
Article:
Cram, IG and Fenwick, H (2018) Protecting free speech and academic freedom in universities. Modern Law Review, 81 (5). pp. 825-873. ISSN 0026-7961

https://doi.org/10.1111/1468-2230.12366

Protecting free speech and academic freedom in universities

Ian Cram, University of Leeds
Helen Fenwick, University of Durham

Abstract

This article interrogates restrictions on speaking events in universities created both by recent student-led efforts at 'no-platforming' and by Part 5 of the Counter-terrorism and Security Act 2015 which placed aspects of the government's existing Prevent strategy on a statutory basis for the first time. The statutory Prevent duty as it applies in universities includes, under the accompanying Guidance, curbing or monitoring such events on the basis that they could have an impact in drawing persons into terrorism. This article will place the combined impact of Part 5 and student-led curbs on campus speech in context by juxtaposing a range of pre-existing restrictions with the various free speech duties of universities. Focusing on speaking events, it sets out to evaluate the results of this chequered situation in terms of the current state of free speech and academic freedom in universities. It finds potential violations of established free speech norms due to the impact of pre-emptive strikes against some campus-linked speech articulating non-mainstream viewpoints. But it also argues that not all such speech has a strong foundation within such norms.

Key words: 'Prevent' duty, student no-platforming policies, universities, Article 10 ECHR, Counter-terrorism and Security Act 2015, Human Rights Act, speech values

A. Introduction

This article analyses curbs on speaking events in universities created both by Part 5 of the Counter-Terrorism and Security Act 2015 (CTSA) and recent student 'no-platforming' policies. Part 5 in effect placed expression-related aspects of the government's existing Prevent strategy[1] on a statutory basis for the first time. It has not so far been the subject of sustained academic examination that takes account of its first years of operation, in the context of student-led curbs on speech and of provisions and practices either restricting or promoting on-campus expression.[2] The Part 5 provisions are intended to address the risk of persons being drawn into terrorism by placing duties on certain authorities, including universities, to prevent the risk arising by, *inter alia*, placing certain curbs on 'extremist expression'.[3] The duty[4] includes disallowing or monitoring the expression of visiting speakers on the basis that it could aid in the radicalisation of students.

Further cognate developments have arisen since Part 5 was introduced. They include the

[1] See Home Office *Countering International Terrorism* (London: Cm 6888, 2006); *Pursue, Prevent, Protect, Prepare: the UK's Strategy for Countering International Terrorism* (London: Cm 7547, 2009). See now at https://www.gov.uk/government/consultations/prevent-duty. The strategy is outlined in Policy paper 2010-2015 *Government policy: counter-terrorism*, updated 8 May 2015.

[2] See J. Blackbourn and C. Walker for an early commentary 'Interdiction and Indoctrination: The Counter-Terrorism and Security Act 2015' (2016) 79 MLR 840. See also S. Greer, S and L. Bell, 'Counter-terrorist law in British universities: a review of the "*Prevent"* debate' (2018) Public Law 84-105.

[3] See CTSA ss 26-33. For ss 26 and 29 and the accompanying Guidance for Higher Education Institutions, see notes 101, 104 and 110 below.

[4] The duty is applicable to England, Wales and Scotland, and took effect in HEIs on 21 September 2015.

appointment of a Commission for Countering Extremism headed by a counter-extremism 'tszar' who will make recommendations with a view to addressing what the Home Secretary (at the time, Amber Rudd) has called the 'scourge of extremism in all its forms'.[5] The Prime Minister and Home Secretary also confirmed in 2017 that there would be a review and expansion of the Prevent anti-radicalisation programme.[6] At the same time concerns have been expressed as to the impact on campus free speech of student 'no-platforming' policies, leading to a proposal to fine universities that fail to uphold free speech[7] and to a significant Report on campus speech from the Joint Committee on Human Rights (JCHR) in 2018.[8] The Office for Students (OfS), operative from April 2018,[9] has also been established, intended inter alia to stand up against censorship on campus.[10] The Higher Education Minister has expressed the hope that the OfS will ensure that university students are exposed to 'new and uncomfortable ideas, and engage in robust, civil debate and challenge.'[11]

Taking account of these nascent developments, this article focuses on the conflicting pressures on campus opposing or protecting free speech and academic freedom, in order to offer an original contribution to the existing legal literature. Pre-emptive strikes against speech articulating non-orthodox and dissenting viewpoints may on several grounds be considered problematic, given the core mission of universities to protect free speech and critique a range of orthodoxies in the name of academic freedom. The pre-existing provisions and practices, Part 5 and student 'no-platforming' and 'safe space' policies taken together can fairly be said to aid in fostering an intellectual environment within which restrictions on free speech may be condoned. But in critiquing these conflicting pressures, this article will also reflect on the extent to which some expression that may potentially be barred from campus genuinely engages free speech values.

B. Pre-existing law and practice underpinning the curbing of speech on campus

Placement of the Prevent duty on a statutory basis, covering on-campus expression, could be viewed as unnecessary since a range of criminal offences already existed that could be invoked against certain speakers or materials in universities. Any university that apprehended the commission of one of those offences would have been expected to take preventive action,

[5] The appointee, Sara Khan, is tasked with providing a comprehensive report into the scale, influence and reach of extremism in Britain: https://www.gov.uk/government/news/sara-khan-to-lead-commission-for-countering-extremism. See further n 103.

[6] See n 102.

[7] Sam Gyimah MP HC Debs (2017-18) Vol.363, col.695: The power to fine universities is given to the Office for Students by the Higher Education and Research Act 2017

[8] Joint Committee on Human Rights *Freedom of Speech in Universities* (4th Report of Session 2017-19) 27.3.18, at https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/589/589.pdf (last accessed 15 April 2018).

[9] It has taken over a number of HEFCE's regulatory functions for the University sector functions after HEFCE was abolished on 1.4.18. See n 117 below.

[10] Freedom of speech was included in a standard list of 'public interest principles' which would form part of the 'public interest governance condition' applying to the 'Approved' categories of universities. For problems surrounding the appointment of OfS members, see C Phipps and others 'Toby Young resigns from the Office for Students after backlash' *The Guardian* 9.1.18.

[11] Sam Gyimah MP HC Debs (2017-18) Vol. 363, col.28 WS.

under existing duties.[12] The perception that one of these offences might arise has been relied on by university authorities to cancel speaking events or withdraw invitations to speakers, while the Public Sector Equality duty also has the potential to lead to the curbing of some expression on campus. That duty and the various criminal offences are reflected in the university Codes of Practice promulgated in response to the section 43 Education (No 2) Act 1986 duty to promote free speech (discussed in full in Part F), and applying to campus speaking events, including those organized by student societies. That can sometimes mean, as discussed below, that they may be cancelled or minimized on the basis of an over-cautious or over-expansive conception of the legal requirements. Since student organisers of such events must comply with the Codes, the provisions discussed below have an indirect impact on Student Unions and their affiliates, which are also directly affected by Charity Commission Guidance, as discussed in Part E.

Counter-terror and hate speech offences

A range of speech-based counter-terror offences could overlap with some speech potentially caught by Part 5. A speaker in a university who directly or indirectly encouraged acts of terrorism via oral or written expression, which included glorifying such acts, whether in the past, the future or generally, would commit an offence, depending on the response of the audience, and the speaker's intention.[13] A range of offences are also available relating to meetings and expression supporting proscribed groups.[14] The dedicated hate speech provisions under Part III of the Public Order Act (POA) 1986, as amended, could also conceivably apply on campus if expression stirring up hatred on grounds of race, religion or sexual orientation, was expected to be promulgated. These provisions are so narrowly drawn, however, especially in relation to the latter two categories - where the expression must be intended to stir up hatred, and must be 'threatening'[15] - that their application would be extremely rare or non-existent if taken into account by university authorities or student societies pre-emptively before the event to consider the risk posed by speakers.

Public order offences

In contrast, the far broader Part I POA sections 4A and 5 provisions, which can arise in

[12] Prior to 2015, see the Guidance from universities UK 2013 on external speakers (http://www.universitiesuk.ac.uk/policy-and-analysis/reports/Pages/external-speakers-in-higher-education-institutions.aspx (last accessed 15 April 2018)) suggesting that universities should consider what assurances might be sought from high-risk speakers if concerns were raised that they might breach the criminal law.

[13] The Terrorism Act 2006 s 1(1) prohibits the publishing of 'a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism or Convention offences'. This very broad provision is qualified in a number of respects by s 1(2), providing that if a person publishes a statement within s 1(1) or causes another to publish such a statement on his behalf he commits the offence if '(b) at the time he does so, he intends the statement to be understood as mentioned in sub-section (1) or is reckless as to whether or not it is likely to be so understood'. Under s 1(3) the statements of indirect encouragement must be ones '(b)…from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances'.

[14] Under the Terrorism Act 2000 s 12(2) it is an offence to arrange a meeting (3 or more persons) which the organiser knows is to support a proscribed organisation, and under s 12(3) it is an offence to address a meeting to encourage support for such an organisation.

[15] Note also the'free speech' defence available under Public Order Act 1986, s 29J (in relation to inciting hatred on grounds of religion).

racially or religiously aggravated forms,[16] could more readily cover visiting speakers or anticipated protests concerning them arising on-campus, including inside lecture halls or other educational meeting places.[17] The provisions specifically allowing regulation or banning of processions and assemblies in POA sections 11-13, are also viewed by universities as relevant to gatherings on campus,[18] as is the very broad common law doctrine of breach of the peace which overlaps with these statutory provisions.[19] Section 5 criminalises use of threatening or abusive words[20] and the display of threatening or abusive visible representations,[21] within the hearing or sight of a person 'likely to be caused harassment, alarm or distress thereby'. The offence under section 4A is similar, as are the defences,[22] except that it could cover some merely offensive expression on campus due to its inclusion of the term 'insulting',[23] but in that case the harassment, alarm or distress must actually have been caused to a person,[24] and intentionally so.[25]

Section 4A also has a further potential application to expression associated with speaking events in universities since it can be applied to cyber-speech,[26] unlike section 5, since there is no requirement that the words used must be within hearing or sight of a person likely to be caused harassment, alarm or distress. So it could arise not only in respect of on-campus inflammatory speech, but also in respect of its digital expression — for example, if talks were 'live-tweeted' or reported on web pages.[27] Clearly, it is unlikely that arrests would occur on campus; far more significantly, the existence of these provisions has quite frequently led risk-averse universities to bar speakers, abandon speaking events or demand that gatherings should be minimized.[28]

General communication offences

The remarkably broad offence under section 127(1) Communications Act 2003 applies only in the context of electronic communications, so it could potentially apply (overlapping with section 4A) to online advertising or reporting on speaking events in any university, and

---

[16] Crime and Disorder Act 1998, s 31(1)(c)..

[17] The offences expressly do not apply to 'dwelling' places, which would cover eg student accommodation, but not seminar rooms etc.

[18] See eg the University of Cambridge s43 Code, at [7].

[19] If the assembly went ahead, police officers could intervene if a reasonably apprehended breach of the peace was considered imminent: *Laporte v Commissioner of Police of the Metropolis* [2007] 2 WLR 46.

[20] A person is guilty of the offence only if he intends his words or behaviour to be (or is aware that they may be) threatening or abusive (s 6(4)).

[21] The word 'insulting' was removed from s 5 in 2014 by the Crime and Courts Act 2013, s 57, but not from s 4A.

[22] Under s 5 and s4A the accused has a defence if it is proved that his conduct was reasonable.

[23] But CPS Guidance indicates that the terms 'insulting' and 'abusive' overlap (CPS 'Public Order Offences incorporating the Charging Standard' (2013) at http://www.cps.gov.uk/legal/p_to_r/public_order_offences/ (last accessed 15 April 2018)).

[24] The words etc can be targeted at one person but take effect on another.

[25] Under s 4A there must be intent to cause a person harassment, alarm or distress, and the verbal or written threats, abuse, or insults must cause that or 'another person harassment, alarm or distress'.

[26] The internet has been viewed as 'public space' for section 4A purposes: in *S v DPP* [2008] 1 WLR 2847; and *R v Stacey* Appeal No: A20120033 30.3.12.

[27] A charge (which was then dropped) under s127 (and under s1 Malicious Communications Act 1988) arose in the university context: 'Bahar Mustafa: Student officer who allegedly posted "kill all white men" to face malicious communications charges' T Brooks-Pollock, the Independent 6.10.15.

[28] See n 58 below.

probably also to using skype to allow students to hear from a speaker outside the UK, who may have been banned from entering the country.[29] It covers the 'improper use of a public electronic communications network'; the content of the message (or other material) must be 'grossly offensive or…of a menacing character', which has been found to cover racist material.[30] It is clearly an over-broad offence, including no express mens rea[31] or defence, in contrast to section 4A POA.[32] In this context any material posted on a web-site linked to a university speaking event or society could be a 'communication' (if not a 'message') in the sense that it is intended to be read by others. How far universities or student societies are aware of this offence in relation to the use of social media relating to a speaking event is debatable, but its profile is rising since it is now clearly established as the key offence to rely on in relation to offensive digital expression.[33] In so far as it might be taken into account in decisions as to the organization of such events, awareness of prosecution policy, which is to use restraint in deploying it,[34] would be significant in avoiding an over-cautious response to its existence.[35]

Anti-discrimination provisions and policies

The Public Sector Equality duty under the Equality Act 2010 means that state universities are obliged to have due regard to the need to: foster good relations between persons who share a relevant protected characteristic and those who do not,[36] which would include good relations between heterosexuals and homosexuals, or between religious adherents and atheists. That latter function includes the need to eliminate discrimination, harassment, victimisation.[37] Student unions also have duties under the Act as associations, and at times as employers and service providers; therefore they must not unlawfully discriminate against students, employees, customers, members or guests. The duty overlaps with the non-discrimination

[29] See *R (on the application of Naik) v Secretary of State for the Home Department* [2011] EWCA Civ 1546 where the bar on entry to a supporter of Osama Bin Laden did not however extend to his communications via a video link to university students.

[30] See *DPP v Collins* [2006] 1 WLR 2223 (on appeal from [2005] EWHC 1308 (Admin)), Lord Bingham, at [9].

[31] s 127(2), which covers messages that the speaker 'knows to be false', clearly does require mens rea. By contrast, an equivalent requirement appears to have been deliberately omitted from s 127(1) in contrast to the otherwise somewhat similar offence under s 1 of the Malicious Communications Act 1988. However, Lord Bingham in *DPP v Collins ibid* read into s127(1) a mens rea of intention to insult or of a form of objective recklessness — that the accused would have been expected to recognise that the message would insult those to whom the message relates (regardless of the reaction of the actual recipient)..

[32] But now not as excessively wide as was originally accepted in *Chambers v DPP* [2013] 1 WLR 1833. See further J. Rowbottom, 'To rant, vent and converse: protecting low level digital speech' (2012) 71 CLJ 355.

[33] See: *R v Sorley and Nimmo*, sentencing: 24.1.14; S. Lavell, 'Internet troll who sent Labour MP anti-semitic messages is jailed' *the Guardian*, 10 March 2017; Oral Evidence to the Home Affairs Select Committee 'Hate Crime and its Violent Consequences' (2017) HC 609, covering online abuse.

[34] See CPS 'Guidelines on prosecuting cases involving communications sent via social media' (https://www.cps.gov.uk/legal-guidance/social-media-guidelines-prosecuting-cases-involving-communications-sent-social-media (last accessed 15 April 2018).

[35] However, abuse, under recent CPS guidelines, is to be treated as being as serious online as offline, BBC News 'Hate crimes: Online abuse as serious as face-to-face' (http://www.bbc.co.uk/news/uk-40981235, last accessed 15 April 2018).

[36] s 149 of the Equality Act. See the guidance on this duty: https://www.gov.uk/guidance/equality-act-2010-guidance#public-sector-equality-duty (February 2013) (last accessed 15 April 2018).

[37] *Ibid*.

provisions of Article 14 ECHR[38] under section 6 Human Rights Act 1998, which impose positive and negative obligations on state universities, not student unions,[39] so long as the instance falls within the ambit of another Article (probably in this context Articles 11, 10 or 8).[40]

The equality duty also requires universities to consider whether its policies contribute to providing equality of opportunity for all and to tackling discrimination. As a result, equality concerns have been cited as a basis for banning UKIP speakers[41] or potentially homophobic ones.[42] Certain Islamic preachers/speakers have reportedly aided in creating an intimidating atmosphere on some campuses, affecting in particular LGBT students,[43] arguably infringing the equality duty. The same can be said of allowing or imposing gender-segregated seating at some speaking events hosted by certain University Islamic societies,[44] a matter cited as a concern in 2016 by the Joint Committee on Human Rights.[45]

Guidance from the Equality and Human Rights Commission as to the equality duty in universities[46] has recently confirmed that gender segregation, involving seating men and women separately at an event, is not permitted at events which are not acts of religious worship.[47] That includes academic meetings, speaking events, lectures or meetings organised

[38] Article 14 covers a wider range of groups than does the Duty and discrimination law generally, of relevance in this context, because it extends to 'political or other opinions'.

[39] Given that universities are bound by the ECHR as public authorities.

[40] Article 10 could be engaged on the basis that the creation of an intimidatory atmosphere by some societies might tend to stifle the expression of certain groups on campus; see comment by the Joint Committee on Human Rights, *Counter Extremism - Second Report of Session 2016-17* HL Paper 39, HC 105, [60].

[41] See n 149 below.

[42] Eg a number of Islamic preachers have been banned by the University of East London (UEL): Murtaza Khan and Uthman Lateef were due to speak at a dinner predicted to be gender-segregated held in the University by the Islamic society, but were barred due to their views on homosexuality which had included stating that homosexuality should be punished by death ('Islamist extremists blocked at East London University' *Peter Tatchell Foundation*, 29 April 2014, at http://www.petertatchellfoundation.org/islamist-extremists-blocked-at-east-london-university/, last accessed 15 April 2018); Imran ibn Mansur had also been due to speak at a gender-segregated UEL Islamic Society event, but was barred by the University. Mansur has stated that homosexuality is 'obscene, filthy, shameless' (see D. Churchill, 'London university bans preacher who calls homosexuality a "filthy" disease' *Evening Standard*, 24.11.14).

[43] For example, a Report published by the University of Westminster Student Union LGBT Society (UWSU LGBT) in 2014 investigated how safe LGBT students feel on campus after a number of concerns were reported. Gay and transgender student communities on campus were reported to'feel unsafe' due to the activities of some in the Islamic society: L. Sherriff, 'Extremist Students Consistently Given A Platform At Westminster', while "Useless" SU Does Nothing' *Huffington Post*, 27 February 2015: http://www.huffingtonpost.co.uk/2015/02/27/extremist-students-consis_n_6767440.html (last accessed 15 April 2018). See also P Walker 'Emwazi's University more scared of being Islamophobic than homophobic' *the Guardian* 2.3.15.

[44] See 'Gender segregation: The truth about Muslim women "forced" to sit away from men' *The Telegraph*, 19 January 2016.

[45] Joint Committee on Human Rights, *Counter Extremism - Second Report of Session 2016-17* (HL Paper 39, HC 105), [61].

[46] 'Gender Segregation at Events and Meetings: guidance for universities and Students' Unions', 17 July 2014: https://www.equalityhumanrights.com/en/publication-download/gender-segregation-events-and-meetings-guidance-universities-and-students, (last accessed 15 April 2018).

[47] *Ibid:* gender segregation is permissible during religious worship because it is not covered by equality law. However, once an event goes beyond religious worship or practice, equality law applies and the courts are likely to consider any gender segregation to be discriminatory on grounds of gender, and so unlawful. (21 July 2014).

for and attended by students, members of the public or employees of the university or students union, whether or not held on university premises. The Guidance makes it clear that genuinely voluntary gender segregation is permissible under the law, but that explicit or implicit pressure on women or men to sit in certain parts of the hall would render the segregation non-voluntary. However, the Commission takes the view that it would be impracticable for organisers to attain the necessary certainty that, at every stage, segregation was demonstrably voluntary for all individuals. It has found that while universities must respect religious freedom, that cannot include condoning gender discrimination,[48] and also that 'If the event's organisers or the external speaker place pressure on any woman to sit separately from men (or vice versa) this would also amount to unlawful harassment'.[49]

It can therefore be concluded that use of gender-segregated seating — even where claimed by the organisers to be voluntary — is *prima facie* unlawful. If, for example, a female student was in effect required to sit at the back in a gender-segregated lecture hall, whether or not she therefore found it difficult to participate in any debate, or found her questions ignored,[50] the university would have breached the equality duty, and the student would also, in theory, have a claim against the university under section 7 of the Human Rights Act, relying on Article 10 read with 14, or alone, given its duty in relation to organising an event on its premises. It has been accepted under Article 14 at Strasbourg that especially weighty reasons must be advanced, not including a mere appeal to tradition, [51] justifying measures creating differentiation if certain grounds of discrimination are at stake, including sexual orientation and gender.[52] So speakers expecting or requesting to speak to a gender-segregated audience might withdraw, or invitations to them might be rescinded. This duty may be linked to the statutory Prevent duty since there may be a correlation between the type of speaker presenting a high risk, and the likelihood that gender-segregated seating would be put in place when he was to speak.[53]

Equality duties of universities can therefore lead to the placing of curbs on speaking events, which may, however, be justifiable as reflecting the competing right to non-discrimination. Positive obligations under the duties could, consistently with Article 14, include an obligation imposed on the institution to disallow discrimination against or harassment of certain minority groups or women on campus that could be fostered as a result of speaking events, or

---

Universities UK has updated its guidance, 'External speakers in higher education institutions' (2013), to take account of the EHRC's advice, p27, Case study 2.

[48] *Ibid*, 6.

[49] *Ibid*, 5.

[50] For discriminatory treatment of female students attending an Islamic Society seminar at Queen Mary University see C Chumley *The Washington Times* 16.12.13.

[51] *Vrountou v Cyprus* App No 33631/06, judgment of 13 October 2015, [75]..

[52] *Konstantin Markin v Russia* (2013) 56 EHRR 8.

[53] For example 'Islam vs Atheism' on 9.3.13 at UCL was organised by a Salafist group with reported links to extremism termed 'the Islamic Education and Research Academy' (IERA); gender segregation was enforced, reportedly using intimidatory tactics by allocating women seats at the back corner of the auditorium (https://www.theguardian.com/world/2013/mar/15/ucl-bans-islamic-group-over-segregation, last accessed 15 April 2018). IERA was then banned from campus by UCL. The University of Leicester launched an investigation into gender segregation in May 2013 (see M. Williams, 'Inquiry launched after Islamic group holds segregated lecture' *the Guardian*, 15.4.13) at a public lecture featuring guest speaker Hamza Tzortzi, hosted by its student Islamic society. See further: R. Sutton, 'Is segregation on campuses becoming the norm?' *The Commentator*18.3.13: http://www.thecommentator.com/article/2956/is_segregation_on_campuses_becoming_the_norm (last accessed 15 April 2018); C Bennett 'Segregation by gender has no place in our public realm', *the Guardian* 15.12.13.

due to the posting of discriminatory material relating to such events in universities[54] on or off-line. Thus duties to further equality could lead to the cancellation of such events, which could potentially be justified under Article 10(2), as discussed in Part G below.

Reflecting these provisions in section 43 Codes of Practice

Reflecting the existing criminal offences discussed, but going beyond them, most universities have specified in their Codes reflecting section 43 Education (No 2) Act 1986 that speaking events may be cancelled or minimised if one or more of the offences considered above might be committed, or if support for a proscribed organisation was likely to be expressed.[55] Reflecting the Equality duty, the Codes may also refer to bans if the event is likely to 'give rise to an environment within which people will experience, or could reasonably fear, harassment or intimidation, particularly because of their ethnicity, race, nationality, religion or belief, sexual orientation'.[56] Such terminology could cover posters, online advertising or reporting on a speaking event reaching students or staff not present at the event itself. The Codes thus draw the offences and the Equality duty to the attention of organizers of public meetings and assemblies indoors and outdoors in universities.[57]

In accordance with the section 43 Codes, for example, a speaker associated with a far-right group could be barred from speaking in a university if it appeared that Muslims might have been attacked in the speech, creating potential liability under the provisions against stirring up hatred on grounds of religion, but it would be much more probable that religiously aggravated public order grounds under sections 4A or 5 POA, or the doctrine of breach of the peace, would be referred to.[58] Those sections, or, conceivably, the provisions against incitement on grounds of sexual orientation, could also be referred to in order to bar 'extremist' speakers if attacks on homosexuals were anticipated.[59]

---

[54] Action taken in respect of such material could accord with the principles underlying the decision in *Vejdeland and Others v Sweden* (2014) 58 EHRR 15. A conviction for distributing leaflets at an upper secondary school that claimed homosexuality was a 'deviant sexual proclivity' and 'morally destructive' held not to violate Article 10.

[55] For example, the University of Western England Code of Practice, pursuant to the Education (No 2) Act 1986 (Part IV, s 43), [6] (iii) and (v).

[56] *Ibid*, at [4]. A number of s 43 Codes include that terminology.

[57] The Code of Practice promulgated under s 43 by the University of Cambridge for example refers to a number of the offences considered here, at [7], and the Freedom of Expression Protocol of the University of Leeds (revised February 2016), [5].

[58] See thus Oxford Union's cancellation of its speaking invitation to English Defence League founder Tommy Robinson, K. Rawlinson, 'EDL leader's Oxford Union appearance cancelled' *BBC News*, 10 March 2013, at http://www.bbc.co.uk/news/uk-24037103 (last accessed 15 April 2018). The same reportedly occurred at Durham and Edinburgh universities in 2015: S Hopkins *Huffington Post* 22.10.15. See also n 175 below and associated text.

[59] Under the Public Order Act 1986, s 29AB (inserted by the Criminal Justice and Immigration Act 2008). The provisions could cover, for example, the Islamist preacher, Abu Usamah at-Thahabi who was invited to Reading University in 2013 to speak to the Islamic society; he had previously argued that homosexuals should be killed: P. Tatchell, 'Reading University colludes with Far-Right Extremist Muslim society' *Huffington Post*, 1 March 2013, at: http://www.huffingtonpost.co.uk/peter-g-tatchell/reading-university-colludes-muslim-extremism_b_2790556.html (last accessed 15 April 2018). Similarly, on 11.6.12 the Islamic Society at York University hosted a preacher, Yusuf Chambers, from 'the Islamic Education and Research Academy' (IERA) who has expressed the desire that homosexuals be killed (*Student Rights*, 12 June 2012), 58. See further http://henryjacksonsociety.org/wp-content/uploads/2017/09/Extreme-Speakers-and-Events-in-the-2016-17-Academic-Year-Final.pdf. The Henry Jackson Society also reported in 2016 that 30 events featuring 'extremist'

Certain section 43 Codes appear to be having some inhibiting effect on expression on campus. They were therefore quite heavily criticised by the Joint Committee on Human Rights in 2018[60] on the basis of their very varying requirements, the inhibiting impact on free expression of the provisions of a number of the Codes, the excessive burdens some of them placed on organisers of speaking events, and their imprecise references to the offences discussed here. In particular, the Committee found that the bureaucracy associated with the Codes tended to have an inhibiting impact on student organisers of speaking events.[61] The regulation of the university sector by the Office for Students may mean therefore, as part of its remit to protect free speech, that further guidance as to the content of the Codes will be issued.

C. The aims underlying University Prevent duties: addressing links to violent extremism?

The shift in the Prevent strategy to cover non-violent extremism

The concerns underlying the Part 5 provisions had previously been expressed in non-statutory form, mainly via the Prevent strategy, which applied to educational establishments, but no specific legal duties were placed on them.[62] Located within the broader counter terrorism CONTEST strategy[63] of the Blair Government, which aimed to reduce the risk of exposure to international terrorism, Prevent sought to tackle the radicalization of persons by:

> deterring those who facilitate terrorism and those who encourage others to become terrorists by changing the environment in which the extremists and those radicalizing others can operate.

Not long after the July 2005 London bombings there were reports that governmental concerns had been expressed as to the threat of violent radicalisation on UK campuses.[64] Shortly

---

speakers, some with a history of holding extreme homophobic views, who denigrated homosexuality at the events, occurred in London universities., see: http://www.studentrights.org.uk/article/2373/extreme_or_intolerant_speakers_on_london_campuses_between_september_2015_and_january_2016. There has, however, only been one successful prosecution: in *R v Ihjaz Ali, Kabir Ahmed and Razwan Javed* (10 February 2012) three Muslim men from Derby were convicted of inciting hatred on the grounds of sexual orientation after they distributed leaflets calling for gay people to be killed (reported at https://www.judiciary.gov.uk/judgments/r-v-ali-javed-and-ahmed/, last accessed 15 April 2018).

[60] See n 8, at [87]-[91].

[61] *Ibid*, at [87]: 'some [Codes] are unclear, difficult to navigate, or impose bureaucratic hurdles which could deter students from holding events and inviting external speakers'.

[62] See the Guidance from the Department for Innovation, Universities and Skills, *Promoting Good Campus Relations* (London, 2008).

[63] Alongside Prevent, the other strands of the CONTEST policy comprise Pursue (gathering intelligence to understand the terrorist threat, detecting and disrupting terrorist networks, working with partners abroad); Protect (improving border security, reducing vulnerability of key sites such as utilities and transport) and Prepare (focusing on the capacity to deal with the consequences of terrorist attacks and the continuous testing and evaluation of preparedness): *Countering International Terrorism: The United Kingdom's Strategy* (2006) Cm 6888 pp.1-2. The Prevent element also stressed the importance of 'tackling disadvantage and supporting reform by addressing structural problems in the UK and overseas that may contribute to radicalization, such inequalities and discrimination.' See *ibid* at para.62.

[64] See eg P. Curtis, 'Minister Urges Action on Campus Extremism' *the Guardian*, 20 July 2005 at http://www.guardian.co.uk/education/2005/jul/20/highereducation.uk (last accessed 15 April 2018).

afterwards, the legal incarnation of the deterrent strategy was unveiled as Part 1 of the Terrorism Act 2006 which, as was seen above, criminalises the indirect encouragement of terrorism (section 1) and the dissemination of such encouragement electronically or by other means (sections 2 and 3). Subsequent iterations of Prevent[65] later highlighted the threat of violent extremism in educational establishments and focused on campuses in particular as centres of such radicalization.[66] The view had previously been expressed that there was a likelihood that encountering radical expression on campus might lead to radicalization of students, and then to acts of terrorism,[67] although the notion of such a linear pathway has since been doubted, as discussed below.

A significant extension in Prevent from a focus upon supporting terrorism and violent extremism to embracing 'non-violent extremism' occurred during the Coalition Government and Theresa May's tenure of office as Home Secretary. This too appears to rest upon a linear understanding of pathways into terrorist activity. 'Non-violent extremism' was considered to be responsible for the creation of an environment that helped popularize views which could then be exploited by terrorists. As the amended 2011 version of Prevent put it:

> We remain absolutely committed to protecting freedom of speech in this country. But preventing terrorism will mean challenging extremist (and non-violent) ideas that are also part of a terrorist ideology. Prevent will also mean intervening to stop people moving from extremist groups or from extremism into terrorist-related activity.[68]

The term 'extremism' was defined in 2015 to include the 'vocal or active opposition to fundamental British values, including democracy, the rule of law, individual liberty and mutual respect and tolerance of different faiths and beliefs.'[69] Theresa May expressed the policy shift in the following terms:

> The starting point of the new strategy is the emphatic rejection of the misconception that, in a liberal democracy like Britain, 'anything goes'- the belief that living in a society like ours means that there aren't any fundamental rules or norms. Instead the foundation of our new strategy is the proud promotion of British values. [70]

The Government's amended policy now points to the application of the Prevent strand of CONTEST in instances that include the peaceful advocacy of whatever is entailed in the expression of 'non-violent extremism' or 'anti-British values.' The imprecision of the terminology has been criticised *inter alia* by the Parliamentary Joint Committee on Human

---

[65] 'The Prevent Strategy: A Guide for Local Partners in England; stopping people becoming or supporting terrorists and violent extremists' (2008) at https://www.counterextremism.org/resources/details/id/45/the-prevent-strategy-a-guide-for-local-partners-in-england-stopping-people-becoming-or-supporting-terrorists-and-violent-extremists (last accessed 15 April 2018).

[66] The 2011 Prevent Strategy review stated 'we believe there is unambiguous evidence to indicate that some extremist organisations, notably Hizb-ut-Tahrir, target specific universities and colleges...with the objective of radicalising and recruiting students' (Cm 8092 June 2011 at: https://www.gov.uk/government/publications/prevent-strategy-2011 (last accessed 15 April 2018)).

[67] See for an example of the now largely discredited linear pathways view, A. Glees and C. Pope, 'When students turn to terror' (London: Social Affairs Unit, 2005). See also *Radical Islam on UK Campuses* (London Centre for Social Cohesion, 2010) pp v-vi.

[68] Prevent Strategy (2011) Cm 8092 para.3.10.

[69] Revised Prevent Duty Guidance for England and Wales, para.7: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/445977/3799_Revised_Prevent_Duty_Guidance__England_Wales_V2-Interactive.pdf (last accessed 25 March 2018).

[70] 'A Stronger Britain, Built On Our Values' March 23, 2015: https://www.gov.uk/government/speeches/a-stronger-britain-built-on-our-values (last accessed 25 March 2018).

Rights.[71]

'Extremist' speakers in Universities

The Guidance to universities accompanying section 26 CTSA, discussed below in Part D, reflected that shift in strategy. It was introduced partly to answer to concerns raised, especially in 2011,[72] 2012,[73] and 2014[74] that certain University Islamic societies (ISOCs) had contributed to the radicalisation of students, mainly by inviting visiting speakers deemed extremist. Clearly, the Part 5 provisions could be, and in other contexts have been, deployed against *any* 'extremist' speakers, including members or supporters of far-right groups.[75] However, such far-right speakers are rarely invited to speak at universities due to no-platforming or 'safe space' policies of the NUS, individual student unions and societies.[76] If they are invited they tend to attract protests, usually leading them to withdraw or be barred on public order grounds.[77] The Part 5 provisions could also be deployed against 'extremist' speakers from *any* religious background, but it has been claimed that controversial non-Islamic speakers are also likely to be barred from speaking due to such student policies.[78] These twin tendencies may partly explain why the aims as stated by government representatives, and the impact of Prevent on-campus in practice, indicate a focus mainly on

[71] Joint Committee on Human Rights 2nd Report *Counter- Extremism* (2016-17) HL Paper 39, HC 105, at para.108:

[72] See 'Freedom of Speech on Campus: rights and responsibilities in UK universities', a Report published by Universities UK, the umbrella group for Vice-Chancellors (2011), at www.universitiesuk.ac.uk/policy-and.../2011/freedom-of-speech-on-campus.pdf (last accessed 15 April 2018). The report was drawn up following the conviction of former UCL student Umar Farouk Abdulmutallab, for attempting to blow up a passenger plane over Detroit.

[73] See n 81 and associated text.

[74] According to the government's Extremism Analysis Unit 'at least 70 events featuring speakers known to the government for promoting rhetoric that aimed to "undermine core British values" such as democracy, the rule of law, individual liberty and respect and tolerance for other faiths and belief systems were held on University campuses in 2014'; it named four London universities - Queen Mary, King's College, SOAS and Kingston University - as those which had hosted the greatest number of such events; see https://www.gov.uk/government/news/pms-extremism-taskforce-tackling-extremism-in-universities-and-colleges-top-of-the-agenda (last accessed 15 April 2018).

[75] Home Office, 'Individuals referred to and supported through the Prevent Programme', April 2015 to March 2016, 9 November 2017. In 2015/16, of the 7,631 individuals referred, 4,997 (65%) were referred for concerns related to Islamist extremism and 759 (10%) were referred for concerns related to right wing extremism. Of the 1,072 individuals discussed at a Channel panel, 189 were referred for concerns related to extreme right-wing extremism (18%) and this proportion increased for the 381 individuals who received Channel support (99; 26 %). The majority of referrals came from the education sector.

[76] See further Section E below, and in particular n 151 and associated text.

[77] For example, Durham Union Society, a debating society separate to the Durham University Students' Union, invited two elected members of the British National Party (BNP) to a debate on multiculturalism in February 2010. After threats of mass protests, the event was cancelled (8.2.10 https://issuu.com/palatinate/docs/715, last accessed 15 April 2018). Similarly, at the University of Bath in 2007 concerns over NUS and UAF protests on campus led to BNP leader Nick Griffin's invitation to the university being declined (http://lancasteruaf.blogspot.co.uk/2007/05/bnp-audience-outnumbered-by-protestors.html, last accessed 15 April 2018).

[78] See L Kollrin *The Jewish Chronicle*, 22 March 2017 for an accusation that Israeli speakers were regularly blocked and pro-Palestinian speakers permitted to address students at King's College London. See further below, n 147 and n 160.

Islamic speakers and societies.[79]

Student vulnerability, student societies, external speakers and radicalisation

The concern as to radicalisation in universities was documented in the Report 'Roots of violent radicalisation' from the Home Affairs Committee in 2012.[80] A linear association was contemplated between holding a position in an ISOC and later engagement in terrorist activity: a number of students who were senior members of Islamic societies have gone on to mount terror attacks. The 2012 Report cited a range of examples.[81] The Committee also considered some evidence of the promotion of radicalisation by the Federation of Student Islamic Societies (FOSIS), the umbrella organisation to which the vast majority of university Islamic societies are affiliated, partly on the basis that it was founded in 1963 by a number of activists from the Islamist Muslim Brotherhood and Jamaat-e-Islami movements,[82] although that notion has been challenged.[83]

The 2012 Report further highlighted the university connection in finding that 30 per cent of those involved in terrorist plots were graduates,[84] but it was noted that the 2011 Prevent Review had not found that terrorists themselves were active recruiters in universities, but rather that the Government's concern related to those 'who are speaking regularly against core UK values and whose ideology incidentally is also shared by terrorist organisations' and the fact that this appeared to be going unchallenged.[85] It was also suggested to the Committee that some students might be vulnerable to radicalisation at university since: 'universities were

[79] The previous Guidance was focused *solely* on Islamic violent extremism: *Promoting Good Campus Relations: Working with Staff and Students to build Community Cohesion and Tackle Violent Extremism in the name of Islam in universities and Colleges* (Department for Education and Skills, 2006).

[80] Nineteenth Report of Session (2010-12) HC 1446.

[81] Examples it put forward (at [26]) included: Kafeel Ahmed, (attempted Glasgow airport suicide attack) on the executive of Queen's University Belfast ISOC; Waseem Mughal, (convicted of inciting murder for terrorist purposes) ran the University of Leicester ISOC website; Yassin Nassari, (convicted of possession for terrorist purposes) was president of the University of Westminster Harrow campus ISOC; Waheed Zaman (convicted for his role in the transatlantic liquid bomb plot) was formerly the president of London Metropolitan University ISOC. Abdulmutallab, (the attempted bomber of Flight 253 over Detroit in 2009), was the president of UCL Islamic society.

[82] *Ibid*; see Q252 et seq from Michael Ellis, referring to an overview from Lord Carlile, one of the previous independent reviewers of terrorism legislation.

[83] On the basis that instead it came to their attention after being founded to cater for the pastoral needs of international students: see T. Choudhury, 'Campaigning on Campus: counterterrorism legislation and student Islamic Societies' *Studies in Conflict and Terrorism* (2016, Taylor and Francis online). See also S. Nabi, 'Federation of Student Islamic Societies, (FOSIS) UK' in F. Peter and R. Ortega (eds), *Islamic Movements in Europe* (London: IB Tauris, 2014).

[84] At [34]. Examples given included Islamic State militant Mohammed Emwazi a graduate of Westminster University;. Omar Sharif, a suicide bomber in Tel Aviv in 2003, allegedly radicalized during his first year at King's College London after attending Hizb-ut-Tahrir meetings on campus; Anthony Garcia, convicted for his role in the 2004 'fertiliser' bomb plot, attended religious talks in the late 1990s at the University of East London Islamic Society; and Mohammed Naveed Bhatti, convicted for his role in Dhiren Barot's 2004 'dirty bomb' plot, was studying at Brunel University and met Barot in the University's prayer room.

[85] This point was made by the Director General of the Office for Security and Counter-Terrorism, Charles Farr, *ibid*, [31]. For the 2011 review, see https://www.gov.uk/government/speeches/review-of-the-existing-counter-radicalisation-strategy-known-as-prevent (last accessed 15 April 2018).

places of vulnerability…That makes it easy for extremist groups to pick them up'.[86] On similar lines, the government linked the concerns underlying Part 5 not only to protecting the public, but also to the welfare of students: as part of the Prevent strategy it cited the duty of care owed by universities to students and staff to safeguard them from the effects of radicalization,[87] and that point was reiterated in 2018 to the JCHR.[88]

Clearly, the fact that about one third of persons convicted of terrorist offences in the UK had attended university does not *in itself* demonstrate that encountering radical materials or speakers at university, whether via engagement with ISOC activities or otherwise, has played any part in involvement in terrorism.[89] A comprehensive study of Islamic terrorism in the UK in 2017 found that there appears to be 'little correlation between involvement in terrorism and educational achievement'.[90] A correlation was, however, found between exposure to extremist material, and engagement in terrorist related activity.[91] It was also found: 'Institutions and sectors remain significant, with the education sector, local authorities and prisons a feature in half of offences'.[92] Higher education was thus identified as an 'at-risk' sector which should be supported in resisting possibilities of radicalisation and the inspiration of terrorist activity. A further Report into students and radicalisation in 2017 found that universities could provide social spaces in which extremists affiliated to or sympathetic to groups such as ISIS could seek to radicalise Muslim students, and that real-world contacts in general could be as important as online ones in terms of contributing to radicalisation.[93] That was the basis on which the JCHR accepted in 2018 that the Prevent strategy is clearly needed on campus, accepting the evidence of a number of witnesses, including the Minister for Security, who told the JCHR: We know that there are and have been terrorist radicalisers and recruiters, and terrorists active on campus, who have recruited young men and women into terrorism. We know that from some convictions'.[94]

While the notion therefore of a simplistic linear pathway between exposure to extreme right-wing speakers or radical preachers at university, leading to radicalisation, and then engagement in terrorist activity, should be rejected, identification of universities as one among a number of at-risk sectors makes a case for seeking resilience against radicalisation within them, partly for the sake of students who might be at risk, and their families. But the connection between Part 5 and building such resilience is not fully clear. Given the professed

---

[86] Evidence from Professor Neumann, who had undertaken a study in 2007 for the European Commission: *ibid* [31]. She further found: 'people of a certain age, often away from home for the first time, [may] feel quite lost and experience…a crisis of identity'.

[87] HM Government Prevent Strategy, Cm 8092 (2011), 72. See also Home Affairs Select Committee 'Radicalisation: the counter-narrative and identifying the tipping point' 2 August 2016, [55]: 'We have heard calls for Prevent to be brought to an end (although notably not from Inspire or the families of those who had travelled to join Daesh)'.

[88] See n 8, at [74].

[89] 2012 Report, n 80, [38].

[90] H. Stuart, 'Key findings and analysis' in 'Islamist Terrorism: Analysis of Offences and Attacks in the UK (1998-2015)' *The Henry Jackson Society* (2017), 2. (It may be noted that funding sources for *HJS* remain unclear but critics have accused it of pursuing an anti-Muslim, anti-free speech agenda, see: https://www.theguardian.com/politics/2014/dec/30/rightwing-thinktank-pulls-funds-commons-groups-disclosure-rules (last accessed 15 April 2018)).

[91] 'Offenders commonly consumed extremist and/or instructional material prior to, or as part of, their offending' *ibid*, 14.

[92] *Ibid*, 20.

[93] E. Webb, 'Spotting the Signs: Identifying Vulnerability to Radicalisation Among Students' *The Henry Jackson Society* (2017).

[94] JCHR Report, n 8 above, at [73].

aims of Part 5, the lack of establishment of a clear causal link between exposure to radical speakers' 'extremist' speech at university, and later terrorist-related activity, constitutes a weakness of the speech-related strategy underlying the statutory Prevent duty in universities. Inevitably, the precise causal relation between exposure to radical preachers and radical materials at university and later involvement in terrorism would always be very hard, if not almost impossible, to establish, [95] as the Home Office Select Committee recently acknowledged.[96] While some impact would be expected to be the case,[97] given the persuasive function of expression, the question, which is addressed below, is whether it justifies the potentially far-reaching impact on free expression posed by section 26 CTSA with its accompanying Guidance, particularly when account is taken of the range of existing, overlapping provisions.

D. Over-breadth of the expression-related Prevent duties of universities?

Speech advocating violence or non-violent extremism

Among international human rights' bodies it has long been acknowledged that the fight against terrorism must be cabined within the rule of law and established human rights norms. The Special Rapporteur's 2016 Report to the Human Rights Council reiterates these important precepts: '…simply holding peacefully views that are considered 'extreme' under any definition should never be criminalized, unless they are associated with violence or criminal activity. The peaceful pursuance of a political, or any other agenda — even where that agenda is different from the objectives of the government and considered to be 'extreme' — must be protected. Governments should counter ideas they disagree with, but should not seek to prevent non-violent ideas and opinions from being discussed'.[98] At the same time, the Report also refers to 'a dangerous grey zone of expression that lies somewhere between peaceful expression and incitement…that needs to be addressed.'[99] The statutory provisions under Part 5 as applied on campus focus on that zone to address the risk of students being drawn into terrorism, but, as discussed below, they could, as reflected in the accompanying

---

[95] See Parliamentary Office of Science & Technology, 'Addressing Islamic Extremism' Postnote No 526 Houses of Parliament (May 2016);. The lack of a specific common profile of terrorists was highlighted by R. Pantucci et al, 'Lone-Actor Terrorism Literature Review', RUSI, 16 December 2015, 5, available at: https://rusi.org/publication/occasionalpapers/lone-actor-terrorism-literature-review (last accessed 15 April 2018); P. Gill et al, 'Bombing Alone: Tracing the Motivations and Antecedent Behaviors of Lone-Actor Terrorists', (2014) 59(2) *Journal of Forensic Sciences* 425, 434.

[96] 'Radicalisation: the counter-narrative and identifying the tipping point' Eighth Report of Session 2016-17 HC 135 'There is no evidence that shows a single path or one single event which draws a young person to the scourge of extremism: every case is different. Identifying people at risk of being radicalized and then attracted to extremist behaviour is very challenging', at [18]: https://www.publications.parliament.uk/pa/cm201617/cmselect/cmhaff/135/135.pdf (last accessed 15 April 2018).

[97] See *Radicalisation on British University Campuses* (London: Quilliam, 2010).

[98] Human Rights Council, February 2016, A/HRC/31/65 at [38], Report of the Special Rapporteur on the promotion and protection of human rights and freedoms while countering terrorism (2016). See also Open Society Justice Initiative, 'Eroding Trust: The UK's Prevent Counter-Extremism Strategy in Health and Education', at https://www.opensocietyfoundations.org/reports/erodingtrust-uk-s-prevent-counter-extremism-strategy-health-and-education (October 2016).

[99] *Ibid*, at [39].

Guidance, also catch some expressions of non-violent extremism.[100]

Section 26 CTSA provides that a specified authority must, when exercising its functions,[101] have 'due regard' to the need 'to prevent people from being drawn into terrorism' (the 'Prevent' duty). As applied in universities section 26 is aimed in part at addressing the concern that universities have disregarded the risk that students might be radicalized and drawn towards terrorism via extremist expression. The government has stated that the Prevent duty is to be strengthened, as part of the government's wider reworking of its Contest counter-terrorism strategy, so any problematic aspects of the Prevent duty as applied on campus may be exacerbated in future.[102] The announcement of a Commission for Countering Extremism could widen the focus of government strategy to the mere holding of views considered to be 'anti-British', but until it is known what recommendations the Commission makes to Government, it is unclear how the legal environment may be affected.[103] Placement of aspects of Prevent on a statutory basis under Part 5 marks a new emphasis in counter-terrorist law and policy, a move from focusing mainly on early-stage terrorist activity, to creating additional sanctions aimed at 'extreme' speech not necessarily linked to incitement to terrorist or violent acts.

The duties under Part 5 do not, however, on their face place a legal obligation to combat 'extremist' speech on the authorities covered, but that term is central to the accompanying Guidance.[104] The Guidance indicates that the aims underlying Part 5 go beyond seeking to

---

[100] See n 104.

[101] Such an authority is one listed in Schedule 6 CTSA. Under s 26(3) the duty does not apply to certain functions of the authority; subsection (3) covers the possibility that specified authorities have a range of functions, or act in a variety of capacities, and that it is appropriate that the exercise of only some of those functions is subject to the duty, or that a specified authority is only subject to the duty when acting in a particular capacity.

[102] The Home Office confirmed in 2016 (see A. Travis, 'Prevent strategy to be ramped up despite "big brother" concerns' *the Guardian*, 11.11.16) that a secret Whitehall internal review of Prevent had been ordered earlier in 2016 by Theresa May when she was Home Secretary. It concluded that the programme 'should be strengthened, not undermined' and put forward 12 suggestions (as yet unpublished) as to how to reinforce it. After the terrorist attacks in Westminster on 22 March 2017, Manchester on 22 May 2017 and London on 3 June 2017, Theresa May as PM reaffirmed that the expected review would include 'a major expansion of the Prevent anti-radicalisation programme': A. Travis, *the Guardian*, 23.3.17. After the terrorist attack in Manchester on 22 May 2017 the (then) Home Secretary, Amber Rudd, reiterated this commitment to strengthening Prevent: 'Government's anti-terror Prevent programme must be strengthened after Manchester attack, says former terror watchdog' J. Maidment, *The Telegraph*, 24.5.17.

[103] See https://w.w.w.gov.uk/government/organisations/commission-for-countering-extremism (last accessed 15 April 2018). The Counter-Extremism Commissioner is tasked with providing a comprehensive study of the 'scale, influence and reach of extremism within Britain…and look(ing) at the effectiveness of counter-extremism measures and policies…'. The appointee, Sara Khan, is a longstanding supporter of a version of Islam that is reconcilable with democratic values and of the Prevent strategy. Her appointment was greeted with concern by some: see 'new counter-terrorism tsar faces calls to quit' 25.1.18 at http://www.bbc.com/news/uk-politics-42807560 (last accessed 25 March 2018), including the former Conservative Party Chair Baroness Sayeedi Warsi, who has claimed that Khan is too close to the Home Office: see J Grierson, 'Choice of new UK anti-extremism chief criticised as "alarming"', *the Guardian* 25.1.18.

[104] s 29 CTSA provides that the Secretary of State can issue guidance to specified authorities. The 'Revised Prevent Duty Guidance' promulgated under s 29, issued on 16 July 2015 (https://www.gov.uk/government/publications/prevent-duty-guidance, last accessed 15 April 2018), states that extremism has been defined as: 'vocal or active opposition to fundamental British values, including democracy, the rule of law, individual liberty and mutual respect and tolerance of different faiths and beliefs. We also include in our definition of extremism calls for the death of members of our armed forces' ([7]). It also states: 'being drawn into terrorism includes not just violent extremism but also non-violent extremism which can create an atmosphere conducive to terrorism' ([64]).

curb violent extremism, and could cover manifestations of non-violent extremism,[105] despite a troubling lack of clarity as to the meaning of the concept. The aim underlying section 26, impliedly allowing the curbing of expression in universities, is to disrupt pathways into terrorism via radicalization; so the provisions strongly contrast with the aims behind the special terrorism offences under the Terrorism Acts 2000 and 2006, as amended, which are to punish acts of terrorism and to allow intervention at a very early stage in terrorist plots and in preparing terrorist acts ('precursor' offences).[106] Part 5 also contrasts with liberty-invading non-trial-based measures, in particular TPIMs,[107] since such measures are aimed at persons who are likely (on the balance of probabilities)[108] to engage in forms of terrorist-related activity (TRA), while Part 5 is aimed at seeking to prevent persons from ever engaging in such activity.[109] It represents an attempt to allow intervention in an assumed process of radicalization which — it also presumes — might eventually lead to engagement in TRA.

The Prevent Guidance to universities

The opaque and very general provision of section 26 is given a degree of form by the Guidance to universities that the Secretary of State has issued under section 29(1),[110] covering the possibility of restricting a range of forms of expression, including that of visiting speakers.[111] In relation to campus speaking events (as distinct from teaching) the section 26 Guidance indicates that if the anticipated expression does not appear to be likely to infringe existing criminal provisions the institution still has to take account of the duty, requiring an incursion into expression going beyond such provisions.[112] Under the Guidance universities must have policies in place relating to the management of events and use of premises that clearly state what is required in order for a speaking event to take place. Since the section 43 Codes already cover such events a number of universities have absorbed the Prevent duty into the Codes. The Guidance applies to events on campus, but also to those off-campus but associated with the university.[113] So a university is also responsible for relevant decisions of the student union or a student society in relation to speaking events.[114] The duty could also apply, although this is not expressly specified in the Guidance, to a range of media associated with a speaking event in a university, such as pamphlets, use of social media (for example, to

[105] *Ibid*. Article 19, Amnesty International and 56 organizations, found in a joint statement that Initiatives to 'counter and prevent violent extremism' raise serious human rights concerns, since the term is undefined, 4 February 2016, (Index: IOR 40/3417/2016): https://www.amnesty.org/en/documents/ior40/3417/2016/en/, last accessed 15 April 2018.

[106] See in particular sections 1 (encouragement of terrorism), 5 (conduct in preparation for terrorism), 6 (training for terrorism) of the Terrorism Act 2006 (TA), s 58 TA 2000 (collection/possession of information useful to a person committing or preparing an act of terrorism).

[107] Terrorism Prevention and Investigation Measures, the replacement for control orders, under the Terrorism Prevention and Investigation Measures Act 2011, as amended by CTSA, Part 2.

[108] The 2015 Act raised the standard of proof for TPIM imposition to the civil standard (CTSA, s 20(1) amending TPIMA, s 3(1)).

[109] See further on this point in relation to Prevent generally, C. Walker and J. Rehman, '"Prevent" responses to jihadi extremism' in V.V. Ramraj, M. Hor, and K. Roach, (eds) *Global Anti-terrorism Law and Policy* (CUP, 2012), esp 257-60.

[110] 'Prevent Duty Guidance for Higher Education Institutions' 16 July 2015 (n 104).

[111] *Ibid*, [7]; for Further Education Institutions (n 104), [5].

[112] *Ibid*, at [7], [10], [11].

[113] [12] of the Guidance (n 104): 'a mechanism [should be] in place for assessing the risks associated with any events which are RHEB [Relevant Higher Education Bodies] affiliated, funded or branded but which take place off-campus'.

[114] *Ibid*, [6] and [7].

'live tweet' a speech),[115] to publicise an event, as well as the spoken word.

The Secretary of State was required to appoint an 'appropriate body to monitor compliance with the Prevent duty'[116] and HEFCE was given that responsibility until it was abolished in 2018.[117] In 2017 it found that the vast majority of universities had responded positively and effectively to HEFCE's monitoring role and the statutory duty.[118] But if the Secretary of State was satisfied that a university has not discharged the section 26 duty she can give it directions to enforce the performance of the duty (under section 30). In publicly-funded FEIs governance would be reviewed, and ultimately dissolution of the institution could occur.[119]

Vetting external speakers under the Guidance

The vetting of external speakers by universities under the section 26(1) duty as fleshed out in the Guidance[120] clearly has some impact on freedom of expression (protected inter alia under section 31 CTSA, as discussed below), even though it does not necessarily amount to a bar on speech, since it could have an inhibitory impact on inviting speakers, and could operate as a precursor to a bar. After amendment to the Guidance, universities do not need to require the text of a speech by an external speaker in advance,[121] but do need to ensure in relation to 'at risk' speakers that a speaker opposed to their views also speaks at the same event, *if* so doing could fully mitigate the risk created.[122] So when universities are deciding whether to host a speaker they should pay particular attention to the views being 'expressed, or likely to be', by considering whether they 'constitute extremist views that risk drawing people into terrorism

---

[115] These forms of expression could fall within the general wording of [5], *ibid*.

[116] *Ibid*, at [31].

[117] The Secretary of State for Business, Innovation and Skills delegated to HEFCE responsibility for monitoring compliance of the Prevent duty for relevant English higher education providers which came into effect on 21.8.15. In September 2016 HEFCE published an 'Updated framework for the monitoring of the Prevent duty in higher education in England' (HEFCE 2016/24), which set out HEFCE's future monitoring of higher education providers' implementation of the statutory duty and instructed the providers to submit a short annual report every year, summarising any relevant evidence demonstrating their continuing active and effective implementation of the Prevent duty. HEFCE was abolished on 1.4.18 under s 81 Higher Education and Research Act 2017 and replaced by the Office for Students (n 9) set up under Part 1 of the 2017 Act which will take over its Prevent duty. In Wales, the Prevent duty is at present monitored by the Higher Education Funding Council for Wales (HEFCW).

[118] Institutions put their policies in place in 2016 and submitted their 'Prevent action plans' to HEFCE in January and April 2016, providing self-assessments of their level of preparedness to comply with their new duties. HEFCE found in 2017 that the response of HEIs to HEFCE's monitoring role had been positive as risk-based and proportionate (80% of respondents took that view): 'Evaluation of monitoring of the Prevent duty in higher education in England', HEFCE, 1.8.17 (Ref. 2017/12), at [37]. See also 'Implementation of the Prevent duty in the Higher Education sector in England: 2015-16' 2017/01) and n 133.

[119] HMG 'Prevent Guidance for Further Education Institutions in England and Wales' (2015), [30]: as regards 'local authority providers, this would result in the Further Education or Sixth Form College Commissioner making an immediate assessment. This could lead to governance and leadership change, restructuring or even dissolution under the Secretary of State's reserve powers'. In respect of non-publicly-funded institutions their contract could be terminated by the Skills Funding Agency. It is noted that Ofsted found in 2016 that some FE providers are struggling to discharge their Prevent duties: 'How well are Further Education and Skills Providers implementing the Prevent duty?' *Ofsted*, 4 August 2016.

[120] In HEIs and FEIs the Guidance promulgated makes it clear that the duty under s 26 applies to the expression of visiting speakers, students or staff. See 'Revised Prevent Duty Guidance for Further Education Institutions', [5-9]; 'Prevent Duty guidance for Higher Education Institutions', [7-11], both to be read alongside the general 'Revised Prevent Duty Guidance' issued on 16 July 2015.

[121] See now the Guidance (n 104), paras 11,12.

[122] Higher Education Guidance, [11]; Further Education Guidance, [8].

or are shared by terrorist groups'.[123] Applauding the actions of terrorist groups or supporting terrorism would amount to the expression of violent extremism capable of creating the risk in question, and so would be covered by both the Guidance and section 26.

Taken at face value, however, the Guidance also covers non-violent extremism, and therefore could incentivise the curbing or suppression of forms of political expression critical of mainstream orthodoxies and 'British values'. If the speaker appears to present a risk that such views may be expressed, the institution, under the Guidance, must cancel the event unless it is '*entirely convinced* that it can mitigate fully the risk without cancellation'.[124] One very literal interpretation of the Guidance could be that it requires the institution to make a prediction over an unspecified time-frame about the future conduct of those attending the meeting in order to be satisfied that the risk that someone at a later point in their life might be drawn into terrorism had been entirely eliminated. The Guidance could appear to require universities on an event-by-event basis to make judgments about the persuasive qualities of the opposing speakers, a task that would necessitate a close understanding of how audience members are likely to evaluate the respective contributions of speakers. Differences in eloquence or even in a predicted non-rational, highly individual emotional connection between the original speaker and some members of the audience, could point towards a likelihood of failure to comply with the Guidance. The phrasing of the Guidance is therefore capable of steering a cautious university towards the risk-averse conclusion that if the sympathies of the majority of the audience were more likely to be with the original speaker, the risk might be deemed to be unable to be mitigated.

However, criticizing mainstream orthodoxies would amount to non-violent extremism which would not without more be covered by section 26; further, expressing views *shared* by terrorist groups could also count as non-violent extremism covered by section 26 only if it is apparent that the holding of the view is causally linked to a risk of being drawn into terrorism. That causal link could arise if the views expressed are intended to create isolationism and division, meaning that listeners might be persuaded that the use of democratic means to address grievances should be eschewed, leaving support for terrorism as the only alternative. Satisfying the Guidance in so far as it *coheres* with section 26 therefore requires universities to examine the views being expressed, or likely to be, in order to determine whether they express violent extremism *or* fall into the *category* of non-violent extremism viewed as capable of radicalizing some listeners, creating a risk that some might then become more susceptible to engaging in terrorist-related activity. Clearly, being 'drawn into terrorism' covers a range of actions, including expressing support for it as a separate terrorist offence, as pointed out in Part B. It appears that, if credence is given to HEFCE's evaluation of university responses, most universities are taking the latter, more pragmatic, approach to the Guidance: they are apparently putting in place procedures to evaluate the risk, and using a range of methods of mitigating it. The majority do not appear to be assuming that because the future behaviour of audiences exposed to the expression of non-British values cannot be predicted with certainty it would often be necessary to cancel speaking events.[125]

---

[123] *Ibid*.

[124] *Ibid* (emphasis added).

[125] HEFCE reported in 2017 (n 118), finding [32] 'providers have [met the Prevent duty] by putting in place consistent systems which enable them to carry out 'due diligence' on external speakers before events are approved, and to identify any risk of unlawful speech which should not be allowed to go ahead, or any risks which might need to be managed to allow an event to proceed safely. We saw evidence of strong processes for assessing the risks around events organised by students and staff, which ensured that events identified as 'high-risk' could be escalated to an appropriately senior level for a decision to be taken on what mitigation might be

Legal status of the Guidance

But uncertainty as to the interpretation of the Guidance, created by its lax wording, creates some risk of chilling expression in accordance with the self-censoring dimension of the policy, by creating a grey area in relation to free expression on campus.[126] In *Butt v Secretary of State for the Home Department*, however, the issue was clarified. Butt's challenge to the lawfulness of the Guidance failed,[127] partly on the basis that it is merely expressed to be 'guidance', and section 26 only requires that 'due regard' should be given to preventing persons being drawn into terrorism. It does not state that the Guidance is binding. It was found that universities must 'consider the degree to which they have mitigated the risks [potentially created by a speaking event] as fully as they realistically can…But that done, they are not in breach of their duties under sections 29, 26 or 31 if they decide to proceed'.[128] It was noted that such a decision would not comply with the terms of the Guidance but that it is not law, in contrast to the duty to uphold free expression under section 31 CTSA (discussed below). It was further found that the Guidance is not ultra vires the section 26 duty since it was not found to 'equate non-violent extremism with terrorism'. It was found: 'If there is some non-violent extremism, however intrinsically undesirable, which does not create a risk that others will be drawn into terrorism, the guidance does not apply to it,' but it was not found that the inclusion of non-violent extremism went beyond what the Prevent duty lawfully permits so long as in the circumstances it *could* be linked to the risk of drawing persons into terrorism.[129]

Where rights to freedom of speech are being curtailed ultimately by force of law, a basic understanding of the rule of law obliges the state to express the circumstances in which the freedom is lost with a sufficient degree of clarity so as to allow individuals and institutions to adjust their behaviours appropriately in order to avoid future proscribed conduct. This foundational test might not be found to be satisfied in the present case if the Guidance had a legal or even quasi-legal status, similar, for example, to that of the Codes of Practice made under the Police and Criminal Evidence Act 1984.[130] Given that that is not the case,

---

needed'. HEFCE commented [42]: we expect that…risks have been assessed properly and appropriate mitigations put in place before an event is allowed to go ahead. However, providers must balance this with their existing responsibilities to ensure freedom of speech – we therefore would not expect senior managers at institutions to cancel events or prevent particular speakers from taking part unless they have reason to believe that risks cannot be mitigated'.

[126] Universities UK told [the JCHR in 2018] that the Government's Prevent policy has created 'a grey area in relation to free speech which did not previously exist' (n 8), at [65]).

[127] *Butt v Secretary of State for the Home Dept* [2017] EWHC 1930 (Admin) 26.7.17. The case was brought by Salman Butt since he had been named in a Downing Street press release about the use of Prevent duty to stop extremists radicalising students on university campuses. He was listed as one of six speakers who had given talks on campuses, and in the release he was said to have views that violated British values 'such as democracy, free speech, equality and the rule of law', including supporting FGM. He challenged his listing in the release as having such views, as well as the non-violent extremism aspects of the Guidance, although, as the court found, he had not been de-invited by a university under the Guidance and so was not a victim of the alleged breach of Article 10 [87]-[95]. In any event the Guidance was found to satisfy the tests under Article 10(2) [127-128], [140-152].

[128] *Ibid*, at [61].

[129] *Ibid*, at [30].

[130] See the 1984 Act, s 67 as to the legal status of the Codes. The Guidance states that the 'duty does not confer new functions on any specified authority. The term "due regard" as used in the Act means that the authorities should place an appropriate amount of weight on the need to prevent people being drawn into terrorism when

following *Butt*, flexibility as to its interpretation in practice is possible, and the evidence from HEFCE suggests that a flexible approach is being taken in universities.[131]

Conclusions

The section 26 duty as reflected in the Guidance is open to the criticism that it is over-broad since if taken at face value it could encourage censorship to occur in the absence of evidence that the anticipated speech might aid in drawing persons into terrorism. Conflicting evidence is currently available as to the impact of section 26; on the one hand it has reportedly had little impact on universities in practice in so far as a large number of 'extremist' speakers in universities in 2016-17 apparently spoke without the availability of balancing speech or debate.[132] HEFCE, on the other hand, reported in 2017, on the basis of universities' self-assessments of their response to the statutory Prevent duty, that the majority had implemented it satisfactorily.[133] The government reported to the JCHR in 2018 that it was unaware of any cancellations of speaking events in Universities due to Prevent,[134] but did not comment on the imposition of the requirements for balancing speech, and obviously could not comment on speakers who were not invited to speak due to fears that they might be viewed as possible extremists. It is also not unreasonable to speculate that, as a consequence of the lack of clarity in the Prevent policy, some speakers on-campus who would otherwise criticise government policies (including Prevent) may be more inclined to exercise self-censorship.

E. Student 'no-platforming' and 'safe space' practices

Formal and informal curbs on speakers at student events

There is evidence that informal student 'no-platforming' and 'safe space' practices have a greater restrictive impact on free expression than is created by the Prevent duty,[135] although

---

they consider all the other factors relevant to how they carry out their usual functions. The purpose of the guidance is to assist authorities to decide what this means in practice', ibid, [4].

[131] n 118, at [7].

[132] R Black 'Extreme Speakers and Events: in the 2016-17 Academic Year' 28.9.17; 'Extreme or Intolerant Speakers on London Campuses between September 2015 and January 2016' Student Rights project, authored by *The Henry Jackson Society*: http://www.studentrights.org.uk/article/2373/extreme_or_intolerant_speakers_on_london_campuses_between_september_2015_and_january_2016 (last accessed 15 April 2018).

[133] HEFCE found in 2017 (n 118) that '84 per cent of providers satisfied us that they had responded appropriately to the statutory guidance. This included having robust policies in place for the management of external speakers and events', at [7] and [26].

[134] n 8, [70].

[135] n 8, [42], [60]: in particular the JCHR found that 'in practice the concept of safe spaces has proved problematic, often marginalising the views of minority groups'. See also Spiked, 'The crisis of free speech on campus' (2016) http://www.spiked-online.com/free-speech-university-rankings#.WMmLz_meaUk (last accessed 15 April 2018). The research was overseen by Professor Dennis Hayes, Head of the Centre for educational research at Derby University and Dr Joanna Williams, senior lecturer in higher education at Kent University. The Free Speech University Rankings (FSUR) was in 2015 the UK's first university rankings for free speech. It found that 63 universities in the UK had 'banned and actively censored ideas on campus'. The 2017 survey (the 3rd survey) ranked 115 UK universities and found that '63.5 per cent of universities now actively censor speech, and 30.5 per cent stifle speech through excessive regulation', 2017; the 63.5% figure indicated an increase from 39% of institutions ranked in that way in 2015. See also A. Anthony, 'Is free speech in British universities under threat?' *The Observer*, 24.1.16.

that is not to say that the duty is disregarded by Student Unions (SUs). One SU which gave evidence to the Joint Committee on Human Rights' in 2018 said, referring to Prevent, that 'a lack of clarity regarding which views might be considered extremist, and the lengthy bureaucracy required to record and investigate events–particularly those which involve external speakers–have resulted in both students and staff self-censoring'.[136] But such impact as Prevent may be having on SUs seems to be transcended by the effect of compliance with Charity Commission Guidance and with non-Prevent-related provisions of the section 43 Codes (JCHR, 2018).[137]

While both student unions and universities are charities, English universities are exempt from registration with the Charity Commission since they have another principal regulator, which was HEFCE, but is now the Office for Students. So they are not principally regulated by the Commission. But since student unions are not exempt it directly regulates them.[138] That means that the Commission's Operational Guidance may be having some stifling impact on their free speech since it provides that student unions should not comment publicly on issues which do not affect the welfare of students as students'.[139] Since most student societies are affiliated to student unions the Guidance may be having some impact going beyond that of its effect on SUs themselves.

Further, the Commission issued guidance in 2013, 'Protecting charities from harm,' which *inter alia* provides: 'all charities must work for the public benefit and must act to avoid damage to the charity's reputation…All charities, including higher education institutions, debating societies and student unions can be challenged on whether they have given due consideration to the public benefit and associated risks when they, or one of their affiliated societies, invite controversial or extremist speakers to address students'.[140] The Guidance is stated to be intended 'to help them protect their charities from abuse by anyone encouraging or condoning extremism, terrorism or illegal activity'.[141] 'Extremism' is stated to be defined as in the Prevent strategy Guidance; however, as indicated above, that Guidance now needs to be up-dated in the light of *Butt*. But as a result, at present, under the 2013 Guidance student unions as charities are required not to provide 'a platform for the expression or promotion of extremist views' which are stated to be 'views which are harmful to social cohesion, such as denigrating those of a particular faith'. [142]

The Charity Commission Guidance is binding on the trustees when framing and carrying out the purpose of the trust. So it is more likely to have an impact in curbing free speech on campus than the Prevent Guidance once the impact of the *Butt* case becomes apparent since it

---

[136] n 8, [65]. The evidence was from Edinburgh University Students' Association.

[137] *Ibid*, Summary: the JCHR found the Charity Commission Guidance to be 'problematic', and 'unduly restrictive'. See also Conclusions, [9].

[138] In Scotland, the Office of the Scottish Charity Regulator; in Northern Ireland, the Northern Irish Charity Commission.

[139] Charity Commission for England and Wales, Operational Guidance 48: Students' unions - B3 2, Political activities and campaigning, Commenting on public issues, para. 2.2: http://ogs.charitycommission.gov.uk/g048a001.aspx (last accessed 15 April 2018).

[140] Charity Commission for England and Wales, Compliance Toolkit, 2013 (reformatted, 2016), chap 5: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/572853/Chapter5.pdf (last accessed 15 April 2018).

[141] *Ibid*, at A.

[142] *Ibid*, at E.

is binding,[143] whereas it is now clear that the Prevent Guidance is not. The Guidance as to extremist speakers would appear to be in tension with the indirect effect on SUs of university free speech duties, and with any duty to uphold free speech flowing from the educational purpose of the trust,[144] given that such a duty is not captured expressly in the Guidance.

The Joint Committee on Human Rights' 2018 Report found that the Commission Guidance is having a chilling effect on student speaking events since student unions were apparently uncertain as to what they considered they could comment on. It also heard evidence, however, to the effect that, 'it is possible [legally speaking] to take the view that this guidance is intended to be solely directed to public comment by trustees or other organs of the union with the power to bind the union to action'.[145] The Committee found that to an extent this Guidance encouraged a 'risk averse' approach to inviting controversial speakers by SUs[146] and that while cautioning against inviting such speakers, it failed to stress the countervailing need to preserve freedom of expression. As pointed out below, the free speech duties of universities, stemming from section 43 of the 1986 Act, section 31 CTSA and section 6 HRA, can be found to extend to SUs and, by extension, to affiliated student societies, but there is no equivalent to those provisions in the Guidance.

The result appears to be that a grey area has been created in which speech has at times been stifled, but it should not be assumed that all SUs or student societies are reacting to the uncertainty created in a uniform fashion. Some may adopt a risk averse approach to all speakers, but, given that 'extremist' speakers have clearly spoken in universities recently, as this article has detailed, some may interpret terms such as 'extremism' or 'social cohesion' to suit their own political/ideological affiliations. In any event, the impact of the Charity Commission Guidance and other formal curbs on student-led speaking events may be dwarfed by the effect of a range of ideological concerns viewed as more pressing by some student groups.

No-platforming

The term 'no platforming' has been used to cover a range of actions leading to creating restraints on external speakers. The term has been used in the media to cover decisions to withdraw invitations from speakers due to their views, to disinvite speakers due to pressure from other students who oppose the speaker's views,[147] or to impose onerous restrictions on

[143] The Charities Act 2011 s17 'Guidance as to operation of public benefit requirement…(5) The charity trustees of a charity must have regard to any such guidance when exercising any powers or duties to which the guidance is relevant'. S4 covers the public benefit requirement: '(1) In this Act "the public benefit requirement" means the requirement in section 2(1)(b) that a purpose falling within section 3(1) must be for the public benefit if it is to be a charitable purpose'.

[144] See *Church of Scientology's Application for Registration as a Charity* 17 November 1999, 1999 WL 33453547, at pp 6-10, 38, 39, indicating that that since the Commission would be (when the HRA came into force) bound under ss 3 and 6 HRA by the demands of the ECHR, the interpretation of the term 'public benefit' would need to accord with those demands.

[145] n 8, at [80]-[83].

[146] n 8, [82].

[147] Eg the students' union of the University of East Anglia cancelled an appearance by UKIP candidate Steve Emmens who was due to speak at an event organised by the university's Political, Social and International Studies (PSI) society. The event was called off at the last minute after a petition was raised against it on the basis of ensuring that safe spaces for students were maintained, leading to fears that it might be in breach of the union's 'Equal Opportunities Policy': see 'UEA's student event cancelled over UKIP invite' *BBC News*, 28.11.14, at http://www.bbc.co.uk/news/uk-england-norfolk-30245209 (last accessed 15 April 2018).

speakers.[148] A high-profile example in 2016 concerned an attempt to bar Peter Tatchell from a university debate: the organisers of a talk at Canterbury Christ Church University on the topic of 're-radicalising queers', received emails from the NUS's lesbian, gay, bisexual and transgender representative, refusing an invitation to speak unless Tatchell, another invitee, did not attend. She cited Tatchell's signing of an open letter in the *Observer* in 2015 in support of free speech and against the growing trend of universities to 'no-platform' certain speakers, such as Germaine Greer, claiming that the letter supported the incitement of violence against transgender people.[149] The attempt to bar Tatchell, however, eventually failed; she therefore withdrew.

Most obviously, the term covers NUS decisions, or those of individual student societies, to ban external speakers/groups from speaking at universities,[150] or to refuse to share a platform with them. Resting principally upon concerns that the speech of supporters of the far-right and certain Islamic groups create (even within existing legal constraints) a threatening milieu on campus, the NUS's 'No Platform' policy, for example, is intended to secure a 'safe environment' for NUS members, partly by reducing the potential for conflict among different student groups. This long-standing policy (operative since 1974) means that currently NUS officers will not share a platform with six groups known to hold racist or fascist views;[151] they are: Al-Muhajiroun; British National Party (BNP); English Defence League (EDL); Hizb-ut-Tahir; Muslim Public Affairs Committee (MPAC) and National Action. They are therefore barred from speaking at NUS events. Curiously, the list still includes the British National Party and the English Defence League who have largely imploded and whose former members (or some of them) now profess allegiance to National Action. Al-Muhajiroun was proscribed in 2010, National Action in 2016, so it would in any event be a criminal offence under section 12(2)(c) Terrorism Act 2000 to arrange or help to arrange a meeting allowing their members to speak. Individual decisions to ban particular individuals or groups on a list agreed by the National Conference every year are made by each student union across the country on a majority vote.[152] But individual unions can and do reject speakers on an individual basis.[153] A wide range of examples was given in the JCHR Report

[148] Eg in March 2015 Maryam Namazie, a critic of Islamism, claimed that she had to withdraw from a speaking event organised at Trinity College, Dublin after college security said that it would be 'antagonising' to Muslims and tried to place restrictions on who could attend (A. McMahon, 'Activist claims Trinity speech on apostasy and Islam cancelled' *The Irish Times*, 22 March 2015).

[149] See 'Peter Tatchell: snubbed by students for free speech stance' T McVeigh, *the Guardian* 13.2.16.

[150] For example, there were no visits by the Israeli ambassador or Israeli diplomats to SOAS between 2005-2017 after its students' union became the first in the country to support the Palestinian Boycott, Divestment and Sanctions (BDS) campaign. In 2017, however, the Israeli ambassador spoke at SOAS when the SOAS director Valerie Amos allowed the event to go ahead despite calls for a boycott from a number of student societies: see E. Heinze, 'Israel, no-platforming – and why there's no such thing as "narrow exceptions" to campus free speech' *The Conversation*, 30 April 2017.

[151] NUS' No Platform policy - key information, background and FAQs at https://www.nusconnect.org.uk/resources/nus-no-platform-policy-f22f (last accessed 25 March 2018).

[152] For example, Kent student union imposes a 'No Platform' policy barring 'any individual who is known to hold racist or fascist views from distributing any written or recorded material in the union which expresses those views…[these include] a member of racist or fascist organisations such as the BNP, Combat 18, Hizbut-Tahrir, MPAC UK, or National Front'. For an example of the application of the policy, see http://www.kentonline.co.uk/canterbury/news/haitham-al-haddad-33512/ (last accessed 15 April 2018). See further the Report 'Freedom of Expression in universities' November 2016, St George's House, with the Centre of Islamic Studies, SOAS, prepared by S Perfect, at [4.1] and [4.2].

[153] Spiked's rankings of universities in 2015 in terms of allowing free expression on campus (conducted before Part 5 had taken effect) found that it is not usually university managements that are behind censorship on campus: only 9.5 per cent were found to impose censorship. In contrast, it was found that 51 per cent of student

2018 of SUs placing barriers in the way of talks organized by student societies, especially those organized by Secular, Atheist or Humanist societies, on the basis that religious groups might be offended. Talks putting forward pro-life viewpoints, or those deemed transphobic, also attracted opposition.[154]

'Safe space' policies

'No-platforming' and 'safe space' policies are to an extent distinguishable. 'Safe space' policies for their part typically seek to insulate students from emotional harms caused by speech which might be considered offensive, to create space where students feel comfortable in expressing certain views that relate to questions of personal identity. Persons, regardless of whichever race, gender, sexual orientation, religion, they choose to identify with are thus offered a tolerant environment in which to express/explore that identity. The guarantee of tolerance means that those that might express themselves in ways that indicate a lack of respect must be excluded from the space in which these identity-privileging interactions occur. In this sense the notion of creating 'safe spaces' is broader than that of no-platforming and encompasses that concept since 'safe spaces' could be created by a range of methods, including that of no-platforming persons. They can also cover restrictions on student expression as part of an audience. For example, at Edinburgh University in 2016 a student was threatened with ejection from a meeting after she raised her hand and shook her head in disagreement with a speaker. It was said that her actions violated the 'safe space' policy which prohibited such gestures.[155]

A good example of the censoring effects of a 'safe space' policy occurred when Goldsmiths College, University of London cancelled the booking of comedian Kate Smurthwaite. The cancellation occurred when members of the feminist society organized a picket of her performance.[156] They objected to her stance on sex workers since Smurthwaite was known for her support of the Nordic regulatory approach in which male users of sex workers are criminalised rather than the sex workers themselves. To some in the feminist society at Goldsmiths, this meant that Smurthwaite was 'whorephobic', and the comedian was informed that sex workers, who were included in the safe spaces policy, *might* be hurt by what she *might* say.

A further well-known example arose when a petition, signed by over 3,000 persons,

---

unions have actively censored certain types of speech or instituted bans: https://www.telegraph.co.uk/education/universityeducation/12105101/Free-speech-rankings-over-half-of-universities-have-banned-or-censored-ideas.html (last accessed 15 April 2018). See further: I. Dunt, 'Safe space or free speech? The crisis around debate at UK universities' *the Guardian*, 6.3.15: https://www.theguardian.com/education/2015/feb/06/safe-space-or-free-speech-crisis-debate-uk-universities (last accessed 25 March 2018). See: B O'Neill 'Students are the new masters – and the result is campus tyranny', *The Spectator* 26.8.17 and, in the US context, Jose A. Cabranes, 'For Freedom of Expression, for Due Process, and for Yale: The Emerging Threat to Academic Freedom at a Great University', 35 Yale L. & Pol'y Rev. 345 (2017).

[154] See n 8, section 4, [56]-[59].

[155] The example is given by P Tatchell: 'Plans to fine universities over free speech restrictions are dangerous' 19.10.17: https://inews.co.uk/opinion/peter-tatchell-plans-fine-universities-free-speech-restrictions-dangerous/ (last accessed 15 April 2018).

[156] https://www.theguardian.com/culture/2015/feb/02/goldsmiths-comedian-kate-smurthwaite-free-speech-show-feminist-campaigners (last accessed 15 April 2018). See also eg E. Redden, '"Nietzsche Club" Banned in British University' *InsideHighered*, 6 June 2014, referring to a ban imposed at UCL after the club posted a poster stating 'Equality is a false god'; somewhat absurdly, the student union at UCL claimed that the Nieztsche Society threatened the safety of the UCL student body.

demanded that Germaine Greer be de-invited from giving a lecture at Cardiff University on women in political and social life; in the end it did not, however, prevent her from delivering her lecture. She had angered the signatories when she had previously argued that post-operative transgender males were not females. Her words were considered 'inflammatory' by protestors. The organizer of the petition said that Greer had 'demonstrated misogynistic views towards trans-women, including continually misgendering trans-women and denying the existence of transphobia altogether'.[157] It is not clear whether protestors were seeking to 'no-platform' Greer or claiming that Cardiff's Safe Spaces policy should have disbarred her from speaking. In similar vein Bristol Student Union is currently considering a motion to 'Prevent Future Trans-Exclusionary Radical Feminist (TERF) groups from holding events at the university'.[158]

The evidence from both the Smurthwaite and Greer cases demonstrates that issues relating to identity politics are being used (sometimes successfully) to close down a category of speaker against whom the most that could be said is that their words might hurt the feelings of somebody on campus.[159] To their supporters the efforts to curtail such offensive speech is part of a broader campaign to challenge the dominance of white, male heterosexual worldviews. In attempting to enforce their own view about ideal societal relations, however, they seek a closing of debates among students about such matters that is redolent of John Stuart Mill's target in *On Liberty* - the infallible censor. The threat of protests is one aspect of the self-generated possibility of campus disorder which can be exploited by student groups to persuade universities to de-invite speakers or abandon events.

An extreme version of enforcing 'safe spaces' arises when students opposed to a speaker's views seek to silence him or her during or just before a talk.[160] Examples include the following. In 2007 the Oxford Union debating society president approached Holocaust denier David Irving, BNP chairman Nick Griffin and the President of Belarussia, Alexander Lukoshenko, to speak at a forthcoming debate.[161] In the event, 50 protesters managed to break into the debating chamber, delaying the event from starting; the security operation allowed the event to proceed, but with a minimised audience. In January 2012 the Atheist, Humanist, and Secularist Society organised a talk by Anne-Marie Waters at Queen Mary College, which was abandoned after a man burst in and began filming attendees, threatening to kill them if they insulted Mohammed.[162] A recent well-known example arose when Conservative MP Jacob Rees-Mogg spoke at the University of the West of England's Politics and International Relations society; a small group of protesters suddenly appeared in the room, some disguising their faces, and a scuffle broke out.[163] Their intention was clearly to seek to stop the talk. Rees-Mogg was unhurt and the talk proceeded; nevertheless, the incident has clear implications for the maintenance of free speech on campus, especially as it

---

[157] S Morris, 'Germaine Greer gives university lecture despite campaign to silence her' *the Guardian* 8.11.15.

[158] See JCHR Report, 2018, n 8, [59].

[159] The examples offer no evidence for the alternative claim that such speakers threaten the safety of the student body, as occurred at UCL in relation to the Nietzsche group mentioned above in n 156.

[160] The Joint Committee on Human Rights (n 8) gives the example of disruption at University College London (UCL) and King's College London (KCL) in 2016 where anti-Israeli protestors disrupted events organised by the Friends of Israel societies, at [44].

[161] See M. Taylor, 'BNP leader and Holocaust denier invited to Oxford Union' *the Guardian*, 12 October 2007.

[162] See *New Humanist Magazine*, 17 January 2012, *blog.newhumanist.org.uk/2012/01/student-organised-talk-on-sharia-law-at.html,* last accessed 15 April 2018.

[163] See: *the Guardian* 3.2.18, R Mason and D Gayle; http://www.bbc.com/news/uk-england-bristol-42926535 (last accessed 15 April 2018).

could deter some politicians from accepting invitations to speak in universities.

Conclusions

Parts of the media appear to have expanded the 'no-platforming' concept to exaggerate the problem of free speech censorship by student societies or individuals within them.[164] Equally, the impact of the Charity Commission Guidance on student societies in terms of curbing free speech should not be exaggerated, since the majority of those responding to a 2018 survey for the JCHR did not consider that the censoring of such speech was a problem.[165] Nevertheless, it is fair to conclude that student 'no-platform' and 'safe space' policies have contributed significantly to a reduction in the range of viewpoints to which students are exposed. The imprecision of aspects of the Charity Commission Guidance, combined with the influence of Prevent, and the lack of a general statutory duty to uphold free speech applying *directly* to SUs and their affiliates, may have aided in creating an area of uncertainty. It appears to have been exploited by some officers of student societies, either to deny certain speakers a platform even where the Commission would be very unlikely to see their views as extremist, or to allow a platform to others whose views might readily be found to fall within that category. The Guidance may therefore have had an influence counter-productive to its expressed aims.

All these 'no-platforming' and 'safe space' policies obviously lack coercive legal force and so must be seen as localised, self-imposed restrictions of speech decided on by student majorities. In banning lawful expression, such policies make no effort to ensure content neutrality, or to abide by rule of law requirements of consistency and clarity. They therefore tend to bar varying forms of dissenting or non-mainstream speech on a highly selective basis on the ground of causing offence to some students or of undermining the creation of a safe environment. It is clear that the contradiction between the general duty of the Charity Commission to uphold free expression under section 6 HRA, and the curbs on expression apparent from its Guidance as it affects SUs, require urgent clarification as one aspect of future reforms intended to uphold free expression on campus, which may in future be prompted by the work of the Office for Students.[166]

F. Duties of universities to protect free speech and academic freedom

A range of statutory duties

Opposing the curbs discussed is a somewhat complex web of statutory duties to uphold free speech and academic freedom. The question of seeking to ensure that universities respect freedom of expression and academic freedom has been a matter of controversy for some time, given that universities are seen as places in which such freedoms are of especial significance as enabling challenge to mainstream orthodoxies. Therefore universities have attracted a uniquely high level of legislative regulation on this matter compared to other public

[164] Joint Committee on Human Rights Report 2018, n 8, [35], although as the Committee accepted, it is impossible to gauge accurately the number of events which do not happen at all on account of such policies.
[165] *Ibid*, Annex 2. But as the Committee acknowledged, the survey only covered very limited numbers of SUs.
[166] *Ibid*, [85]: the Commission has stated that it will reassess its approach. See also the comments of the Higher Education Minister on this issue, n 182.

authorities. Section 31 CTSA requires universities to have 'particular regard' to the duty to secure freedom of speech imposed by section 43(1) of the Education (No 2) Act 1986, when carrying out the Prevent duty. Section 31(2)(b) CTSA further requires institutions to have particular regard to the importance of academic freedom[167] as described in section 202(2)(a) of the Education Reform Act 1988,[168] but the section does not provide a right of academic freedom to external speakers.[169] Importantly, the section also places the same duties on the Secretary of State when issuing guidance or when giving directions to universities.

Section 43(1) emphasises the significance of free speech in universities by imposing a legal obligation on those governing them to 'take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured' to staff, students and visiting speakers; the governing body must also promulgate a Code of Practice setting out procedures relating to speaking events.[170] But the high profile of universities as creating forums for the airing of controversial views also raises the likelihood that protests will occur in respect of visiting speakers,[171] with which the institutions are ill-equipped to deal, meaning that free expression may give way,[172] taking account in particular of the public order offences discussed above. The Codes of Practice promulgated under section 43 by universities answer to various legal demands, including public order ones; they typically provide that notice must be given to designated authorities in the university by the organisers, and permission sought in respect of gatherings to be held on the premises. The university will then decide whether to impose conditions on the gathering.[173]

The 'reasonably practicable' aspect of the section 43 duty

Under section 43(4) universities are under a duty to 'take such steps as are reasonably practicable' (including where appropriate 'the initiation of disciplinary measures') to secure compliance with the section 43 duty. The courts have shown some disinclination to interfere with universities' decisions on the meaning of 'reasonably practicable' where speech is curbed as a result. In *R v University of Liverpool, ex p Caesar-Gordon*[174] the term

[167] s 43 applies to England and Wales, s31 to England, Wales and Scotland.

[168] The duty applies to England, Wales and Scotland; it means ensuring that academic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing the jobs or privileges they may have at their institutions. (The freedom does not extend to non-academic staff, students and visiting speakers.) The duty applies if they are 'qualifying institutions' – pre-1992 universities - within the meaning of s 202(3) of the 1988 Act. Post-1992 universities have adopted similar provisions in their constitutions. S36 of the Higher Education and Research Act 2017 provides a narrower duty to protect academic freedom, not expressed to be relevant to Part 5.

[169] That was confirmed in *Butt v Secretary of State for the Home Dept* [2017] EWHC 1930 (Admin), at [50].

[170] Under s 43(3). Universities UK's guidance, published in 2013, recommended that the s 43 codes of practice should set out the procedures to be followed by students, and should make non-compliance with the code a disciplinary matter as covered by s 43(4): http://www.universitiesuk.ac.uk/policy-and-analysis/Pages/universities-and-counter-terrorism.aspx, (last accessed 15 April 2018).

[171] It was confirmed that visiting speakers were covered under s 43 in *R v University of Liverpool, ex p Caesar-Gordon* [1990] 3 WLR 667. Various examples of protests having an adverse impact on speaking events are given by the Joint Committee (n 8) in 2018 at [43]-[54] and above in Part E.

[172] See, for example, L. Tickle, 'Free speech? Not at four in five UK universities' *the Guardian*, 2 February 2015; she cites the visit to speak at Essex University by Israel's deputy ambassador on 20 February 2013; it was met by noisy protests which meant that the event had to be abandoned. See also n 160 above and associated text.

[173] Such curbs are present, for example, under the Code of Practice (in [3-5]) promulgated under s 43 by the University of Cambridge.

[174] [1990] 3 WLR 667.

'reasonably practicable' under section 43 was considered in finding that HEIs could ban meetings by political groups or inflammatory speakers if there were good reasons to fear disruption on an institution's premises.

The High Court also recently declined to interfere with the University of Southampton's decision to withdraw permission for a planned conference on 'International Law and the State of Israel'.[175] Permission was withdrawn when the university conducted a risk assessment (based in part on police evidence) and concluded that the event carried a significant threat of disorder. It had received considerable correspondence from a range of pro-Israel and pro-Palestinian groups who intended to protest at or near the conference, some of which conveyed threats of violence against the university, and media interest had made it more likely that further outside groups would want to come to the university. Significantly, the university did not rule out the possibility of a similar conference occurring in the future. The Court deferred to the judgment of the university after being unable to find fault with the risk assessment. It was also found that it could take account of the terrorist attacks in Paris in 2015 and the general state of national alert, as external factors because they could have led to disorder or violence within the confines of the university.[176] This example supports the contention that the free speech duties of universities may readily be found to give way to other considerations which bear relation, not to the value of the speech in question, but to the arbitrary propensity at certain times of certain forms of controversial content to attract protests.

Student Unions and affiliates

As mentioned, section 43 does not directly cover student unions, but student organisers of speaking events must comply with the requirements of the section 43 Codes, and under section 43(8) premises they occupy are covered. Further, as the JCHR pointed out in 2018: 'given the obligation on universities to secure free speech on university and student union premises, the student union constitutive documents, Memorandum of Understanding with the University, or conditions of the student union's funding grant from their University, will often require the union to comply with the university's free speech duty'.[177] The JCHR was not, it appears, referring to section 6 HRA and Articles 10 and 11 ECHR, as well as section 43, but the same point would clearly apply. In other words, universities' free speech duties extend *indirectly* to Student Unions and their affiliated societies. The section 6 HRA duty also extends to the Charity Commission itself since it is a public authority,[178] but, as pointed out above, the Commission's binding Guidance is in tension with those duties in so far as they apply to SUs, and the Guidance does not expressly impose obligations to protect free speech on SUs.

Conflicting wording of statutory duties

The University Prevent Guidance fleshes out the obligation to balance the Prevent duty with universities' obligations to ensure freedom of speech and academic freedom,[179] but does not

[175] *R (on the application of Ben-Dor and ors) v University of Southampton* [2016] EWHC 953 (Admin).
[176] *Ibid*, at [76].
[177] n 8, [25].
[178] See n 144.
[179] n 104. Universities are also advised to refer to the Universities UK's guidance published in 2013: http://www.universitiesuk.ac.uk/policy-and-analysis/Pages/universities-and-counter-terrorism.aspx. It includes

address the difference between paying 'particular regard' to free expression under section 31, and 'having due regard' under section 26. The contrasting terms were taken in *Butt* to mean that the former duty had been accorded a greater emphasis.[180] Clearly, the section 31 duty also overlaps with positive and negative duties[181] already arising under Articles 10,11 and 9 ECHR protecting freedom of expression, assembly, conscience and religion, applicable to public authorities under section 6 Human Rights Act, which obviously includes public universities (as having a public function), but not student unions or societies, although they are indirectly affected, as discussed below. Articles 10 and 11, as interpreted at Strasbourg, not only apply in the university context, but can also influence the interpretation and application of section 31 CTSA, section 43 of the 1986 Act, and section 202 of the 1988 Act.[182]

The Prevent duty and Guidance appears to present universities with a conflict in respect of their duties to uphold free speech that is left unresolved. But after *Butt* parts of the Guidance may be disapplied on the basis that they do not conform to the law. Moreover, *Butt* signals that the respective section 6 HRA and section 31 duties to protect freedom of expression carry greater weight than the safeguarding duty under section 26 of the 2015 Act. The phrasing of section 6(1) – 'it is unlawful for a public authority to act in a way which is incompatible with a Convention right' - would even more clearly trump the section 26 duty of having 'due regard' to the risk of drawing persons into terrorism, than would the duty as expressed under section 31. This appears to open the possibility of emasculating the latter duty and of leaving universities with little guidance as to putting it into practice, a conclusion that strongly supports the case for a review of Part 5 as well as of this Guidance.[183]

Conclusions

This web of statutory duties, applying indirectly to student societies, appears to point away from the curbs on speech on campus discussed. But, as discussed in Part B, provisions in certain section 43 Codes appear more likely, as pointed out in 2018 by the JCHR, to inhibit free expression on campus than to promote it.[184] Under the remit of the OfS to protect free speech on campus[185] universities will be required to include provisions and practices to

---

guidance on visiting speakers: http://www.universitiesuk.ac.uk/policy-and-analysis/reports/Pages/external-speakers-in-higher-education-institutions.aspx. (all last accessed 15 April 2018).

[180] *Butt v Secretary of State for the Home Dept* [2017] EWHC 1930 (Admin) [62].

[181] So a university has a duty to ensure that speakers attending an event organised by, for example, the atheist or Jewish societies are not prevented from speaking due to intimidation by students espousing conflicting religious views. The duty could apply, for example, in the following situation: 'Muslim Students from Goldsmith's University Islamic Society "heckle and aggressively interrupt" Maryam Namazie talk' *Independent Online,* 4.12.15, at http://www.independent.co.uk/student/news/muslim-students-from-goldsmiths-university-s-islamic-society-heckle-and-aggressively-interrupt-a6760306.html (last accessed 15 April 2018).

[182] Under the Human Rights Act, ss 2, 3 and 6. The Charter of Fundamental Rights of the European Union uses similar wording in requiring member states to uphold the rights of citizens to freedom of expression and information (Article 11), freedom of assembly and association (Article 12), and freedom of thought, conscience and religion (Article 10). For criticism of this over-complex scheme see 'Universities' Minister: one set of guidelines on free speech needed' R Adams *the Guardian* 3.5.18.

[183] As recently called for by the Joint Committee on Human Rights in 2016 (n 47, [42]) and 2018 (n 8, Conclusions, [8]), and by the former Independent Reviewer of Terrorism Legislation (Supplementary written evidence submitted by David Anderson QC, [then] Independent Reviewer of Terrorism Legislation, to the Home Affairs Select Committee inquiry into Countering Extremism, 29 January 2016).

[184] See n 8, [87].

[185] See n 9 and n 10. The JCHR Report 2018 (n 8) welcomed 'the OfS' strong support of free speech'

protect freedom of speech in their constitutional documents as well as in the section 43 Codes,[186] but it remains to be seen whether that will clarify the position as to free speech duties. The current on-campus conflict between restricting and protecting free speech may be exacerbated in future if on the one hand further measures to counter extremism are taken due to policy suggestions from the new Commission for Countering Extremism, but on the other the duties of universities to protect free speech are strengthened under the OfS. But in order to come to some conclusions as to the instances in universities in which the demands of free speech duties could be found to outweigh the demands created by the curbs discussed, a close examination of the extent to which free speech norms apply to the types of expression that could be constrained follows.

G. Implications of the various curbs on campus expression for free speech norms

The various duties to protect free speech on campus considered clearly rely on identifying its demands in this context. So the discussion now turns to considering free speech values and their reflection in relevant jurisprudence to consider whether or how far the various curbs on expression considered, flowing from statutory duties, Guidance, codes of practice, and student policies, violate free speech norms in the campus context. Since such curbs, including implementation of the section 26 duty, often rely on making a judgment about a speaker in advance without necessarily seeing a text of the speech, the discussion below largely covers the anticipated 'extremist' content of speeches on campus. The term 'far-right' will be used below for brevity to denote speakers from or associated with groups supportive of discrimination against protected groups, including of minority groups within minorities. Speakers supportive of ideas associated with groups such as National Action or ISIS tend, from the standpoint of defending particular mono-cultures from external influences, to express similar anti-democratic, homophobic, sexist, anti-semitic,[187] racially or religiously intolerant sentiments. But speakers from the secular far-right are unlikely to be invited to universities, so section 26, and the other curbs, while potentially applicable to them, are usually not relevant in practice. A number of the examples below therefore relate to 'far-right' speakers at ISOC events due to the nature of student no-platforming policies (although such policies do also apply to certain Islamic groups deemed far-right as racist by the NUS).[188]

The extent of the protection for speech maintained under Article 10 ECHR can clearly be criticized, but that standard is obviously the one universities are legally bound to adhere to under section 6 HRA, and the one that is influential under the other free speech duties. As is well established, the term 'expression' in Article 10 ECHR covers all sorts of expression,

---

(Summary).

[186] See Department for Education, Securing student success: risk based regulation for teaching excellence, social mobility and informed choice in higher education, Government consultation on behalf of the Office for Students – Guidance on registration conditions, 19 October 2017, p 44.

[187] See H Sherwood, *the Guardian* 11.4.18: 'Feelings of insecurity are widespread among European Jews as a result of the resurgence of the extreme right, a heated anti-Zionist discourse on the left and radical Islam, according to a global study of antisemitism'. Universities were one of the sectors mentioned in the Report. The article refers to a publication entitled *Annual Report on Antisemitism Worldwide* 2017, produced by the Kantor Center at Tel Aviv University.

[188] See n 151.

including shocking or controversial material,[189] the spoken or written word, and all forms of media, including web-sites or images.[190] But it is axiomatic that all expression is not equally valued at Strasbourg, or domestically, meaning that some speech fails to engage Article 10 at all, or creates only a light engagement. Depending on its content, speech is often valued instrumentally — usually for the benefits it brings to democratic participation, the search for truth, and self-development.[191] It is argued below that reference to such values does not invariably provide a strong defence of some forms of campus-related speech that might be caught by the curbs considered.

Anti-democratic expression

The argument from participation in a democracy is well established as the most significant of these speech theories[192] on the basis that citizens cannot participate fully in a democracy unless they have a reasonable understanding of political issues;[193] therefore, open debate on such matters is essential.[194] The term 'democracy', or the furtherance of democracy, has not been narrowly defined, especially at Strasbourg, to include only according value to allowing criticisms of the decisions of the particular government in power, or of politicians or policies in general. It has also been found to relate to expression linked to the protection for minorities and fundamental freedoms more generally,[195] as related to values implicit in any mature conception of a democracy. Racist attacks or attacks on particular religious groups by members of far-right secular or faith-based groups could nevertheless count as forms of political speech (understood as speech on matters which citizens *qua* citizens ought to be interested in),[196] even though such claims challenge other substantive norms such as the equal worth of all citizens. Further, speech from such individuals, which avoids incitement to

[189] See *Handyside v UK* (1979-80) 1 EHRR 737; *VBK v Austria* (2008) 47 EHRR 5. But limits are recognized where *inter alia* speech is deemed abusive: see eg: *Gough v DPP* [2013] EWHC 3267 (Admin) in which public nudity as a form of expression was found to be 'threatening, abusive, insulting or disorderly' under section 5 POA in the context of Article 10 ECHR, and the interference was found to be justified (confirmed in *Gough v UK* (2014) ECHR 1156); *Abdul and others v DPP* [2011] EWHC 247 in which it was found that shouted abuse at a military homecoming parade in Luton crossed the threshold of legitimate protest and so fell outside the protection of Article 10. See also the examples concerning attacks on minorities: text to n 224 and n 228, below.

[190] See *Delfi AS v Estonia* (2016) 62 EHRR 6, at [127]; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary*, App no 22947/13, judgment of 2 February 2016.

[191] See further T. Campbell and W. Sadurski, *Freedom of Communication* (Aldershot, Hants, 1994), the respective chapters by F. Schauer, T. Campbell and E. Barendt; I. Loveland, (ed), *Importing the First Amendment, Freedom of Expression in Britain, Europe and the USA* (Oxford: Hart Publishing, 1998), chapters by I. Loveland and J. Laws. See more generally H. Fenwick and G. Phillipson, *Media Freedom under the Human Rights Act* (Oxford: OUP, 2006) chapter 1 for an account of how free speech rationales and countervailing values play out under the ECHR.

[192] It is described by Barendt as 'probably the most attractive of the free speech theories in modern Western democracies' and viewed as 'the most influential theory in the development of 20th century free speech law' E. Barendt, *Freedom of Speech*, (Oxford: Clarendon Press, 1987), 20 and 23 respectively. See also A. Meiklejohn, 'The First Amendment is an absolute' (1961) Sup Ct Rev 245.

[193] See *Derbyshire v Times Newspapers* [1993] 2 WLR 449.

[194] See *Lingens v Austria* (1986) 8 EHRR 407, [41] and [42]. See further K. Greenawalt, 'Free speech justifications' (1989) 89 Colum L Rev 119, 143. See also V. Blasi, 'The checking value in First Amendment theory' (1977) Am B Found Res J 521.

[195] See R. Dworkin, *A Bill of Rights for Britain: why British liberty needs protection* (Chatto & Windus, 1990); the view also clearly underpins his general political philosophy, see eg, 'Liberalism' in *A Matter of Principle*, 1985. See also H.L.A. Hart, *Law, Liberty and Morality* (Stanford University Press, 1963) and A. Lester, *Democracy and Individual Rights* (London: Fabian Society, 1969); D. McGoldrick and K. O'Donnell, 'Hate Speech Laws: Consistency with National and International Human Rights Law' (1997) 18 LS 453.

[196] See on this point *Giniewski v France* (2007) 45 EHRR 23.

violence, but attacks democracy, could be accorded weight on grounds of contributing to debate.[197]

It is, however, significant in this context that this argument sees speech as a public interest and as justified instrumentally by reference to its beneficial effects on democracy, rather than seeing it as an individual right of inherent value. It therefore renders speech vulnerable to arguments that it should be overridden by competing public interests claimed to be reflected in the duty, which could be deemed also to be essential to the maintenance of democracy.[198] A judge who sees the value of free speech only in terms of its contribution to the political process could readily approve an argument that allowing the speech in question will do more harm than good to the maintenance of democracy, given that some expression, whether from far-right secular groups or speakers inspired by ISIS or similar groups, has counter-democratic aims. In *Brind*[199] it was found that preventing IRA-supporting politicians from speaking directly on air by using actors to dub their voices did not violate free speech principles because the content of the speech was not affected, merely the manner of its delivery. But a more general argument for disallowing air-time entirely to such politicians, stifling their ability to use a very significant medium to promulgate their message, would have failed under the application of this justification, since the IRA was not attacking democracy *per se*.

In contrast, it may be argued that some speech of far-right secular or faith-based groups, aimed at attacking democracy or democratic values, fails to engage this instrumental justification.[200] Speakers in universities advocating anti-democratic positions, such as that Islam is incompatible with democracy, or that Muslims should not vote since candidates are usually unbelievers,[201] could be defended in stable democracies such as the UK, as Heinze has argued,[202] in principle, as the communication of a minority opinion (and thus as a

---

[197] See eg *Gunduz v Turkey* (2005) 41 EHRR 5. During a televised debate Gunduz spoke very critically of democracy, describing contemporary secular institutions as 'impious', fiercely criticising secular and democratic principles. He was convicted of openly inciting the population to hatred and hostility on the basis of a distinction founded on membership of a religion or denomination. The Court found a violation of Article 10, noting in particular that the applicant had been taking an active part in a pluralist debate seeking to present the sect and its unorthodox views, including the notion that democratic values were incompatible with its conception of Islam, a topic which had been the subject of widespread debate in the Turkish media, of general interest. The Court considered that the applicant's remarks could not be regarded as a call to violence or as hate speech based on religious intolerance.

[198] See thus Margaret Thatcher's well-known justification for the media ban challenged unsuccessfully in the *Brind* case: *R v Secretary of State for the Home Department, ex p Brind* [1991] 2 WLR 588: 'We do sometimes have to sacrifice a little of the freedom we cherish in order to defend ourselves from those whose aim is to destroy that freedom altogether'.

[199] *Ibid*.

[200] See I. Hare and J. Weinstein, *Extreme Speech and Democracy* (OUP, 2009), especially chapters 5, 7, 8, 10, 14, 15, 16. See also E. Heinze, 'Hate Speech and the Normative Foundations of Democracy' (2013) 9(4) Int JLC 590; the article is an extended review essay of M. Herz & P. Molnar (eds), *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (CUP, 2012) and J. Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012).

[201] Eg Haitham al-Haddad (who has recently spoken on campuses, see n 43) reportedly takes the stance that democracy is 'filthy': see A Gilligan 'The baroness, Islamic extremists and a question of free speech' *the Telegraph* 22.3.15. Abdur Raheem Green was invited by UCL ISOC to speak on 23.11.05, 4.10.06, 22.1.09. He has argued that 'Islam is not compatible with democracy': see 'UK to shift anti-terror strategy', BBC News, 16.2.09. He was also invited to speak at a SOAS University event on 14.2.14: https://www.standard.co.uk/news/london/anger-as-preacher-who-supports-fgm-speaks-at-soas-campus-debate-9137997.html.

[202] E. Heinze, 'Viewpoint Absolutism and Hate Speech' (2006) 69 MLR 543-82.

contribution to self-government) where it does not carry an actual or implicit threat of violence against others.[203] Salafism/Wahabism, for example, is openly anti-democratic; the doctrine, which is linked to ISIS and similar groups, such as Al-Shabaab, could be viewed as defined by its anti-democratic stance, and its adherents, which have included certain speakers in universities, have sought to dissuade Muslims from voting in elections.[204] Speech even of such anti-democratic speakers could have some value as providing a contribution to pluralist debate, but Salafist/Wahabist preachers in universities have reportedly at times spoken unchallenged, without fostering, or participating in, any debate.[205] It can be concluded that this speech rationale would provide little support for speech on campus advocating the anti-democratic positions considered if in the circumstances debate and challenges to it were improbable.

At first glance the work of Robert Post, in particular, would not support that conclusion; starting from a definition of democracy as active and mediated self-rule by citizens, his view is that, for citizens to experience government as their own government, each person must 'have the warranted conviction that they are engaged in the process of governing themselves.'[206] A vital component of this conviction is the perception that the state is responsive to the values of each citizen and that each individual has the potential to influence the outcome of public discourse through her ideas and arguments. The individualistic basis of public discourse through which each person participates in collective self-determination dictates that the freedom of speakers must trump the claims from groups whose feelings are 'injured' by speech. Where, conversely, expression cedes way to the feelings of others, there is a significant loss to the democratic legitimacy of decision-making. On Post's view, each individual is required to demonstrate a degree of fortitude and self-confidence in order to enter the arena of public discourse unaided by the state. Otherwise, as Post observes, in large heterogeneous countries 'populated by assertive and conflicting groups, the logic of circumscribing political discourse to reduce political estrangement is virtually

[203] See, for example, *Gunduz v Turkey* (2005) 41 EHRR 5; a speaker, self-identified as a hard-line Islamist was sentenced to four years' imprisonment for incitement to commit an offence, and challenged the decision under Article 10 at Strasbourg. Turkey cited the following comments by the applicant that had appeared in the report: 'These people [moderate Islamic intellectuals] have no strength left ... Now they have come up with IN [an Islamic intellectual known for his moderate views]...All that is needed now is for one brave man among the Muslims to plant a dagger in their soft underbelly'. The Court, in declaring the application inadmissible, since the conviction and sentence was found to be justified under Article 10(2), found that 'statements which may be held to amount to hate speech or to glorification of or incitement to violence, such as those made in the instant case, cannot be regarded as compatible with the notion of tolerance and run counter to the fundamental values of justice and peace set forth in the Preamble to the Convention'.

[204] See http://henryjacksonsociety.org/wp-content/uploads/2017/09/Extreme-Speakers-and-Events-in-the-2016-17-Academic-Year-Final.pdf. and n 152. For reported examples of this stance outside the campus context, see eg 'Allah flyers put up in Cardiff tell Muslims not to vote' *BBC News*, 17 April 2015, at http://www.bbc.co.uk/news/uk-wales-south-east-wales-32352674 (both last accessed 15 April 2018). See also 'Leaflets urging Muslims not to vote issued in Tower Hamlets' on the basis that so doing is 'shirk' (polytheism), B. Gault, *The New Statesman*, 15 June 2015. One justification for this instruction is given, for example, in the blog of I. Nazar Hussein, http://www.imranhosein.org/: 'the outstanding Pakistani Islamic scholar, Dr Israr Ahmad, has categorically declared that it is Haram [forbidden] for a Muslim to participate in the electoral politics of the modern secular state'. He also asks: 'can a believer vote for an idol-worshipping Hindu, or for an enemy of Islam…a moneylender, who owns shares in a bank or is a bank director etc.? Can he vote for a political party that supports the legalization of the lending of money on interest, lottery, homosexuality and abortion? and finds that to do so would also be Haram'.

[205] See http://henryjacksonsociety.org/wp-content/uploads/2017/09/Extreme-Speakers-and-Events-in-the-2016-17-Academic-Year-Final.pdf (last accessed 15 April 2018), at p 4.

[206] R. Post, 'Democracy and Equality' (2006) 603(1) The Annals Am Acad Pol & Soc Sci 24.

unstoppable.'[207] Clearly, this stance would oppose not only the thinking behind sections 26-29 CTSA, but also, much more strongly, no-platforming or safe space policies of student unions or societies. But how far this stance — adopted in relation to citizens entering discourse arenas they are also free to withdraw from — applies to some minority groups on campus in the face of speech directly attacking them *without* the possibility of challenge is, however, debatable, a point also pursued below.

Speech that is (potentially) antithetical to the pursuit of truth

The placing of value on free speech on the Millian basis of the pursuit of truth,[208] might appear to apply particularly to the ability of those within universities as centres for debate of diverse viewpoints to engage in uninhibited, reasoned, sceptical challenges to a range of established ideas. Audience interests in the pursuit of truth are also relevant. Even where a speaker at a University event asserts dogmatically that, for example, apostates should be killed, and is unwilling to engage with questions putting an opposing view from the audience, that very failure to engage may nonetheless enable some audience members to evaluate the speaker's claims in a way that would not have arisen had the speaker been prevented from coming onto campus in the first place. To find otherwise might in some instances enable subjective notions of offence to play a determinative role in setting the boundaries of speech.[209] Mill considered that there was value both to the individual and to society if some are caused moral distress when their deeply cherished beliefs are attacked by another.[210] The individual, he considered, could benefit morally and intellectually from participation in such a confrontation, whilst societal progress in moral matters could also occur. In a finding obviously antithetical to the student policies considered here, Mill even went so far as to suggest that where no spontaneous dissent exists, it might have to be manufactured for the benefits described above to accrue.[211]

Where, however, the organisers of campus speaking events impliedly or expressly prevent questioning of speakers, they could be said to frustrate the purpose of a meeting held on campus. There are also practical issues as to safeguarding audience members seeking to pose questions espousing views contrary to those of the speaker. As the Joint Committee on Human Rights has pointed out, it is 'also important for universities to ensure that such a debate is possible and that students are not too intimidated to challenge visiting speakers on their views'.[212] Such safeguarding of audience interests in evaluating far-right secular or faith-based claims might justifiably entail reliance on material already available in digital and print format without the need for a direct face-to-face encounter.

Further, it is arguable that this justification has no ready application to speech that presumes that the truth has already been discovered and is opposed to an open search for the truth or to

---

[207] R. Post, 'Racist Speech, Democracy, and the First Amendment' (1991) 32 Wm & Mary L Rev 267, 316.

[208] See J.S. Mill, 'On Liberty' in M. Cowling (ed), *Selected Writings of John Stuart Mill* (Everyman, 1972).

[209] See Harlan J in *Cohen v California* 403 US 15, 26 (1971): 'we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views.'

[210] J.S. Mill, 'On Liberty' in *Three Essays: On Liberty, Representative Government, the Subjection of Women* (OUP, 1912), 56-57; see also I Cram, 'The Danish Cartoons, Offensive Expression and Democratic Legitimacy' in (eds. I Hare and J Weinstein) *Extreme Speech and Democracy* (OUP, 2009) at 311-329.

[211] *Ibid*, 55.

[212] n 8, [60].

an exploration of varying truths, as may be said of speakers in the tradition of ultra-orthodox Judaism or Wahabism.[213] As Fenwick and Phillipson have pointed out, this argument rests on a proposition about a causal relationship between two phenomena — discussion and truth — which of course has never been conclusively verified.[214] But the underlying assumption, if it is accepted, that more free speech will tend to lead to more truth,[215] is opposed by the denigration of racial groups, including faith groups (and of moderate minorities or opposing sects within faith groups), by the far-right, since it could lead to the creation of false and damaging images of such groups. The assumption therefore that truth is most likely to emerge from free and uninhibited discussion and debate, has, it might appear, only a weak application to some speech from the secular and faith-based far-right. In the context therefore of a collision between free speech and denigration of minority groups, there may be thought to be little intrinsic value in hearing directly from a preacher on campus, *if* speaking unchallenged, that Shia Muslims are the enemy of the Muslim community.

The self-fulfillment justification for speech promulgating damaging images of minorities

There are also difficulties in defending, for example, Wahabist expression on the separate justificatory basis that it facilitates individual self-fulfillment. Speech can be justified as fostering human self-development and growth, including intellectual development aided by access to information, ideas and free debate with others.[216] But some speech on campus runs counter to the outcome - intellectual development - which promoting freedom of expression and academic freedom on campus is designed to ensure. For example, the ideology of Wahabi preachers/lecturers finds that women are subordinate to men and that 'unbelievers' include not only all non-Muslims, but also Shia and Sufi Muslims,[217] as well as Sunni Muslims who do not accept Wahabi doctrine. On that Wahabist view all such groups should not be accepted as Muslims or tolerated by Muslim communities,[218] while Westerners should be entirely shunned. 'Dehumanisation of the enemy' thus features in some Wahabi discourse, and could also correlate with lowering inhibitions to engagement in terrorist activity.[219] The argument from self-development struggles to justify the protection of material which is demeaning to girls/women, to a range of minorities and to minority groups within

[213] Cf reformist Muslims such as I. Manji who writes: 'The question is simple: can Islam be reconciled with free expression? The answer is yes. The Qur'an points out that there will always be nonbelievers and that it is for God, not for Muslims, to deal with them: 'The truth is from your Lord, so whoever wills — let him believe; and whoever wills — let him disbelieve.' (18:29). Moreover, the Qur'an states that there should 'no compulsion in religion (2:256)' *The Spectator*, 29 March 2014.

[214] See discussion in *Media Freedom under the Human Rights Act* (Oxford: OUP, 2006) at 170 *et seq*.

[215] Cf P. Wragg's argument in 'Mill's dead dogma: The Value of Truth to Free Speech jurisprudence' (2013) PL 363, esp 381-382.

[216] See T. Emerson, *The System of Freedom of Expression* (Vintage Books, 1971), 6.

[217] Abd al-Wahhab, the founder of Wahabism, listed apostates meriting death; they included the Shiite, Sufis and other Muslim denominations, whom he did not consider to be Muslims (H. Ahmed and H. Stuart, 'Hizb Ut-Tahrir: Ideology and Strategy' The Henry Jackson Society, Nov 2009).

[218] Eg in February 2013 Greenwich University Islamic society invited Dr Khalid Fikry to speak at its annual dinner. He has given speeches (in particular a lecture, 'The Agenda of the Shia', uploaded to Youtube (Salafimedia.com) in 2013) in which he suggests that Shia Muslims believe 'raping a Sunni woman is a matter that pleases Allah'; he has stated that 'Shia are one of the worst and greatest enemies of our Ummah (community) nowadays': S. Swinford, Z. Flood and T. Whitehead, *The Daily Telegraph*, 26.5.13.

[219] See The Henry Jackson Society, *Islamic Terrorism: Analysis of Offences and Attacks in the UK* (2017), at http://henryjacksonsociety.org/2017/03/05/islamist-terrorism-analysis-of-offences-and-attacks-in-the-uk-1998-2015/, 19 (last accessed 15 April, 2018).

minorities.[220]

The position might differ if those holding an opposing view, including female students, were at all times able to speak and challenge such speakers. However, reportedly, women tend impliedly or expressly to be discouraged from participating in campus speaking events (especially to challenge the speaker) run by Salafist/Wahabi-dominated ISOCs[221] to further that agenda. That is on the basis that the Wahabi preacher (invariably male) may have discretion over who is allowed to speak and also deemed to have greater authority, both as a man and a cleric than female students.[222] If such a speaker was de-invited from a campus speaking event a potential infringement of Article 10 could be justified under paragraph 2 on the basis that the expression in question would be likely to interfere with the expression rights of others[223] and to foster discrimination on grounds of gender.

The Strasbourg Court has not found that interference with speech that is merely offensive to minority groups can be justified under Article 10, if it qualifies as political expression, as in the case of speech from the far-right, whether from secular or faith-based speakers. So a student policy barring, for example, certain feminist speakers as transphobic or whorephobic on grounds of causing offence would not be justified. But, taking account of Article 9, the Court has created a concerning category of gratuitously offensive expression aimed at religious groups, susceptible to a fairly ready justification.[224] That category would cover, for example, speech attacking Muslims or Jews from far-right speakers, or aimed at one sect of a religion by an opposing sect, but it would not cover barring secular speakers from campus speaking events by student societies merely on the basis that their *presence* might offend religious groups.

The role of Article 17 ECHR[225] should also be accounted for since it is of significance in relation to expression attacking minorities; the Article disallows Convention protection to

---

[220] See the Casey Review: 'A review into opportunity and integration' (2016) which found 'A similar picture is seen for lesbian, gay and bisexual groups – who suffer discrimination in mainstream society, but are affected twice over when they also belong to a community that can be culturally intolerant of non-heterosexual identification':
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/575973/The_Casey_Review_Report.pdf, (last accessed 15 April, 2018) at [1.58]. That comment could be applied to the effect of far-right faith-based speakers on some campuses. Eg an Islamic preacher, Haitham al-Haddad, accused of promoting homophobic views, was barred from speaking at the University of Kent in 2015: Kentonline, 17 March 2015: http://www.kentonline.co.uk/canterbury/news/haitham-al-haddad-33512/, last accessed 15 April 2018.

[221] Examples of such ISOCs have reportedly included: Greenwich University Islamic society (see A. Gilligan, 'Lee Rigby memorial, "All I want to know is that my son will not be forgotten"' *The Telegraph* 17 May 2014); Queen Mary Islamic Society, which was suspended in 2015 and has been accused of hosting a number of extremist speakers (B. Quinn, 'University Islamic society suspended over "protocol breach" claims' *the Guardian*, 10 December 2015; Student Rights, in a Report *Preventing Prevent? Challenges to Counter-Radicalisation Policy on Campus*, found in 2015 that Queen Mary had hosted the highest number of 'extremist' speaking events); Westminster University ISOC (see C. Galpin, J. Wareham and P. Walker, 'Westminster University Islamic students' society dominated by ultra-conservative Muslims' *the Guardian*, 20 September 2015; a Report commissioned by the University into the ISOC found that University officials tacitly tolerated, for fear of appearing Islamophobic, a 'sometimes hostile or intimidatory' attitude to women on the campus).

[222] See n 50.

[223] See text to n 49.

[224] See *I.A. v Turkey* (2007) 45 EHRR 30, esp at [41].

[225] Article 17 provides: 'Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction on any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.'

groups or individuals seeking destruction of the ECHR principle of according equal dignity to all. Article 17 reflects an acceptance of limitations on speech where its impact undermines the consequentialist justifications for its own protection, and some of the viewpoints under discussion, potentially curbed on campus, could fall within it. This approach, setting limits on the protection provided by Article 10, differs from the limits provided for under Article 10(2); it is adopted where the speech in question could qualify as hate speech, and therefore restrictions on it would usually be justified under paragraph 2, but if it is deemed also to be apt to destroy the fundamental values of the Convention[226] the tests of necessity and proportionality may not be applied as rigorously. This jurisprudence is open to attack as allowing political expression to be abrogated too readily, but its application is arguably more defensible in the campus context due to the greater propensity of such speech to create intimidation or the risk of radicalization in that restricted environment,[227] an environment within which specific duties of ensuring non-discrimination must be discharged.

The Article has not so far been deployed in relation to speech attacking women or minority groups in general, such as LGBT individuals, but in a number of decisions the Strasbourg Court has refused to offer protection to speech attacking racial or religious groups,[228] relying on Article 17. It has found: '[T]olerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society…so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance…provided that any [restrictions]…imposed are proportionate to the legitimate aim pursued.'[229] In *Norwood v UK,*[230] for example, a BNP poster attacking Islam, and linking the religion as a whole with 9/11, was not found to be covered by Article 10(1) since Article 17 was found to apply: the interference with the expression in question did not need to be justified due to the nature of the speech; it failed to receive even very light protection.[231] In *DPP v Collins*,[232] concerning racist speech, Lord Bingham found that effect must be given to Article 17 in finding that interfering with such speech by criminalising it was justified. Similarly, speech attacking non-Muslims has been found to fall outside Article 10 protection.[233]

Article 17 might therefore be relied on to justify a withdrawal by a student society, or under Part 5, of invitations to speak from speakers intending to attack Islam or, alternatively, non-

---

[226] See European Court of Human Rights, 'Hate Speech', November 2015. The role of Article 17 in a 'militant' defence of democracy is discussed by P Harvey, 'Militant democracy and the European Court of Human Rights' [2004] *Eur L Rev* 407.

[227] See R. Ali, 'Don't deny campus radicalisation' *the Guardian*, 6.12.08.

[228] See ECommHR, *Otto E.F.A. Remer v Germany*, App No 25096/94, judgment of 6 September 1995; *Witzsch v Germany*, App No 41448/98, judgment of 20 April 1999; *Garaudy v France*, App No 65831/01, judgment of 24 June 2003. In *Pavel Ivanov v Russia* App No 35222/04, judgment of 20 February 2007 a speaker who had attacked Jews was found to be unable to rely on Article 10 since he fell within Article 17 – at [1]. In *M'Bala M'Bala v France* App No 25239/13, judgment of 10 November 2015, the Court found that a French comedian's show was a demonstration of hatred, anti-Semitism and support for Holocaust denial. The Court considered that even if the performance was meant to be satirical it did not fall within the protection of Article 10, under Article 17 – at [39].

[229] *Erbakan v Turkey*, App 59405/00, judgment of 6 July 2006, [56].

[230] App No 23131/03, judgment of 16 Nov 2003.

[231] Similarly, it was indicated in *Jersild v Denmark* (1995) 19 EHRR 1 that *directly* racist speech in a broadcast would be virtually or entirely outside Article 10's protection.

[232] [2006] 1 WLR 2223.

[233] *Belkacem v Belgium* Application no. 34367/14, judgment of 27 June 2017.

Muslims. So doing would also cohere with a university's equality duty and probably with its section 43 Code. The potential of the Article to exclude certain viewpoints from the public domain is, however, a matter of concern since so doing could deny non-mainstream speakers a chance to participate in and shape public discourse, while possibly leaving open space for more hidden, divisive and insidious narratives from far-right faith-based or secular groups. Where no immediate threat is posed to societal institutions or public peace, the Court's reliance on Article 17 to refuse to scrutinize national authorities' restrictions closely has lent itself to a restrictive stance. The Article 17 jurisprudence appeared to play a part in the view taken by the government that the infringement of freedom of expression created by the Part 5 provisions in universities could be viewed as justified.[234]

The Strasbourg stance discussed, however, including the approach taken to Article 17, finds some justification in respect of the self-fulfillment rationale, as well as the promotion of equality on campus. A far-right secular or faith-based speaker/preacher may be unable to develop to his full intellectual and moral potential unless he is free to communicate his views and ideas to others.[235] However, if Speaker A's freedom of expression by its very utterance hinders the intellectual and moral development of student B, and seeks to silence her or exclude her from public life,[236] it is by no means clear on self-fulfillment grounds why Speaker A's communicative freedoms should trump student B's interests in being shielded from Speaker A's message, bearing the campus context in mind. Therefore, where it seems that allowing free expression of the particular viewpoint, would be likely (where robust debate and counter-arguments are not allowed or impliedly discouraged) to retard or hinder the growth of others in the campus setting, the justification does not offer a strong defence of speech.[237] As Barendt has argued, justifications for suppressing some forms of speech can be advanced on the basis that human dignity (the value promoted by allowing self-development) would thereby receive protection.[238]

H. Taking account of free speech values in practice in universities in

[234] As indicated in the s 19 HRA statement of compatibility and the ECHR memo accompanying the 2015 Act (Bills (14-15) 059).

[235] E. Barendt, *Freedom of Speech* (OUP, 1987), 15.

[236] See A. Hirsi Ali: 'Fundamentalist terror…is not a legitimate response that can be supported by the progressive forces of the world. Its main target is the internal democratic opposition to [its] theocratic project…of controlling all aspects of society in the name of religion…When fundamentalists come to power, they silence people; they physically eliminate dissidents and they lock women "in their place," which, as we know from experience, ends up being a strait jacket' – a statement from a representative of the organization 'Women Living under Muslim Laws' (WLUML), at the 2005 World Social Forum in Porto Alegre: quoted in M. Tax, *Double Bind: The Muslim Right, the Anglo-American Left, and Universal Human Rights* (New York: Center for Secular Space, 2012), 82.

[237] See *Zengin v Turkey* (2008) 46 EHRR 44, in which it was found that extremist expression would only lightly engage Article 10 in an educational setting [47]-[48] because it is opposed to promoting pluralism. See also n 221.

[238] In *Freedom of Speech* (1987), 16-17. He cites the finding of the German Constitutional Court that there was no right to publish a novel defaming a dead person as such publication might violate the 'dignity of man' guaranteed by Article 1 of the German Basic Law (*Mephisto* (1971) BVerfGE 173). A similar argument has been used by some feminist commentators to justify the censorship of pornography. Thus, MacKinnon asserts that far from aiding in the growth of anyone, 'Pornography strips and devastates women of credibility': C. MacKinnon, *Feminism Unmodified* (Harvard University Press, 1987), 193. The Strasbourg Court has found: '…tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance…' (*Erbakan v Turkey*, App No 59405/00, judgment of 6 July 2006, [56]).

relation to Prevent or Charity Commission Guidance

The argument that some anticipated speech of visiting speakers on-campus can have an impact that runs counter to promoting consequentialist free speech values should influence the procedure adopted in response, either by the university authorities under Prevent or by SUs following Charity Commission Guidance on extremism. But, clearly, it is not inevitably the case that such speech, whether from the secular or faith-based far-right, could be deemed to contribute to radicalization of students, or to create a risk of drawing them towards terrorist activity. The Prevent duty also covers, under the Guidance, speech expressing views 'shared by terrorist groups', meaning that Charity Commission Guidance would cover such speech as well. Speech, for example, attacking homosexuality might be viewed as of low quality in terms of the speech justifications discussed, but its propensity to draw students towards terrorism might be doubted. Such attacks constitute the expression of views also shared by certain terrorist groups, including National Action[239] and ISIS, but, if expressing non-violent extremism, would, following *Butt*, only be covered by section 26 if it had the ability to contribute to drawing students towards terrorism. The expression of hatred towards certain faith groups could perhaps more readily fall within either the 'shared views' or 'risk of drawing persons towards terrorism' terminology, if it could contribute to the risk that students might be drawn towards far-right secular groups plotting attacks on Muslims, or to the targeting of Jews by certain Islamic groups.

The possibility of radicalizing some students would appear to be higher where the views are put forward as insulated from critical debate. It cannot be ruled out that once radicalized some of them might then be more susceptible to being drawn into terrorist activity[240] although, as discussed, the causal link between the type of speech in question and the drawing of students into terrorism has not been fully established. So the discussion below proceeds on the basis that some speech on campus viewed as of low quality in terms of the speech rationales may tend also to fall within Prevent or Charity Commission Guidance. The use of risk assessments and of mitigating actions in relation to it could arguably be justifiable under Article 10 in the campus context, taking account of the dangers of contributing to radicalization.

Making a Risk assessment

In evaluating the level of risk presented by a speaker one difficulty lies in predicting in advance the range of ideas that at-risk speakers might intend to put forward. The past utterances of a speaker might indicate that a talk would be very likely to be intimidatory/denigratory towards certain minority groups (or minorities within minorities), and unsusceptible to criticism or debate. So the signs that vetting procedures should be triggered would include the fact that a speaker had previously attacked groups on grounds of sexuality, religion, race or sex, or had supported terrorism, and would also be expected to take account of the group or organization of which the speaker is a member of former member. HEFCE has recommended that specialist training should be put in place for staff involved in booking and approving events.[241]

---

[239] In 'What is National Action and why is the Nazi Group banned? The Daily Telegraph reported the (then) Home Secretary's comments to the effect that National Action is 'racist, anti-semitic and homophobic' (5.9.17).
[240] See the 2016 Report by St George's House, with the Centre of Islamic Studies, SOAS (n 152 above), at [5.3]. See also *Radicalisation on British University Campuses* (London: Quilliam, 2010).
[241] n 118, at [33].

Mitigating actions taking account of free speech duties

As discussed, universities are, on one interpretation of the Guidance, being asked to achieve the impossible: to predict how a range of persons will respond to a speaker. The emphasis upon 'full mitigation' could clearly signal to a risk-averse university that it should incline towards the cancellation of a controversial speaker. However, after *Butt* it can disregard that emphasis as appearing only in the Guidance[242] and instead consider a *range* of mitigating actions in order to avoid violation of its section 6 HRA, section 31 or section 43 duties. The decisions discussed above under Article 10 were largely concerned with those instances in which speech attacking certain groups or inciting terrorism had already occurred; the key question was whether the words in question did constitute an attack, although Strasbourg has not ruled out the use of prior restraint against forms of hate speech.[243] So determinations as to mitigating actions should as a starting point include 'more speech' solutions, such as ensuring that the chair of a speaking event can provide balance and allow debate, or ensuring that a balanced platform is put in place by ensuring that a speaker opposed to the views of the original speaker speaks at the same event. HEFCE recommended in 2017 that universities should ensure that the selection and training for chairs of events would mean that they would be equipped to enable challenge and debate.[244] A university could also put 'codes of conduct' in place communicated to speakers in advance to ensure that they were aware of institutional values and expectations, including the need to adhere to the equality duty. Such solutions may have some inhibiting impact on expression due to the bureaucracy involved since decisions as to the selection of speakers might be influenced. But if the speech rationales are unlikely to be strongly engaged by the speech, use of such mitigating actions would mean that conflict between the duties stemming from section 26 or Charity Commission Guidance, and the free speech duties of universities and of student societies, could be minimized.

If an opposing speaker or chair could not be identified as available and acceptable to the society that had invited the original speaker, a university Prevent officer or SU representative could ask to see an abstract or text of the speech beforehand in order to make the evaluation as to mitigation. As mentioned, a *requirement* to see a text was dropped from the Guidance on free speech grounds. But if, in the circumstances, cancellation of the speech appeared to be the only alternative, failing to ask for the text of the talk beforehand instead could have a greater adverse impact on expression, failing the test of proportionality under Article 10(2), and also therefore risking failure to satisfy the statutory free speech duties. The lack of such a requirement in the non-legally binding Guidance would therefore be irrelevant. While the Charity Commission's 2013 Guidance does not set out specific methods of meeting the duty to deny a platform to extremist speech, adherence to such a requirement by a student group, rather than merely banning a speaker, would equally provide a means of satisfying the free speech demands indirectly imposed on student societies. Clearly, considering the content of a talk before determining whether a speaker should be de-invited, would mean accepting content-based restrictions on expression, although obviously the speaker in question would be free — subject to the general criminal law — to post the text online or disseminate it by other means.

---

[242] See n 127 and associated text.

[243] See *Erbakan v Turkey*, App No 59405/00, judgment of 6 July 2006, [56]: 'it may be considered necessary… to sanction or even *prevent* all forms of expression which spread, incite, promote or justify hatred based on intolerance…' (emphasis added).

[244] n 118, at [33].

Cancellation of a speaking event

If despite attempts to adopt mitigating actions they failed because, for example, a speaker deemed high-risk refused to provide an abstract or text of the speech in advance, cancellation of the event might be found to be the only alternative, although in *Butt* it was found that once a university had considered and attempted to deploy such actions the section 26 duty could be found to be fulfilled and cancellation would not be the inevitable next step.[245]

If cancellation occurred by a student society following Charity Commission Guidance on extremism, or by University authorities under Prevent, meaning that a speaker from the secular far-right, or a preacher in the Salafi/Wahabi tradition, did not speak on campus, the damage done to free expression might appear to be minimal. As discussed in Part G, the campus context is relevant: creation of an invasion of moral autonomy, and of denigration in terms of self-fulfilment, may arise if a member of a minority is forced to witness unchallenged expression intimidatory or directly denigratory towards that minority.[246] That could occur where the speech was so pervasive as to be unavoidable, given the lack of choice accorded to students who have to use campus buildings, or because it is likely that a student will encounter it unwittingly as a member of the audience (or, for example, in the case of posters or postings on social media advertising a forthcoming speech on campus likely to attack Shia Muslims).[247] The case for restricting such expression is stronger where it occurs in a context in which there have been recent intimidatory incidents aimed at individuals belonging to a group on the basis of their membership of that group.[248] For example, a far-right speaker denouncing gender equality may also be conveying a host of emotive and cognitive messages via gesture and tone of voice, conveyed with greater immediacy in person. But the impact of such messages in the restricted environment of a campus where intimidation of some female students was already occurring undermines the value that might be attached to the speech on instrumental grounds, bearing the safeguarding and equality duties of universities in mind, also reflected in the section 43 Codes.

I. Conclusions

Taking account of the conflicting duties of universities, and (although the conflict is less stark) of SUs and their affiliates, we have argued above that there is a case for restricting expression cognate with that of certain terrorist groups, including National Action or ISIS.[249]

---

[245] See n 127.

[246] Cf the famous 'Nazis at Skokie' affair. A group of Nazis wished to demonstrate, wearing Nazi uniforms and displaying swastikas, in a predominantly Jewish community. They relied, successfully, on their First Amendment right to do so, in a case that divided civil libertarians: *Collin v Smith* (1978) 578 F 2d 1197, 7th Cir.

[247] That would be analogous with the facts of *Norwood* (n 230 above). In *Vejdeland*, n 54, [56] it was found: 'The Court also takes into consideration that the [homophobic] leaflets were left in the lockers of young people who were at an impressionable and sensitive age and who had no possibility to decline to accept them'.

[248] As in the case of attacks on religious faith or homophobic, racist or sexist expression targeted directly at specific individuals. Examples of offensive behaviour that might readily become intimidating would include: putting up posters impliedly threatening to Muslims or to gay students; sexist, homophobic or racist remarks directed at fellow students and posted on social media; displaying an offensive symbol associated with ISIS, or targeting persons in university buildings as part of a racist campaign — eg putting leaflets or stickers associated with National Action in prominent places. See for examples, n 43 and n 221.

[249] The Strasbourg Court may find a breach of Article 10 where a conviction arises in respect of apologism for terrorism if it arises in the context of political debate, representing the stance of a political party, and does not

That has also been found, more controversially, where it would create/add to an (already) intimidatory environment for certain groups of students – who are sometimes minorities within minorities. The Guidance associated with section 26, however, goes beyond such qualified incursions into freedom of speech on campus, as *Butt* made clear, in terms of its potential impact, as does the Charity Commission Guidance. Both are therefore in need of revision, and there are signs that such revision may be imminent. The Prevent Guidance to universities creates a scheme that is both over-broad and imprecise, given its focus on anticipation of risk, on 'extremism', and on uncertain causal links between exposure to 'extreme' expression, radicalization, and likelihood of engagement in terrorism.[250] While it can be disapplied, the current lack of clarity is a matter of concern and is exacerbated by student policies that create an appearance of distortion to the impact of Part 5: speech from the secular far-right tends not to be caught by Prevent since the speakers are already likely to be no-platformed by student bodies. As applied on campus, Prevent might therefore *appear* disproportionately to target content that endorses a minority Islamic viewpoint, whilst leaving untouched forms of secular far-right expression. It is therefore susceptible to exploitation by anti-Prevent lobby groups,[251] reinforcing the case for reform of the Guidance in light of *Butt* and for attempting to create greater transparency as to its impact in practice.

It has been argued that taken at face value the combined effect of Part 5 CTSA and the associated Guidance constitute an imprecisely-stated, viewpoint-based assault on notions of free inquiry and challenges to received opinion. When set alongside restrictions flowing from the Charity Commission Guidance and student-imposed 'No Platform' and 'Safe spaces' policies, an observer could be forgiven for thinking that the freedom to challenge current orthodoxies (including radical critiques of government policy) on campus is currently in jeopardy, caught in a pincer attack due to the combined policies of the government and of student unions and societies.[252] A campus-based orthodoxy might appear to be arising instead, with chilling effect.

The binary nature of the responses to the Prevent duty is also itself detrimental to the protection of free expression in universities and to management of the risk of radicalisation. The view that all Muslim students or ISOCs without distinction should be viewed as part of a suspect community is contemptible and impoverished, but the opposing view that such

---

amount to hate speech or incite violence: see *Faruk Temel v Turkey* App no 16853/05, judgment of 1 February 2011. But a conviction in respect of a cartoon supporting and glorifying the violent destruction of the US, and expressing moral support for the perpetrators of the attacks of 11 September 2001, was not found to create such a breach: *Leroy v France* App No 36109/03, judgment of 2 Oct 2008, because it approved of the violence perpetrated against thousands of civilians.

[250] Home Affairs Select Committee 'Radicalisation: the counter-narrative and identifying the tipping point' 2 August 2016, [18]: 'If the Government adopts a broad-brush approach, which fails to take account of the complexities, and of the gaps in existing knowledge and understanding of the factors contributing to radicalisation, that would be counter-productive and fuel the attraction of the extremist narrative rather than dampening it.' See also A.Z. Huq, T.R. Tyler, and S.J. Schulhofer, 'Mechanisms for eliciting cooperation in counterterrorism policing: Evidence from the United Kingdom' *Journal of Empirical Legal Studies* 8, no 4 (2011), 728-61.

[251] Louise Casey's Review in 2016 (n 220) described 'an active lobby opposed to Prevent'. She found that 'elements of this lobby…appear to have an agenda to turn British Muslims against Britain', whose activism to undermine Prevent she describes as making British Muslims 'feel even more alienated and isolated – and therefore more vulnerable to extremists and radicalisers'. She also found that the lobby had 'deliberately distorted and exaggerated cases' of Prevent delivery in an attempt to 'portray the programme at its worst'.

[252] For a recent and valuable survey of students' attitudes towards free speech on campus, see N. Hillman, *Keeping Schtum? What students think of free speech* (Wave 2 of the HEPI/YouthSight Monitor) (2016, HEPI Report 85).

students, regardless of religious sect, personal predilections or cultural background, are victimized by Prevent and uniformly reject the 'British values' it relies on is also damaging and counter-productive in terms of combatting both Islamophobia and radicalisation. Rigidly poised between accusations of Islamophobia[253] or suppression of expression on the one hand,[254] and a heightened fear of terrorism and radicalization in universities on the other, focusing unquestioningly only on Islamism,[255] little space is left for reasoned discourse on this matter that could point student groups and universities towards a flexible and nuanced response to both secular and faith-based far-right speech. In evaluating the true speech value of some forms of campus-related expression alongside a critique of the forces, including the Prevent duty, allowing their suppression, this article has made a contribution towards expanding that space and filling a significant lacuna in the literature.

[253] See: In the High Court of Justice M/350/14 *In the matter of the Representation of the People Act 1983 and in the matter of a Mayoral Election for the London Borough of Tower Hamlets held on 22 May 2014*, it was found at [686]: 'Events of recent months in contexts very different from electoral malpractice have starkly demonstrated what happens when those in authority are afraid to confront wrongdoing for fear of allegations of racism and Islamophobia. Even in the multicultural society which is 21st century Britain, the law must be applied fairly and equally to everyone. Otherwise we are lost.' See also S. Khan and T. McMahon, *The Battle for British Islam: Reclaiming Muslim Identity from Extremism* (Saqi Books, 2016), Chap 3. The JCHR Report 2018 (n 8), Conclusions, echoed Casey's concern about combatting myths about the Prevent strategy, by ensuring transparency, while strongly endorsing the strategy, [9].

[254] The Casey Report (n 220): 'Too many public institutions, national and local, state and non-state, have gone so far to accommodate diversity and freedom of expression that they have ignored or even condoned regressive, divisive and harmful cultural and religious practices, for fear of being branded racist or Islamophobic' ([1.67]).

[255] See A. Glees 'Universities: The breeding grounds of terror' *the Telegraph* 6.6.11.