

academic  
freedom  
and the law

(A COMPARATIVE STUDY)

ERIC BARENDT

# Academic Freedom and the Law

A Comparative Study

Eric Barendt



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## ACADEMIC FREEDOM AND THE LAW

*Academic Freedom and the Law: A Comparative Study* provides a critical analysis of the law relating to academic freedom in three major jurisdictions: the United Kingdom, Germany and the United States. The book outlines the various claims that may be made to academic freedom by individual university teachers and by universities and other higher education institutions, and it examines the justifications that have been put forward for these claims. Three separate chapters deal with the legal principles of academic freedom in the United Kingdom, Germany and the United States. A further chapter is devoted to the restrictions on freedom of research that may be imposed by the regulation of clinical trials, by intellectual property laws and by the terms of contracts between researchers and the companies sponsoring medical and other research. The book also examines the impact of recent terrorism laws on the teaching and research freedom of academics, and it discusses their freedom to speak about general political and social topics unrelated to their work.

This is the first comparative study of a subject of fundamental importance to all academics and others working in universities. It emphasises the importance of academic freedom while pointing out that, on occasion, exaggerated claims have been made to its exercise.

## *Preface*

It is unlikely that university professors and lecturers spend much of their working lives actively thinking about academic freedom. But they generally assume it is fundamental; they consider exercise of the freedom essential for serious academic work, distinguishing university employment from work in business, industry and the civil service. In England academic freedom has largely been taken for granted. Lawyers in this country have shown little interest in the subject, perhaps because it has lacked until recently a clear legal dimension. So it has hardly been discussed in English periodical literature, and I could find only one book, *The Concept of Academic Freedom* by Kevin McGuinness, that contains any extensive discussion of this area of law in the United Kingdom. In contrast, there is a rich literature in the United States, Germany and, to some extent, other jurisdictions. So this book has been written to fill a major gap in English legal writing.

It is particularly important now to fill this gap, since in the last few years scholars and scientists have become increasingly concerned with what they perceive to be growing threats to their academic freedom. These threats come from a number of sources. Medical researchers argue that drugs companies or other sponsors impose restraints on the freedom to publish research findings so the sponsors can protect their intellectual property rights or their commercial reputation. Social scientists sometimes find troubling the restrictions imposed by ethics committees or by data protection laws, while criminologists and drugs advisers have complained of the restraints imposed by the governments for which they work. More generally, many academics consider that their freedom to teach and research is increasingly circumscribed, in particular by the demands of government to show that their work is socially relevant and economically productive and by the requirements of the 'managerial' university, which often sees itself as a business rather than a community of independent scholars.

This book deals with all these issues from a legal perspective, though not always at the level of detail that would be required by a practising

lawyer. My intention has been to discuss academic freedom questions in general terms, exploring how they have arisen and how they have sometimes been resolved in decided court cases. It discusses the legal principles and court decisions in three major jurisdictions—the United Kingdom, Germany and the United States—for it is only through comparative law that we can begin sensibly to consider how problems arising in one system are of more than local interest and how they might best be resolved. The opening chapters of the book discuss some theoretical questions, which pundits on academic freedom ignore or treat cursorily: what is academic freedom, how does it relate to freedom of speech, and how can the freedom be justified? It is only when these questions have been answered, at least provisionally, that we can assess how seriously academic freedom is threatened by, say, legal restrictions on the conduct of research or by recent anti-terrorism laws.

This book does not attempt to answer the critical practical question regarding how much academic freedom has been lost in the last few decades in the United Kingdom, let alone in other jurisdictions. Giving a precise answer to that question would require prolonged empirical work over two or three years. What this book does show is that there are real *threats* to its exercise emanating from the sources referred to earlier in this Preface, and they are of concern to a number of scientists and scholars. And my impression based on several interviews and on my experience as a member of the Council for Academic Freedom and Academic Standards (CAFAS) is that these threats are now significant, particularly in the post-92 universities, where the managerial culture is most prevalent. University professors and lecturers should take academic freedom seriously, not to safeguard their own prerogatives but to assert the values of cultural independence and the search for truth with which the freedom is associated. (See the arguments in chapter three.)

My own interest in this subject began in 2005 when I was finishing the revision of my earlier book, *Freedom of Speech*. In particular I was intrigued by the relationship of freedom of speech and academic freedom: what does the latter add to freedom of speech (or expression), a fundamental human right that can be claimed by everyone, whether or not they work in a university or other higher education institution? I was also interested in the extent to which academic freedom should be regarded as an institutional freedom, similar to press or broadcasting

freedom, a right that could be claimed by universities rather than by the individual professors and researchers who work in them. (These complex issues are explored throughout the book but particularly in chapter two.) Another personal note is that I was exercising my own academic freedom when I decided to do the research for and to write this book: my chair has been in Media Law, but nobody at UCL thought it wrong for me to spend the best part of five years on this project rather than on writing more articles on libel law or broadcasting regulation. UCL respected academic freedom!

I have endeavoured to take note of recent important legal and other developments in the United Kingdom up to the beginning of May 2010. Comments on the chapters dealing with German and US law (chapters five and six) confirm that they presented an accurate account of the law in those countries towards the end of 2009; I am confident that the exposition of legal principles in those jurisdictions remains sound at the time of writing this Preface.

I owe an enormous debt to the large number of people who have helped me at various stages in the course of writing this book. I am grateful to David Bentley, David Erdos, Hector McQueen, Gillian Morris, David Palfreyman and David Rabban, all of whom read two or more chapters, and to Aubrey Blumsohn, Bill Cornish, Thomas Groß and Alex Weedon, who commented on particular chapters or sections. David Coleman, Roger Gair, David Healy, Paul Heywood, Sean Matthews, Nancy Olivieri and Rod Thornton all commented on aspects of the text of particular concern to them. I could not have written chapter ten without the provision of material by Chris Brand and without the help of others, in particular Halla Beloff, Vincent Egan and Hector McQueen. I would also like to thank David Erdos for encouraging me to explore the implications of data protection law for academic freedom, and Tim Hope, Sean Matthews, Dario Milo, Nancy Olivieri, David Palfreyman, Justine Pila and Michael Robertson for supplying me with material. I benefited at early stages of this work from conversations with Professor Malcolm Grant, Provost of UCL, and with the late Professor John Griffith, the founder of the Council for Academic Freedom and Democracy (the predecessor of CAFAS) and the most intrepid defender of academic freedom from the 1960s. Nicholas Cropp, a law graduate from UCL, provided invaluable

research assistance in the summer of 2005; I am also grateful to Daniel Greineder for his work on German law in 2006.

The research involved two trips outside the United Kingdom. I am grateful to Professor Hans-Heinrich Trute, Dean of the Law Department at the University of Hamburg, for inviting me to spend the month of October 2008 to work on German law. I took the opportunity to discuss the German concept of scientific freedom, *Wissenschaftsfreiheit*, with Professor Trute, his colleagues and research assistants. Professor James Weinstein invited me to a workshop and panel discussion at Arizona State University, Phoenix, in March 2009, where aspects of academic freedom and the freedom to raise unorthodox ideas in universities were treated to vigorous debate. While in Phoenix, I benefited enormously from talking to a number of American scholars, in particular Professor Robert Post, former Counsel to the American Association of University Professors and now Dean of Yale Law School, and Professor James Moeser, Chancellor Emeritus of the University of North Carolina at Chapel Hill.

I would like to thank the Leverhulme Trust for the award of a Research Fellowship for the academic year 2008–09, and UCL for granting me study leave that year from normal teaching and administrative duties. Without the Fellowship and study leave, I would never have had the time to do the necessary research for this book, let alone to write it. Finally, I am grateful to Richard Hart and his colleagues for their patience in waiting for delivery of the manuscript and for their prompt production of the book, and to Lisa Gourd for her skilful editing of the text.

As always, my greatest debt is to my wife, Sheila, without whose encouragement and support I could never have completed this book.

Eric Barendt  
May 2010



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## *Notes on Abbreviations*

The German abbreviations used in the notes may be unfamiliar, so a list is appended here. The second group of abbreviations are of leading law reviews.

BVerfGE	<i>Entscheidungen des Bundesverfassungsgerichts</i> (Decisions of the German Constitutional Court)
BVerwGE	<i>Entscheidungen des Bundesverwaltungsgerichts</i> (Decisions of the German Administrative Court)
BGBI	<i>Bundesgesetzblatt</i> (Federal Statute Gazette)
FS	<i>Festschrift</i> (Commemorative essays)
AöR	Archiv des öffentlichen Rechts
DÖV	Die Öffentliche Verwaltung
DVBt	Deutsches Verwaltungsblatt
JZ	Juristenzeitung
NJW	Neue Juristische Wochenschrift
NVwZ	Neue Zeitschrift für Verwaltungsrecht
NVwZ-RR	Neue Zeitschrift für Verwaltungsrecht-Rechtsprechungsreport
VVDStRL	Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer

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