The image on which the power argument appears to rely – an all-powerful teacher dominating a class of cringing, terrified students – does not conform to reality.

Moreover, this line of argument does not take into account the most likely reason students do not challenge the views of their teachers. It is not because of a pervasive fear of retribution, but rather because they do not have at their fingertips all the facts, arguments and interpretations they would need to provide a convincing counter-argument to the one used by their teachers. Such fear is

based on the possibility of embarrassment because it may be revealed that the student challenging the teacher is not as well-informed as the teacher. Speech codes do not address this concern.

Of course there is no reason why students should be as well-informed as their teachers. After all, teachers are hired primarily for their expertise in an academic discipline, and that expertise is the source of their "authority". The power argument seems to be advocating an artificial closing of the distance between teacher and student. Instead of the traditional student/teacher relationship, the power argument advances the idea of the classroom as a site for co-workers and co-learners to interact with each other. It is unacceptable to restrict academic freedom in the interests of furthering a narrow and problematic view of what the classroom experience ought to be.

Besides inhibiting discussion in the classroom, speech codes also attempt to punish rudeness or other lapses from the norms of middle-class speech because such lapses are regarded as offensive breaches of civility. Speech codes often appear to favour a stale language of euphemistic displacements rather than a more vigorous demotic speech. Language is the first and one of the most effective battlegrounds for totalitarian control. Nazis, fascists and communists have all tried to conceal their horrors in a rhetoric of polite obfuscation. Canadian universities should not attempt to imitate and encourage such practices. Better to have the bluntness of "mass murder" than the blandness of "final solution". The proper answer to speech we do not like is not to ban it but to debate it.