

SPEECH CODES IN ACTION

Robert Martin*

Universities have rushed to establish policies ostensibly designed to combat "racism". In ominous and revealing language, these are often referred to as "speech codes". Despite the apparently noble motives of their proponents, these policies can lead to thought control and witch-hunts. They are an affront to academic freedom and an assault on the rights of employees of universities. But rather than engage in abstract sermonising, I want to tell a story about speech codes. The events in this story happened at The University of Western Ontario, but they could have happened at any Canadian university.

Marjorie Ratcliffe teaches Modern Languages. She has a Ph.D. from the University of Toronto and more than two decades of classroom experience. She regards herself as someone who is politically and intellectually of the "left".¹ In the fall of 1991 she was teaching Spanish 302 – Theory of Translation.

One student in Dr. Ratcliffe's class was originally from Iran. He and his family had left Iran because of religious persecution, eventually settling in Canada. The student's name is not relevant and I will call him simply "the complainant". He had often made critical remarks about the current Iranian leadership in Ratcliffe's class. In his first year at Western the complainant received one A, three Ds and an F. The next year he managed a D and two Fs. He withdrew from two other courses. In his third year he got three Bs, two Ds and two Fs. One B and one D were from Professor Ratcliffe.

On 6 December 1991 the students in Spanish 302 were doing a translation exercise. The complainant, then in fourth year, offered his version of a document. He incorrectly translated several English words into Spanish as "condenar", the equivalent of "condemn". Dr. Ratcliffe observed that perhaps the complainant made this error because, as he himself had said earlier, "in Iran they condemn

*Of the Faculty of Law, The University of Western Ontario. I would like to thank my colleague, Robert Hawkins, for his assistance. This essay could not have been written without Marjorie Ratcliffe's help. I dedicate it to her and especially to her courage and determination.

¹My sources for the narrative which follows are, first, conversations, over more than two years, with Marjorie Ratcliffe. Second, she also gave me access to her correspondence with various university officials. Third, I have read all the official and quasi-official reports which are referred to in the narrative. A useful journalistic summary is Stephen Northfield, "No Middle Ground" *The London Free Press* (20 March 1993) E1. An official overview can be found in the "Report of The University of Western Ontario Race Relations Policy Review Committee" *Western [U.W.O.] News Supplement* (16 September 1993) [hereinafter Review Committee Report]. Fourth, I have consulted the two newspapers published at The University of Western Ontario – *Western News* and *The Gazette*. *Western News* is the official organ of the university, published by its Department of University Relations and Information. *The Gazette* is the student newspaper, published by the University Students' Council.

everyone". This remark led to a complaint of racial harassment under the University's race relations policy.

Western adopted its policy in September 1990. The University committed itself to developing "an environment free of racial discrimination and harassment". "Racial harassment" was defined as:

unwelcome attention of a racially oriented nature, including remarks, jokes, gestures, slurs, innuendoes, or other behaviour, verbal or physical, which is directed at an individual or group by another person or group who knows, or ought reasonably to know, that this attention is unwanted.²

A procedure was also established to investigate alleged violations of the policy. The Race Relations Office was central to this procedure.

Western's Race Relations Office is part of the University's Department of Equity Services. The department has a Director, an Employment Equity Officer, a Race Relations Officer, a Sexual Harassment Officer, and supporting staff. In 1993 the budget for the Department of Equity Services was \$427,000.00.³

The Race Relations Office⁴ was to conduct "awareness programs" about racial discrimination and harassment. As originally established, it could receive complaints, conduct investigations, and set in motion the procedure for a formal hearing. It could dismiss a complaint, but was required in such a case to provide a written report to the complainant. There was no corresponding obligation to provide any information to the person about whom the complaint was made. The office was also authorized by the policy to keep "records and pertinent statistics on all matters of alleged discrimination and harassment". Faculty and other employees had no right of access to these records.

The complainant took his concerns about Dr. Ratcliffe's remark to Leela MadhavaRau, the first and so far the only, Race Relations Officer hired by Western. Leela MadhavaRau was born in the U.K., but grew up in Welland, Ontario. She has a B.A. from McGill and a M.Phil. from Cambridge.⁵ She was appointed in June of 1991.

I have not met Ms. MadhavaRau, but brief quotes from some of her public statements may help in understanding her. In a letter to *The Globe and Mail* of

²See The University of Western Ontario, Race Relations Policy, Policy No. 1.21 (27 September 1990) ss. 1.00 and 4.02. This policy was superseded in September 1994.

³*Western [U.W.O.] Facts* (1993) 41.

⁴See U.W.O. Race Relations Policy, *supra* note 2, s. 7.00.

⁵"Officer has 'diplomatic tenacity'" *Western [U.W.O.] News* (6 June 1991) 5.

30 July 1992, Ms. MadhavaRau spoke of the presence of "everyday and systemic racism" in Canadian society, a society she charged with "hypocrisy". She did admit that "at times we are all insensitive and perhaps 'racist'".⁶ In her first annual report she spoke of "deep-rooted racism within this university community", painting a picture of an institution seething with racial hostility.⁷ She has also argued: "The historical view of universities as enlightened and accepting institutions ... may no longer be valid." She had identified "a very clear need for changes to the existing curriculum."⁸ More recently she observed, without citing any evidence, that "... racism in Canada is on the increase rather than on the decrease."⁹

When the complaint about Marjorie Ratcliffe was made to her, Western's policy required the Race Relations Officer to "inform the respondent (Professor Ratcliffe) of the complaint".¹⁰ Ms. MadhavaRau did not do this, but instead took the complaint directly to Professor Ratcliffe's Dean. Professor Ratcliffe was summoned to the office of the Dean of the Faculty of Arts early in January 1992. She was informed of the complaint and met with the Race Relations Officer. One further meeting took place, an attempt by Ms. MadhavaRau at face to face "mediation" between Professor Ratcliffe and the complainant.

On 13 January 1992, after this session, the complainant wrote to Professor Ratcliffe withdrawing all his substantive accusations against her, including an assertion he had made that she was "definitely [*sic*] a racist". His only remaining complaint about Professor Ratcliffe was, "I feel that there has been a degree of insensitivity to my situation."¹¹

The Race Relations Office had expected Professor Ratcliffe would "apologise for any unintentional hurt she may have caused and acknowledge she may have been insensitive". As a matter of principle Ratcliffe declined to do so. The Race Relations Officer then initiated a formal complaint, the only time this has happened at Western. Under the University's policy a hearing would have to be held. The only allegation against Professor Ratcliffe by this point was that she had shown "a degree of insensitivity".

⁶"Racism is Everywhere" *The Globe and Mail* (30 July 1992) A12.

⁷"Race Relations Office Annual Report, 10 June 1991 - 30 June 1992" *Western [U.W.O.] News* (3 December 1992) 9.

⁸"Fighting Institutional Racism and Sexism" *The [U.W.O.] Gazette* (19 November 1992) 6.

⁹M. Seebach, "Race Foundation Meets Criticism" *The [U.W.O.] Gazette* (22 November 1994) 2.

¹⁰See U.W.O. Race Relations Policy, *supra* note 2, s. 13.03.

¹¹Letter of O. Pour-Ahmadi to Professor Marjory Radcliffe [*sic*] (13 January 1992).

The policy suggested that such a hearing should take place before an internal Human Rights Tribunal.¹² This tribunal had not yet been constituted, so Western hired Emily Carasco, a law professor at the University of Windsor, as adjudicator.

Professor Carasco held a hearing on 27 April 1992. The parties to the hearing were Ms. Leela MadhavaRau and Professor Ratcliffe. According to the policy, the Race Relations officer was to be "responsible for carriage of a complaint"¹³ at such a hearing. I interpret this to mean the officer was to function as prosecutor. Ms. MadhavaRau was assisted by a lawyer paid by the university. Professor Ratcliffe paid her own lawyer.

Professor Carasco submitted her report to Western's President, George Pedersen, on 9 June 1992.¹⁴ She found that Professor Ratcliffe's comment about the complainant's error in translation did "not constitute racial harassment". She concluded that "there was no evidence that Professor Ratcliffe violated the letter of the prohibition against racial harassment". And in another letter to Pedersen she advised that "the complaint should therefore be dismissed".

Professor Carasco added some personal observations. She speculated on Professor Ratcliffe's motives in not apologising to the complainant, observing that an apology "connotes only the hallmark of a caring and sensitive member of the teaching profession". Whether Professor Ratcliffe had been "caring and sensitive", or more important, whether she was under any obligation to be so, were not issues which Professor Carasco had been directed to address.

On 27 July 1992 Pedersen wrote to the complainant, to Ms. MadhavaRau and to Professor Ratcliffe, to state: "I have accepted the adjudicator's recommendation and hereby dismiss this complaint." But for Marjorie Ratcliffe that would not be the end. On 31 July she wrote George Pedersen to assert that she had been falsely accused by the complainant and then "persecuted" by the Race Relations Officer. She demanded the University apologise to her and pay her legal fees.

Pedersen replied on 17 September and expressed his "concern". His response was to hire Professor David Mullan of the Queen's University Law Faculty to review the matter. Pedersen specifically asked Mullan to determine whether the hearing conducted by Professor Carasco "met the standard of fairness" and

¹²See U.W.O. Race Relations Policy, *supra* note 2, s. 15.00.

¹³*Ibid.* s. 15.02.

¹⁴Professor Carasco's report has not been published. It was enclosed with a letter she wrote to George Pedersen on 9 June 1992.

whether Professor Ratcliffe's claim of persecution was substantiated. Mullan reported to Pedersen on 16 November.¹⁵

Pedersen reacted quickly and wrote to Professor Ratcliffe on 20 November. In Pedersen's view Mullan had absolved the university and its officials of wrongdoing. In a press release, Pedersen argued that the Mullan report "sustained the integrity of the process and the propriety of those actions undertaken by officers of the University".¹⁶ Ms. MadhavaRau stated publicly that Professor Mullan's review had "exonerated her handling of the case".¹⁷ These are generous interpretations of what Mullan actually said.

Mullan offered no criticism of the way in which Professor Carasco conducted her hearing, but he had plenty to say about Western's Race Relations Policy and the conduct of its Race Relations Officer. Of the policy he observed:

the multiplicity of functions fulfilled under the present policy by the Race Relations Officer compromises that person's ability to act as a mediator of complaints particularly when, at the same time she is the person charged with deciding whether there is a prima facie case against a respondent as to justify a formal hearing into a complaint.¹⁸

And concerning Ms. MadhavaRau, he noted:

I do, however, have serious concerns with the way in which this particular matter reached the hearing stage. The failure of the Race Relations Officer to contact the respondent at least before meeting with her Dean was not calculated to contribute to the informal settlement of such a dispute.¹⁹

Mullan rejected Professor Ratcliffe's assertion that she had been "persecuted" by Ms. MadhavaRau.

Pedersen's letter to Professor Ratcliffe of 20 November did acknowledge the existence of one problem. He announced there would be a formal review of the university's Race Relations Policy. But he refused either to apologise to Ratcliffe or to compensate her for more than \$7,000.00 in legal fees and disbursements. She had also determined she should be given one year's paid leave to make up for the time lost in defending herself.

¹⁵The University of Western Faculty Association subsequently became involved in the matter. It eventually published the entire text of Professor Mullan's report in its newsletter. See (1993) 25:2 UWOFA Rev. 8.

¹⁶"Race Relations Policy Facing 'A full review'", *Western [U.W.O.] News* (26 November 1992) 1.

¹⁷*Ibid.*

¹⁸See UWOFA Review, *supra* note 15 at 13.

¹⁹*Ibid.*

By this stage the matter was very public. The University of Western Ontario Faculty Association (UWOFA) had already called for revision of the Race Relations Policy.²⁰ A series of critical letters appeared in the university's *Western News* on 22 October and 29 October. Leela MadhavaRau's response to these letters was to claim that she was being "racially harassed".²¹

The UWOFA published, with Professor Ratcliffe's permission, the key documents in the affair in the *UWOFA Review* of January 1993.²² The Association called Pedersen's refusal to pay Ratcliffe's legal fees and apologise to her "seriously flawed". The Race Relations Policy was also described as "flawed" and what happened to Ratcliffe as an "injustice". Indeed, the UWOFA got involved to the point that its members adopted a formal motion of censure against the President of the University, a motion which stated: "[T]his Association strongly condemns the manner in which the President of this university has handled the accusation of racism against our colleague M. Ratcliffe."²³

On 5 March 1993 Pedersen wrote to offer Ratcliffe both an expression of "regret" for her "pain and suffering" and payment of her legal bills, if she would release the University from any legal claim. Ratcliffe refused to accept this offer.

In February 1993 Pedersen had selected the members of the ad hoc committee to review Western's policy and procedures on race relations. The committee was to be made up of eight persons from the University – two students, two members of staff and four professors. The committee began its work at once and reported to Pedersen in July. He made the report public in September.²⁴

The report is a remarkable document. The committee had held public hearings and received submissions from individuals and groups at Western. It studied all the relevant background documents. In the end it produced a long, meticulous and unanimous report which moved inexorably to the conclusion that the existing race relations policy was misconceived and should be amended.

Marjorie Ratcliffe did not appear before the committee. Her case was mentioned in its report, the committee making the coy observation that "it was

²⁰S. Coulson, "New Race Relations Policy Needed" *The London Free Press* (16 October 1992).

²¹J. McCarten, "Race relations officer claims harassment" *The [U.W.O.] Gazette* (6 November 1992) 1.

²²See UWOFA Review, *supra* note 15.

²³"Appeal to grievance committee, says President" *Western [U.W.O.] News* (15 July 1993) 1.

²⁴See Review Committee Report, *supra* note 1.

not oblivious to the fact that the Ratcliffe case was part of the background to the appointment of this committee."²⁵ In fact, Ratcliffe is an implicit presence in every sentence of the report, a silent accuser.

The committee did not recommend, as many persons had urged, that the race relations policy simply be scrapped. The committee was more astute than that. Western was to continue to have a policy and a Race Relations Officer, but neither would have any executive or disciplinary authority.

The keys to the new policy were to be education and voluntary mediation. There would be no formal hearings and no sanctions. Allegations of serious misbehaviour would be dealt with as part of the regular, established university disciplinary procedures. The Race Relations Officer would remain, but be stripped of executive authority. Serious manifestations of racism would be left to the state, according to the laws of Ontario and Canada.

The irony of the review committee's report is that it was well-received and supported by almost everyone at the University except Marjorie Ratcliffe and Leela MadhavaRau. Ratcliffe wanted the Race Relations Policy to be scrapped in its entirety. MadhavaRau wanted it retained without change. A group of persons close to Leela MadhavaRau expressed their support for a new race relations policy in a letter to the editor of *Western News*.²⁶ A few students did oppose the changes, but they were formally adopted in September of 1994.²⁷

Western thus became the first Canadian university to effectively jettison a speech code after having adopted one. Interestingly, the University's "sexual harassment" policy, which in many respects paralleled its Race Relations Policy, has survived untouched.

The major question remaining was redress for Marjorie Ratcliffe. Ratcliffe and the UWOFA continued to push Pedersen throughout the summer and fall of 1993. In early 1994 there was an agreement. The University would pay Ratcliffe's legal fees and disbursements. It would give her one year's paid "academic study leave". For her part Ratcliffe would release Western from any legal claims. But Pedersen would not apologize. The best he was prepared to do was a letter written to Ratcliffe on 7 February 1994 in which he affirmed that she had not "racially harassed" the complainant.

²⁵*Ibid.* at s.5.

²⁶L. MadhavaRau, Letter to the Editor, *Western [U.W.O.] News* (21 October 1993) 13.

²⁷See The University of Western Ontario, Race Relations Policy, Policy No. 1.21, 29 September 1994.

Ratcliffe has been profoundly affected by her brush with speech codes. She continues to have trouble sleeping. She does not like the cynicism she now feels towards students and the sense that she will never be able to trust one again. She is aware of imposing her own censorship on what she says in the classroom.

But she also believes the major lesson to be learned from what happened to her is that a little bit of backbone goes a long way. She has little respect for the Canadian Association of University Teachers or the Ontario Confederation of University Faculty Associations, organisations which she once assumed would leap to her defence. Both were, in her words, "wishy-washy".

And what of Leela MadhavaRau? Shortly after the university changed its Race Relations Policy she resigned. At the beginning of the essay I suggested that this story could have taken place at any Canadian university. Let me leave the last word to Leela MadhavaRau. In 1993 she said about the Ratcliffe affair, "I think that this case is reflective of what is happening on campuses across the country, and it could happen with any (equity) policy."²⁸

There are three lessons for universities in this sad little tale. First, universities should acknowledge that they and their members are obliged to obey the law of the land – no less, but no more. The law of the land, in the form of the *Criminal Code*²⁹ and provincial human rights legislation, contains clear prohibitions against racist behaviour and racist expression. Universities have no business attempting to police the acts of their members. That is the job of the state. When universities seek to do so, they compromise their fundamental purpose. Western's Department of Equity Services has become its in-house thought police. And when a university gives someone the title Race Relations Officer, it is creating a position which depends on maintaining the perception of widespread racism. A Race Relations Officer who painted a picture of racial harmony would soon be unemployed.

Second, universities must abandon the conceit that they are, or should be, multi-purpose social service agencies. That conceit has largely destroyed primary education in Canada. It is subverting our universities. Western maintains its Department of Equity Services at the same time as it has been cutting back on library acquisitions.

The third lesson arises from the decidedly odd position we have reached where the people who work and, apparently, study in Canadian universities have become terrified of words. We could all profit from reflecting on this.

²⁸See Stephen Northfield, *supra* note 1.

²⁹R.S.C. 1985, c. C-46.