

Mandate of the Special Rapporteur on the right to education

ACADEMIC FREEDOM AND FREEDOM OF EXPRESSION IN EDUCATIONAL INSTITUTIONS

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Oxford Human Rights Hub

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Executive Summary

In the three jurisdictions surveyed (Australia, India, and South Africa), only South Africa has an express constitutional provision on academic freedom. This can be limited under the constitutional limitation clause, and exclusions for propaganda for war, incitement to violence and hate speech. The Indian constitution includes a general right to freedom of speech and expression, and a non-justiciable ‘fundamental duty’ to develop, inter alia, the ‘spirit of enquiry.’ Although there have been some progressive judicial dicta on academic freedom, the National Education Policy 2020 does not refer to academic freedom. Australia has no national human rights statute, but two states and one territory have human rights acts protecting freedom of opinion, expression, and the right to receive and impart information. Universities are, however, required to maintain an environment upholding freedom of intellectual inquiry.

All three jurisdictions face challenges to academic freedom. In Australia, job insecurity increases pressure to self-censor. In South Africa, decolonising education and academic freedom can conflict. In India, challenges are most acute, including restrictions on institutional autonomy; political appointments; harassment of dissenters, and fear, repression, and self-censorship. Challenges in all these countries are exacerbated by a lack of a clear understanding of academic freedom and effective protection.

In all three jurisdictions, police presence on university campuses is lawful.

Only Australia has a Model Code on Freedom of Speech and Academic Freedom, adopted by all Australian universities. Nevertheless, many universities remain poorly aligned with the substantive

protection of academic freedom. A handful of South African universities have academic freedom committees or codes of conduct.

Experience of surveillance varies widely. While in Australia and South Africa, there are strict regulatory guidelines and no noticeable threat to academic freedom; in India, there are many instances, most severely in Kashmir, and India scores low on campus integrity. This is exacerbated by legal provisions allowing surveillance and criminalization of texts alleged to insult religion or encourage separatist feelings.

[Word Limit – 3000 words, including Executive Summary and excluding footnotes and Annexure]

Questionnaire Responses

General framework

1. *How is academic freedom defined and protected in the constitution or laws of your country, and what are possible limitations or restrictions? Please provide the original citation and source, as well as a summary of relevant judicial practice, if any.*

Australia

1. In Australia, there is no statutory human rights instrument at the national level. Neither does the Constitution include a right to freedom of speech or expression, although there is an implied right to freedom of political communication¹ which is not conferred on individuals but is instead a general right to freedom from governmental interference. However, ‘A well-established principle of statutory interpretation in Australian courts is that Parliament is presumed not to have intended to limit fundamental rights, unless it indicates this intention in clear terms’²
2. Two of Australia’s six states – Victoria and Queensland – and one territory (the Australian Capital Territory) have their own Human Rights Acts which contain the following identical provisions:

¹ *National News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106; *Union NSW v New South Wales* [2013] HCA 58.

² Australian Human Rights Commission, ‘Freedom in Information, Opinion and Expression’ (n.d.) <<https://humanrights.gov.au/our-work/rights-and-freedoms/freedom-information-opinion-and-expression#:~:text=Constitutional%20law%20protection,government%20created%20by%20the%20Constitution.>> accessed 12 January 2024.

- i. Everyone has the right to hold opinions without interference.
- ii. Everyone has the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kinds...³

In all three cases, the protection applies orally, in writing, in print, by way of art, or any other chosen medium.⁴

India

3. In India, there is no specific definition of academic freedom within the Constitution or laws. The Constitution contains article 19(1)(a) which provides freedom of speech and expression.⁵ This forms part of the fundamental rights guaranteed to Indians. This article is subject to the limitations mentioned in article 19(2), such as, sovereignty and integrity, public order, decency etc.⁶ In addition, it is also considered a 'fundamental duty' of the state and citizens to 'develop the scientific temper, humanism and the spirit of enquiry and reform'⁷ as well as to 'strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.'⁸ The former is justiciable, while the duties are not. Read together, these provisions can be assumed to contain within it any protection to academic freedom, however, no such protection has been explicitly made through legislation.
4. Nevertheless, there are a few decisions which expand the understanding of academic freedom. In 1986, the Andhra Pradesh High Court held that free speech in Indian Constitution includes academic freedom, which deals with the rights of teachers and the rights of students:⁹

³ Human Rights Act 2004 (ACT), s. 16; Charter of Human Rights and Responsibilities Act 2006 (Vic) s. 15; Human Rights Act 2019 (Qld), s. 21.

⁴ *ibid.*

⁵ Constitution of India, 1950, art 19(1)(a).

⁶ Article 19(2): 'Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence.'

⁷ Constitution of India, 1950, art. 51A(h)

⁸ *ibid.*, art. 51A(j).

⁹ *Dr R. Rama Murthy and Ors. v. Government of Andhra Pradesh*, 1986 SCC Online AP 67.

The right of a teacher is to teach without restraint. That right has three facets... (1) a teacher must be at liberty to pursue scholarly inquiry to any honest conclusion. (2) he must be free to present his findings. (3) he must be free to publish results of research to his pupils and (in the wider context) to the general public. For a student, academic freedom is to have honest instruction. The student should have the freedom to draw his own conclusions. He also should have a right to decide what he has to study.¹⁰

5. Although expansive, the facets of academic freedom for teachers and students expounded in this judgment only have a persuasive value and are not legally binding. In a 2002 case, the Indian Supreme Court held that there should be a resistance towards governmental dominance of the educational process. It also observed that ‘state aid was not to be confused with state control over academic policies and practices.’¹¹ In 2008, the Delhi High Court while commenting on the autonomy in creating a course curriculum held that ‘academic freedom is fundamental to the life of the university’.¹²
6. Even with progressive observations from the courts in India, the state of academic freedom in India has been precarious. For instance, the National Education Policy 2020 does not define or refer to academic freedom/autonomy. Clause 13.4 offers freedom to the faculty to design their own curricular and pedagogical approaches if it is ‘within the approved framework, including textbook and reading material selections, assignments, and assessments.’

South Africa

7. Academic freedom forms part of the constitutional right to freedom of expression in section 16 of the Constitution, and therefore enjoys constitutional protection.¹³

¹⁰ *ibid* [17].

¹¹ *T.M.A Pai Foundation v. State of Karnataka*, (2002) 8 SCC 481 [52].

¹² *Dina Nath Batra v. University of Delhi*, WP (c) No. 2902/2008.

¹³ Constitution of the Republic of South Africa, 1996, s. 16(1):

- (1) Everyone has the right to freedom of expression, which includes—
 - (a) freedom of the press and other media;
 - (b) freedom to receive or impart information or ideas;
 - (c) freedom of artistic creativity; and
 - (d) academic freedom and freedom of scientific research.

8. The Constitution does not define academic freedom, nor is it defined in statutes regulating institutions of learning.¹⁴ Moreover, the term has not been authoritatively defined by the Constitutional Court.
9. It is widely agreed that the formulation by Thomas Benjamin Davie of ‘academic freedom’ in the 1950’s has been influential in South Africa. This he described as freedom from external interference in (a) who shall teach, (b) what we teach, (c) how we teach, and (d) whom we teach.¹⁵
10. South Africa’s Department of Education released a White Paper in 1997 to serve as the overarching policy framework for the sector¹⁶ and to transform higher education in South Africa away from the governance under apartheid regime. The White Paper envisioned ‘a transformed, democratic, non-racial and non-sexist system of higher education’ [para 1.14] based on fundamental principles including academic freedom: ‘The principle of academic freedom implies the absence of outside interference, censure or obstacles in the pursuit and practice of academic work [as] a precondition for critical, experimental and creative thought and therefore for the advancement of intellectual inquiry and knowledge.’
11. In a defamation case, Froneman J (as he then was) for the Eastern Cape High Court said:

Freedom of expression, which includes academic freedom as a fundamental right under our Constitution, is of particular importance in university and academic life. Whatever the true nature and reach of freedom of expression, and academic freedom as part of it, may be at a university, it would, in my judgment, include an unfettered debate on issues surrounding the autonomy of a university and the roles that managerial and academic staff, respectively, should play in that regard.¹⁷

¹⁴ Example, South African Schools Act 84 of 1996 or the Higher Education Act 101 of 1997 [South Africa].

¹⁵ Y Taylor & R Taylor ‘Academic freedom and racial injustice: South Africa’s former ‘open universities’ (2010) 24(6) South African Journal on Higher Education 898; Council for Higher Education (CHE) ‘Report of the independent task team on Higher Education, Institutional Autonomy and Academic Freedom (HEIAAF)’ in *Academic Freedom, Institutional Autonomy and Public Accountability in South African Higher Education* (August 2008) 18 (hereinafter, ‘CHE HEIAAF’).

¹⁶ CHE HEIAAF (ibid) 1.

¹⁷ *Chetty v Adesine* (Case No. 33/2007) [11] < <https://www.saflii.org/za/cases/ZAECHC/2007/98.pdf> > accessed 12 January 2024.

12. Respected commentators Currie and De Waal explain that ‘At the core of the right to academic freedom is the right of the individual to do research, to publish and to disseminate learning through teaching, without government interference.’¹⁸

Possible limitations/restrictions

13. Within the Constitution, the right to freedom of expression is internally limited in that three categories of expression do not fall within the content of the section 16 right.¹⁹ Moreover, expression that does not fall within the section 16(2) exclusions can nevertheless be justifiably limited by the general limitations clause of the Constitution.²⁰

14. As to what constitutes hate speech under section 16(2), section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (‘PEPUDA’) spells this out.²¹

¹⁸ I Currie & J De Waal ‘Expression’ in I Currie & J De Waal (eds) *The Bill of Rights Handbook* (6th ed) (Cape Town Juta 2013) 351-352.

¹⁹ Section 16 (2) The right in subsection (1) does not extend to—

- (a) propaganda for war;
- (b) incitement of imminent violence; or
- (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

²⁰ Section 36 (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

²¹ Section 10(1): Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to—

- (a) be hurtful;
- (b) be harmful or to incite harm;
- (c) promote or propagate hatred.

15. The authoritative interpretation of this section was given in by the Constitutional Court in *Qwelane*.²²

16. Section 12 of PEPUDA excludes *bona fide* academic and scientific inquiry from the application of section 10.²³ Note, however, that PEPUDA is limited in its application to equality-based conduct and expression attributable to its listed or analogous grounds.

2. ***Are academic staff, teachers, students all entitled to academic freedom? Does this differ by level of education? Please explain.***

Australia

17. Protection is most explicit at the higher education level. Federally, the Tertiary Education Quality and Standards Agency (TEQSA) Act 2011 provides for the mandatory registration of universities (on which funding is contingent), with requirements detailed in the Higher Education Standards Framework (Threshold Standards) 2015. These standards include that governing bodies of higher education providers must ‘develop and maintain an institutional environment in which freedom of intellectual inquiry is upheld and protected’.²⁴

18. The currently tabled Higher Education Support Amendment (Freedom of Speech) Bill 2020 seeks to replace and repeal references to ‘free intellectual inquiry’ with ‘freedom of

²² *Qwelane v South African Human Rights Commission and Another* [2021] ZACC 22. The Constitutional Court held, first, that the thresholds in sections 10(a)-(c) must be determined objectively from the perspective of the reasonable person [95-101]. Secondly, that reading the thresholds disjunctively would unjustifiably limit the right of freedom of expression [102-112]. Thirdly, that “hurtful” was too vague and cannot be justified under the general limitations clause [139-144]. Thus, section 10(1) of PEPUDA was held to be unconstitutional to the extent that it included “hurtful” speech, which the Court cured by striking out the term and suspending the declaration of invalidity for 24 months. The Court gave an interim order that section 10(1) should be read as prohibition speech that is both “harmful” and which “incites harm” [see Order].

²³ Section 12. No person may— (a) disseminate or broadcast any information; (b) publish or display any advertisement or notice, that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person: provided that bona fide engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution, is not precluded by this section.

²⁴ Standard 6.1.4.

speech and academic freedom’, in response to the 2019 *Report of the Independent Review of Freedom of Speech in Australian Higher Education Providers* (the French Review). The Bill also includes a comprehensive definition of academic freedom, echoing the Model Code produced by the French Review.

19. At the secondary schooling level, the general principles of freedom of speech are taught as part of the mandatory national curriculum for Years 7 & 8 Civics and Citizenship (12–14-year-old students).²⁵

South Africa

20. Yes, academic freedom is available to all. The right to expression (including academic freedom) is afforded to ‘everyone’ within and across levels of education. See, for example:
 - ‘[T]his right [to academic freedom] applies not to institutions of higher learning or to academics specifically but is held by ‘everyone’.²⁶
 - ‘Under the Final Constitution the freedom is specifically incorporated under the expressive right and is no longer confined, as it was under the Interim Constitution, to ‘institutions of higher learning’. Academic freedom is therefore protected at all educational institutions including schools and colleges.²⁷

3. *What do you consider to be (a) the main challenges to academic freedom, and (b) gaps in the legal framework for protecting academic freedom?*

Australia

21. Challenges arise predominantly at the university level: the National Tertiary Education Union cites key issues including workforce casualisation (leading to employee vulnerability and increased pressure to self-censor) and increasingly bureaucratic performance

²⁵ Australian Curriculum, ‘Civics & Citizenship: Years 7 and 8’ (ACARA 2023) <<https://www.australiancurriculum.edu.au/resources/curriculum-connections/dimensions/?Id=54181&YearLevels=42685&searchTerm=%22Freedom+of+speech%22#dimension-content>> accessed 12 January 2024.

²⁶ CHE HEIAAF Report (n 15) 28.

²⁷ D Milo, G Penfold & A Stein ‘Chapter 42: Freedom of Expression’ in Stu Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* <<https://constitutionallawofsouthafrica.co.za>> 60-62.

management regimes (which may conflate professional misconduct with the exercise of academic freedom).²⁸ In addition, freedom of information is threatened by a ‘policy climate adverse to public transparency’ and inadequate protections for whistle-blowers.²⁹ Finally, national security interests may impinge on academic freedom in relation to public policy.³⁰

India

22. There are many insidious challenges to academic freedom in India:
- a. Restrictions on and subversion of institutional autonomy;
 - b. Subversion of faculty section, and an increasing appointment of university leaders and faculty on non-academic grounds, such as political affiliation;
 - c. Institutional harassment of faculty and students who dissent;
 - d. Restrictions on intra-mural freedom to teach, study and have an opinion;³¹
 - e. Restrictions on extra-mural freedom to acquire and express opinions;
 - f. Restrictions on internet and access to information networks in certain parts of India such as Kashmir;
 - g. Atmosphere of fear, repression and self-censorship;³²

Each of these issues is expanded in detail in a 2020 status report.³³

²⁸ NTEU, ‘Intellectual and Academic Freedom’ (n.d.) <https://www.nteu.au/NTEU/PolicyManual/Public_Policy/Academic_Freedom/Academic_Freedom_Policy.aspx> accessed 12 January 2024.

²⁹ *ibid.*

³⁰ *ibid.*

³¹ For example, recently, a premiere Indian University cancelled a lecture on ‘Crisis in Education’ by Ganesh Devy citing ‘unforeseen circumstances’. The same institute had also cancelled a lecture on ‘Israel-Palestine’ issue in November 2023 and a two-day conference on Left Politics in 2022. See Editorial, ‘IIT Bombay Cancels Lecture on ‘Crisis in Indian Education’, Raises Concerns Over Academic Freedom’ *The Wire* (Delhi, 01 February 2024) <<https://thewire.in/education/iit-bombay-cancels-lecture-on-crisis-in-indian-education-raising-concerns-over-academic-freedom>> accessed 01 February 2024.

³² For example, the current Indian (Modi) government has ‘ended a 13-year fellowship programme that allowed students from minorities to pursue MPhil and PhD degrees; ended, without explanation, bank-interest subsidies to minorities studying abroad; cutback school scholarships for minorities; and slashed 99% funding to a non-profit that runs education and skilling schemes for minorities’. Arshi Qureshi, Quratulain Rehbar, ‘How Modi Govt Ended or Slashes Financial Aid to Minority School, Higher Education & Foreign Study Schemes’ (*Article 14*, 20 January 2023 <<https://article-14.com/post/-how-modi-govt-ended-or-slashed-financial-aid-to-minority-school-higher-education-foreign-study-schemes--63ca053b22e2>> accessed 28 January 2024.

³³ Nandini Sundar and Gowhar Fazili, ‘Academic Freedom in India: A Status Report’ (2020) <<https://indianculturalforum.in/wp-content/uploads/2020/09/ICF-Academic-Freedom-.pdf>> accessed 27 January 2024.

23. Gaps in the legal framework: In the absence of a specific law defining academic freedom, its meaning and scope vary from one court to another. This also means that there is no uniformity of understanding between states. The gaps can be filled with progressive understanding of education and academic freedom such as in the decisions mentioned in Question 1. In the absence of such progressive judgments, there is a wide scope to restrict academic freedom. As seen in the recent National Education Policy, there is no mention of academic freedom. Freedom is allowed only when it is within the approved framework.³⁴

South Africa

24. A unique challenge in the South African context is the relationship between decolonising education and academic freedom. While South Africa seeks to decolonise its education system, this can come in conflict with other forms of academic freedom. ‘However, this criticism has to some extent suffered from a perceived lack of agreement on the concept and status of academic freedom itself.’³⁵

25. Another threat to academic freedom is educational institutions themselves which have begun to take on increasingly managerial institutional ethos.³⁶

26. Gaps in legal framework: Research and policy has been directed primarily at the level of higher education. The legal framework should do more to foster academic freedom of students at the school-going level. More explicit laws and regulations should be passed to prevent educational institutions from becoming captured by financial interests. This is particularly relevant for universities and independent schools.

Autonomy of educational institutions: Police Presence

4. *Are there restrictions on police or military personnel entering educational institutions? If so, please share the rules.*

³⁴ National Education Policy, 2020, clause 13.4

³⁵ Erik J. Olsson ‘Academic freedom and the decolonisation of knowledge: curriculum transformation in South Africa from a UNESCO perspective’ (2023) 48(8) *Studies in Higher Education* 1172-1182.

³⁶ CHE HEIAAF Report (n 15) 63.

Australia

27. Police presence on university campuses is lawful.³⁷

India

28. There are no legal restrictions on police or military personnel entering educational institutions. The police are authorized to arrest any person under section 35 of the Bharatiya Nagarik Suraksha (Second) Sanhita, 2023 and they have the official powers under section 44 to enter any place where they believe the person is hiding or residing. The 2016 UGC Guidelines on ‘Safety of students on and off campus of higher educational institutions’ also do not mention any restrictions on police/military personnel from entering a university campus.³⁸ In 2020, the Delhi Police was accused of entering the campus of one of the Indian Universities (Jamia Millia Islamia University) where they ‘trashed book cases’ and ‘beat students’ and thus, ‘shut down university protests against the religiously discriminatory Citizenship (Amendment) Act (CAA) by caning Muslim students into submission.’³⁹

South Africa

29. The Control of Access to Public Premises and Vehicles Act⁴⁰ governs access to public premises, which includes universities and public schools.⁴¹ This would empower universities to allow police and military personnel to enter their premises.⁴² Moreover, any police or military officer ‘who is required in the performance of his functions to enter or

³⁷ See example, Parliament of Australia Hansard Record, ‘Questions without Notice: Police Entry to University Grounds’ (16 September 1976) 749 <<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22hansard80%2Fhansards80%2F1976-09-16%2F0002%22;src1=sm1> > accessed 12 January 2024.

³⁸ University Grants Commission, UGC Guidelines on Safety of Students on and off Campuses of Higher Educational Institutions, 2016 <https://www.ugc.gov.in/pdfnews/4006064_Safety-of-Students-Guidelines.pdf > accessed 24 January 2024.

³⁹ Mukul Keshavan, ‘The attacks on two Delhi universities reveal Modi’s targets: Muslims and their allies’ *The Guardian* (India 13 January 2020) <<https://www.theguardian.com/commentisfree/2020/jan/13/attacks-delhi-universities-modi-muslims-allies> > accessed 29 January 2024.

⁴⁰ Act 53 of 1985.

⁴¹ *ibid*, s. 1(vi) read with 1(viii).

⁴² *ibid*, s. 2(1).

enter upon any public premises' is exempt from liability under the Act.⁴³ This would be in addition to private security officers or companies that schools and universities employ.⁴⁴

30. This has recently only been deployed with the approval of University Councils to control or disperse student protests from interfering with the academic program of universities and/or from causing damage to property.⁴⁵

31. It could be argued that these are not and have not been used as means deployed to stifle academic freedom. But, in a wider sense of academic freedom — which includes protests as a form of expression of dissatisfaction with various aspects of education institutions — this may hinder academic freedom.

5. *Please provide examples of institutional guidelines/codes of conduct developed to ensure respect for academic freedom, including from external public or private actors.*

Australia

32. The Model Code produced by the 2019 French Review has been voluntarily adopted by all Australian universities in accordance with their internal regulatory frameworks (for instance, see the University of Sydney's Model Code Implementation Group Report⁴⁶). However, the 2021 Walker Review into the Adoption of the Model Code on Freedom of Speech and Academic Freedom scrutinised the alignment of universities' regulatory reforms with the Model Code, establishing that, despite implementation, many of the

⁴³ *ibid*, ss. 3 read with 2(2).

⁴⁴ On the legality of actions taken by private security companies, see < <https://witsvuvuzela.com/2019/04/12/private-security-acted-illegally-in-feesmustfall-protests/> > accessed 20 January 2024.

⁴⁵ M Greeff, K Mostert, C Kahl & C Jonke 'The #FeesMustFall protests in South Africa: exploring first-year students' experiences at a peri-urban university campus' (2021) 35(4) South African Journal of Higher Education. See, also, discussions by the Parliamentary Committee on Higher Education such as in 2017 < <https://pmg.org.za/committee-meeting/24650/> > and 2021 < <https://pmg.org.za/committee-meeting/34014/> > accessed 20 January 2024.

⁴⁶ University of Sydney, 'A Model Code for the Protection of Freedom of Speech and Academic Freedom in Australian Higher Education Providers' (30 September 2019) < <https://apo.org.au/sites/default/files/resource-files/2019-10/apo-nid264771.pdf> > accessed 20 January 2024.

universities remained poorly aligned with the substantive protection of academic freedom.⁴⁷

33. At the levels of primary and secondary schooling, Australian states are each responsible for their own regulatory bodies, though subject to a centralised national curriculum (developed by the regulatory body ACARA). Certain representative institutions for the teaching of specific subjects provide their own codes of conduct on issues relating to censorship and text selection.⁴⁸ Discussions around the need to decolonise the curriculum remain ongoing, particularly regarding the need to incorporate First Nations knowledge systems.⁴⁹ Victoria has produced a specific plan to this end: *Marrung*, The Victorian Aboriginal Education Plan 2016-2026.⁵⁰

South Africa

34. Some universities, such as the University of Cape Town⁵¹ and the University of Johannesburg,⁵² have academic freedom committees. At the University of Cape Town, rules on meetings at the university are underscored by academic freedom.⁵³ The University of Johannesburg's Student Regulations limit the right of students to organise and

⁴⁷ Australian Government Department of Education, 'Walker Review categories of university alignment with French Model Code' (2020) <<https://www.education.gov.au/higher-education-reviews-and-consultations/resources/walker-review-categories-university-alignment-french-model-code>>.

⁴⁸ Example, Australian Association for the Teaching of English, 'Censorship and Text Selection' (n.d.) <<https://www.aate.org.au/documents/item/645> > accessed 20 January 2024.

⁴⁹ David Mountford, 'Decolonise the Curriculum: Australian Schools' (*The Teacherist* n.d.) <<https://theteacherist.com/2020/01/11/curriculum-australia/>>. See also Brinagh Hassett, 'Cleansing the Narrative: On Censorship in Schools' (*Overland* 26 July 2016) <<https://overland.org.au/2016/07/cleansing-the-narrative-on-censorship-in-schools/>> accessed 12 January 2024.

⁵⁰ See <https://www.education.vic.gov.au/Documents/about/programs/aboriginal/Marrung_Aboriginal_Education_Plan_2016-2026.pdf > accessed 20 January 2024.

⁵¹ See <https://au.uct.ac.za/sites/default/files/media/documents/au_uct_ac_za/1037/Academic%20Freedom%20Committee.pdf > accessed 20 January 2024.

⁵² See <<https://www.uj.ac.za/wp-content/uploads/2022/11/uj-charter-for-the-senate-academic-freedom-committee-jun-2022.pdf> > accessed 20 January 2024.

⁵³ See UCT General Rules and Policies 2021 <https://uct.ac.za/sites/default/files/content_migration/uct_ac_za/49/files/UCT_Handbook_3_2021.pdf > accessed 20 January 2024.

participate in student action that might disrupt academic work of students or staff.⁵⁴ The University of Pretoria's Constitution for Student Governance (CSG) includes a Bill of Students' Rights which enshrines a right of all students to academic freedom.⁵⁵ Varsity College which is governed by the Independent Institute for Education — the body which regulates non-public tertiary education institutions — includes under misconduct the obstruction of teaching, study, and research.⁵⁶ At the school level, the Department of Education's example code of conduct includes in its general principles that no learner has a right to behave in a way that disrupts learning.⁵⁷

Surveillance

8. *Please explain whether and the extent to which academic staff and students, at all levels of education, are subject to surveillance by public authorities, for example through on-site cameras or online scrutiny. Has this led to undue restrictions to academic freedom and freedom of expression in educational institutions?*

Australia

35. The use of on-site cameras in schools and universities has not noticeably threatened academic freedom in Australia. Surveillance devices are regulated at the State level, with most states providing stringent regulatory guidelines for the installation/use of surveillance in educational settings.⁵⁸

India

36. There have been many instances of surveillance which has led to curtailment of academic freedom:

⁵⁴ See from Section 5 < <https://www.uj.ac.za/wp-content/uploads/2021/10/student-regulations.pdf> > accessed 20 January 2024.

⁵⁵ University of Pretoria Constitution for Student Governance, s. 8.

⁵⁶ See IIE Student Code of Conduct < https://www.varsitycollege.co.za/media/islbgl3/iie015-1-student-code-of-conduct_v8_1-jan-2015.pdf > accessed 20 January 2024.

⁵⁷ See

< <https://www.education.gov.za/Portals/0/Example%20of%20a%20Code%20of%20Conduct%20for%20a%20school.pdf?ver=2009-10-13-121912-523#:~:text=The%20Code%20of%20Conduct%20spells,School%20concerning%20transgressions%20by%20learners> > accessed 20 January 2024.

⁵⁸ See Government of Western Australia Department of Education, 'School Security for Public Schools Procedures' (2019) < <https://www.education.wa.edu.au/web/policies/-/school-security-for-public-schools-procedures> > accessed 20 January 2024.

- India scored low in campus integrity, which measures the extent to which campuses are free from politically motivated surveillance or security infringements.⁵⁹
- Increasingly, with a politicised and partisan student body, teachers have started noting the surveillance of lectures. Online lectures only increase this possibility.⁶⁰
- Surveillance, harassment and arrests of Kashmiri students or their allies on flimsy grounds is not uncommon in India.⁶¹
- Some students have been covertly and overtly forced to change topics of their research or tone them down by the faculty so as not to attract the attention of the state authorities.⁶²

37. There are legal provisions in the Bharatiya Nyaya Sanhita (Second) 2023 that allows for surveillance and scrutinization of ‘written words’ (which could include books, academic text etc.) – criminalization of sale of obscene books,⁶³ criminalization of written text/words which insults religion or religious belief⁶⁴ or which ‘encourages feelings of separatist activities or endangers sovereignty or unity and integrity of India’.⁶⁵

⁵⁹ Katrin Kinzelbach, Staffan I. Lindberg, Lars Pelke, and Janika Spannagel, ‘Academic Freedom Index Report Update 2023’ (Friedrich-Alexander-Universität Erlangen-Nürnberg (FAU) and the V-Dem Institute 2023) < https://academic-freedom-index.net/research/Academic_Freedom_Index_Update.pdf> accessed 29 January 2024.

⁶⁰ Sundar & Fazili (n 33) 15.

⁶¹ *ibid* 20.

⁶² *ibid* 14.

⁶³ Bharatiya Nyaya Sanhita (Second) 2023, s. 294. ‘(1) For the purposes of sub-section (2), a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, including display of any content in electronic form shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one 15 of its items, is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.’

⁶⁴ *ibid*, s. 299. ‘Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words, either spoken or written, or by signs or by visible representations or through electronic means or otherwise, insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.’

⁶⁵ *ibid*, s. 154. ‘Whoever, purposely or knowingly, by words, either spoken or written, or by signs, or by visible representation, or by electronic communication or by use of financial mean, or otherwise, excites or attempts to excite, secession or armed rebellion or subversive activities, or encourages feelings of separatist activities or endangers sovereignty or unity and integrity of India; or indulges in or commits any such act

South Africa

38. No record of surveillance of academic staff and students by public authorities was found.
39. Such surveillance would be subject to the Regulation of Interception of Communications and Provision of Communication-related information Act 2002 (RICA). In terms of RICA, there is a general prohibition against such interception⁶⁶ with the ability to apply to intercept communications.⁶⁷

shall be punished with imprisonment for life or with imprisonment which may extend to seven years, and shall also be liable to fine.’

⁶⁶ RICA, chapter 2.

⁶⁷ RICA, chapter 3. In the main, section 16(5) applies which primarily allows for such for reasons of public health and safety.

ANNEXURE

The following is a transcript of an Oxford Human Rights Hub RightsUp Podcast episode, where Gauri Pillai, our former Managing Editor of the Oxford Human Rights Hub, speaks to Professor Adrienne Stone, Director of the Centre for Comparative Constitutional Studies at Melbourne Law School and Professor Eric Heinze, Professor of Law and Humanities, Queen Mary University of London on the human rights implications of the alleged free speech crisis in university campuses. Link to Podcast - <https://ohrh.law.ox.ac.uk/free-speech-crisis-in-university/>

Gauri Pillai (0:11): You're listening to RightsUp!, a podcast from the Oxford Human Rights Hub. In today's episode, we talk to Professors Adrienne Stone and Eric Heinze about the human rights implications of the alleged free speech "crisis" in university campuses in Australia and UK, but also more globally.

(0:52) UK Education Secretary Gavin Williamson, on 12 May 2021, introduced the Higher Education (Freedom of Speech) Bill,^[1] and the Bill claims to promote freedom of speech in UK universities to counter the chilling effect caused by unacceptable silencing and censoring on university campuses. Similar concerns about free speech and academic freedom on university campuses have also been raised in Australia. And it's important for us to remember that both of these are just manifestations of much larger debates, which are raging far beyond the borders of [the] UK and Australia individually.

(1:27) So to discuss the human rights implications of this alleged free speech crisis in university campuses, we have with us today Professor Adrienne Stone, Director of the Center for Comparative Constitutional Studies at Melbourne Law School, and Professor Eric Heinze, Professor of Law and Humanities at Queen Mary University of London.

(1:49) To begin, Professor Heinz, maybe you could briefly explain to our listeners what the 2021 Bill really proposes to do and how it claims to protect the right to free speech?

Professor Heinze (2:00): Yes, of course. The Bill was originally introduced in response to a number of controversies surrounding outside speakers who were brought into universities, sometimes against great opposition by students, or even by staff. In some cases this led to proposals, at least, or attempts to have the speakers "dis-invited". This caused a lot of outrage in Government circles and so what the Government proposes to do is to promote a culture of free speech by limiting the ability of some members of a campus community to censor invitations issued by other members of the campus community to controversial speakers.

Gauri Pillai (3:00): How do you think that these issues that the Bill [is] seeking to target are reflective of the more global debates on free speech that are happening at the moment?

Professor Heinze (3:09): Well, this is not a controversy limited to Britain. As is commonly the case, these sorts of controversies tend to—tend to boil over in the United States, first, and then, for a few years, people think that these are just American problems, but little by little they tend to spread, and evermore quickly now in the age of the internet, where local problems often quickly become global problems—particularly American problems tend very quickly to become global ones. And so, lo and behold, these questions about campus speech, campus speech codes, about inviting outside speakers, are becoming more and more heated in a number of countries throughout the world. And of course, particularly in democracies that have certain traditions of free speech, and of open inquiry at universities... And so now, really, in a number of countries, certainly, for example, on the European continent, we're seeing these sorts of debates increasing year by year.

Gauri Pillai (4:18): Professor Stone, maybe you could jump in here and tell us a little bit about Australia in this context, and especially the French Review, and whether you think that the debate in Australia has shaped up quite similarly to the UK and more globally, starting with the US?

Professor Stone (4:35): So I do think the debate has shaped up similarly. And I think that is at least as much because the debates seep from one country to another, even if the underlying problems don't. So I think that there is an extent to which there have been—there has been an eye on the United States here, and there has been something of an assumption that we might have the same problems in Australian universities as— as arguably exists in the US (and I'm a bit critical of that assumption).

(5:10) But— so let me just say a little bit about the Australian context. There have been a series of controversies. I think that it's pretty well established that they've been fairly limited in number and significance, but there have been a number of controversies, including instances in which I think speakers were subject, I think, to excessive opposition when they wanted to come onto campuses. There's been a lot of criticism of the universities, largely associated with the conservative Government — so, from the political right — and there was a review into free speech in Australian universities headed by a former Chief Justice of the High Court, Robert French.^[2]

(5:53) And the findings of that review were, to summarise a long review: first of all, that there was no identified— there was no evidence of a free speech “crisis” in Australian universities; secondly, that Australian universities already had considerable mechanisms within the governing documents to deal with academic freedom and freedom of speech; and thirdly (and I agree with this as well), that they probably weren't specific and strong enough.

(6:21) The result was that there was a Model Code proposed.^[3] It is not a Code that Australian universities have to adopt, but many of them have moved either to adopt it, or to, I think, improve their own free speech policies in the light of it. And it was a specific recommendation of the French Review that the Model Code not be compulsory, not be legislated, and that universities have some room to respond themselves. But relevantly, the Model Code in relation to controversial speakers takes the view [that] it should only be in circumstances where speakers might subject people within the university community to humiliation or intimidation, and that only in those circumstances would it be legitimate not to extend or— an invitation to a speaker who wanted to come onto campus.

(7:18) So that's approximately the best short summary I can give you of a complex situation.

Gauri Pillai (7:25): That's excellent, and that was very helpful, both of your responses. So, to pick up on something you said, Professor Stone, about empirically whether the claims of a free speech “crisis” are exaggerated or not. So, as in Australia, and as the French Review found in Australia, reports by the higher education regulator in the UK suggests that claims of [a] free speech crisis are exaggerated. To just give you an example, regarding “no-platforming” of speakers — of the 62,000 requests by students for external speakers at English universities in 2017-18, only 53 were rejected by a student union or university, which is less than 0.1% of the total.^[4] And similar observations were made in a 2018 report by the Joint Committee on Human Rights in the UK.^[5] So my question is to you, Professor Heinze — in light of these reports, how would you respond to the claim that there is a free speech “crisis” in universities?

Professor Heinze (8:25): I think there are a number of problems with this statistic. And incidentally, yes, whether there is a “crisis” or simply a problem— You know, nowadays, everything's a “crisis”, it's an overused word... I certainly do think that there is a problem. And this statistic is extremely misleading, and I'm surprised that anybody uses it. Let's— let's take a close look at it. Right, it speaks of more than 60,000 requests for external speaker events. Now, overwhelmingly, the speaking events at universities do not involve major social controversies. An outside speaker might be invited to talk about a new astronomical discovery, a new discovery in biology, new information about Shakespeare's childhood... There are infinite numbers of speaking events that take place that are not— that simply don't have anything to do with general social controversies.

(9:28) So that number is useless, 60,000. What they needed to do was look at the number of speakers who— whose— who were taking somehow controversial positions on somehow socially controversial matters. That would have been much smaller at any given university, right? So the number would have to be reduced from 62,000 to, at most, a few 100 (and I'm not even sure it would go that high). When we look at it from that perspective, 53 is not a small number — quite the contrary, it's a very large number.

(10:05) And moreover, and perhaps this is the even more important point — human rights are not about projecting— protecting only problems that exist in high numbers. Human rights are often about protecting the small numbers of people — again, people who are dissenters. Dissenters often exist in small numbers. But I would say that again, however we want to construe this number of 53, it means that people were rejected because of their opinions, or because of their viewpoints, or standpoints, right, when it's precisely the function of the university to examine controversial views.

Professor Stone (10:50): So, you know, I absolutely agree that it's always a good time to talk about freedom of speech on university campuses, and I absolutely agree that a small number of instances is enough to justify a really serious discussion. I actually think that these kind of events are quite rare, but the effects of them can last

a very long time, they can be very damaging to the university community. So I want to take them really, really seriously.

(11:19) The reason that I do insist on just getting a little bit of perspective on this is that I think we also have to realise that there's a very particular context in which criticisms are currently being launched at universities, and some of this is, I think, intimately associated with the rise of the populist right. And certainly, this is evident in Australian politics — that there is a populist right that is deeply suspicious of elites, of any form of expertise, and of independent institutions that might hold Governments to account. And universities are all of those things. And so, in my view, the exaggeration of the crisis in university risks giving fuel to the populist criticism that seeks fundamentally to undermine the authority of universities.

(12:15) Now, I think that makes it all the more important that we make— take a small number of problems seriously. But I think it is also important to understand the context and get the perspective, because in my view Australian universities are forums where controversial ideas are discussed all the time.

Professor Heinze (12:35): In a sense, I certainly agree with you that there's— that there's a hysteria being whipped up on, you know, on the political right. Having said that, I think that there's a lot of hyperbolic rhetoric at both extremes, and I think within university departments, in particular, the politics are often very different from those of society as a whole. And so I would like to see, actually, both extremes, moderated a bit, and which— and I think, actually, free speech serves that cause.

Professor Stone (13:09): So perhaps I could just say that this is going to be no fun, Eric, if we continue to be in furious agreement all the time, but I will say that I couldn't agree more about the need for moderation on both— at both ends of the extreme here. I think a certain amount of passionate commitment and overstatement is, you know, part of campus life and part of political life. What I hope would be special about universities, and what I think universities and university academics ought to be doing is to be— have a special responsibility to promote genuine open-mindedness, reasoning, and evidence-giving— and evidence provision in the course of argumentation. And that a— that's a hard task, but it's one that I think would be worth exploring, because otherwise you're right, we're left with the culture war, and the feature of the culture war is, you know, a lack of reason and good motive on both sides a lot of the time.

Gauri Pillai (14:10): Well, I think that the agreement is fascinating, because it kind of shows that the extent to which the polarisation actually exists is also, in fact, exaggerated.

(14:22) So maybe we can now move onto the specific legislative proposals in the UK, and again, to go back to something we started with, it is important for us to remember that all of these issues which we talk about in the context of the UK or Australia have a lot of global resonance.

(14:40) My next question is, the supporters of the Bill argue that policies such as no-platforming, which the Bill targets, raise free speech concerns by clamping down on the free and open discussion of all ideas. And no-platforming, as I'm sure you're all aware, refers to the refusal to provide a platform to speakers who further marginalise disadvantaged or subordinated groups. So my first question is to you, Professor Heinze — you have argued that no-platforming is at the opposite— is at odds with the mission of higher education. Can you explain this claim and how no-platforming raises free speech concerns?

Professor Heinze (15:17): Yes, yes, gladly. Yeah, and here, I'm afraid I'm going to have to become just a little bit professorial, so feel free to interrupt me if you find yourself falling asleep. We're in the habit of talking about liberal democracy, as if “liberalism” and “democracy” basically entail the same values. Sometimes they do — sometimes the phrase “liberal democracy” is useful. In the case of free speech, it's terribly confusing. The— Overwhelmingly, the arguments that we have about free speech have been framed within the vocabulary and the concepts of classical liberalism. What do I mean by that? The classical liberal view of free speech is that we need— or the classical liberal view of anything— is that politics should always optimise individual freedom — it should always allow as much freedom as possible, limited only by possible harms caused in the exercise of freedoms, right? That would be the outer limit of any given freedom, including free speech.

(16:29) Now, what does that mean, for universities? It means that we have to have, for each case, kind of “Platonic guardians” who are in the business of deciding how— of measuring out everyone's fair share of speech — how much freedom should everyone get? I think this is totally wrong. And so in my own work, I've argued that the liberal— this kind of liberal calculus, of freedom versus harm, gets us nowhere — it simply becomes

another way of rephrasing the same old debates or, as Adrienne said, the same old cultural wars, and what we need is actually a democratic model, which is very different from a liberal model here. What do I mean by a democratic model?

(17:11) I would admit any speaker. What matters are the rules of the game, the rules of the discussion — how is that speaker then being invited? What kind of event is it? If you're going to invite speakers, what's important is that there is a platform — and this is very easy nowadays, in the era of the internet — where the whole university community is informed, you identify who's doing the inviting (whether it's an individual or a group), you advertise it to the whole university community, everyone's invited, no private meetings (you know, at least on, you know, state financed campuses, which are most of the campuses in Europe), and then there's always— the final rule is that there is always an opportunity for cross-examination. You don't have “gurus” who come, say what they want to say, and then leave. A lot of controversial speakers simply wouldn't come because they would know that they were being subject to cross-examination, and many of them don't like that.

Professor Stone (18:16): Oh, okay, so I'm going to be professorial for a moment and offer a competing frame (and this comes from my recent book, which I co-authored with Carolyn Evans).^[6] So, I mean, my view, overall, about inviting speakers onto a university campus is that what is important to remember is that this is a university, and universities ought not be thought simply as forums for the politics that might occur in the society at large. They're special communities of research and teaching, and the way in which activity is conducted on a university campus — including the way in which speakers who are invited from outside, the way in which we respond to them, and decide who can come and who can't, and what circumstances — all of that has to be consistent, and really driven by fundamentally university values. Now, I think that universities ought to place a very high priority on having a very diverse range of speakers and absolutely permit the unorthodox and the uncomfortable idea to be expressed in campus. I think those are university ideals. But, um, I think universities should not be shy about curating the speech environment in a way that reflects what academic ideals are, and so we should be really rather insistent on things like the provision of an opportunity for response.

(19:56) Now, all that is said, I think where Eric and I differ is this. There are a very small number of speakers who I think having them on a university campus is inimical to the kind of community that you want a university to be. So, for example, I think, you know, the worst forms of, say, white supremacy. Now, in my country, those would be basically illegal anyway, but there might be some places where they're not. Or, for example, I think the most egregious forms of say, anti-vaccination activism, which actually operate, not only with a disregard of, but with a fundamental contempt for, the knowledge-seeking mission of universities.

Professor Heinze (20:09): See, I guess the problem is, I've heard at a number of academic conferences, and there are actually publications written also, to suggest that climate change deniers— we need to, you know, exclude them too. People, you know, who have differing views on the rights of trans people. Again, it always looks like a small exception, but you know, these exceptions, they don't stop, they just keep coming and coming, and each one has a passionate reason for it, and it's always just going to be a very narrow exception. Well, before you know it, particularly once you allow one group's exception, then it becomes harder and harder to disallow other exceptions. I don't think the question is— obviously nobody has a right to a university platform. Certainly no outsider has a right to it. But I don't think that's the question.

(21:03) Again, the question is, if some members of an academic community make the autonomous decision, like a student group, that they want to invite a speaker... Because then the question is whether other members of the academic community have any standing at all to censor that view, that's really what we're talking about, right? It's not— I don't think it is an abstract discussion about what are the values, or you know, the mission of a university, because again, that simply presupposes what often needs to be discussed. And again, it sort of pre-empts, it says, “Well, we've already solved this problem of what a university is and what its vision is, and so now we can move on.” But— but who's made that decision, right? That ultimately becomes authoritarian.

(22:25) My last point would be that— and again, why I get nervous about a model about “academic values”, again, whatever those are, and whoever they are... A university is not only actually about the pursuit of academic values. That's what happens in the classroom. That's what happens at the library. That's what happens in the laboratory. But a university community is also a community, and in a democracy, it means it's a democratic community within a democracy. Now, what student groups do when they invite speakers is not always meant to recapitulate what's going on in classrooms. It is an expression of them, of their community identity, and not simply their academic identity or allegiance.

Professor Stone (23:11): I think we have to remember, whatever approach we take here, there are costs, and there are risks. So if we take the view that every speaker is welcome on campus, let's remember that there are costs.

(23:25) One of the costs might be the co-option of the prestige of a university to a thoroughly unworthy cause, like say, intelligent design or eugenics, or something like this. Another thing to remember is that, I think it's a mistake always to characterise an invitation to a speaker on campus as [if] members of a university community were genuinely interested in knowing what the speaker wants to say. Very often— or, not very often but at least in some circumstances, it's quite clear what you have is one group of students provoking, deliberately, another group of students, which is part of ordinary politics, but it's not quite valuable, robust, open discussion.

(24:08) And lastly, of course, there are the costs to members of the community who may be the subject of very, very hurtful and harmful kinds of speech. And we just have to remember that those don't fall evenly, you know? They fall on minority students more than they fall on the majority of students. They fall on women more than they fall on men.

(24:35) Now, I really think part of the point of a university education is to learn a certain degree of civic courage — that is, the capacity to hear the really horrible offensive idea and respond. I'm really interested in universities being able to work with their students in building up those values. But we shouldn't pretend that there are no costs and no risks to either kind of approach here. Um, and secondly, I'm just not as agnostic about what the values of a university are. I think that there are instances of universities worldwide that have done a brilliant job at, you know, self-consciously, as a community, engaging in a process of identifying university values — the Chicago Principles are one.^[7] And, you know, I don't necessarily— wouldn't necessarily suggest every university adopt those principles themselves, but what's wonderful about them is how they have brought a university community into a dialogue about what that university is about. Other universities have done the same, and we detail some of them in our book. I think that it is within the scope of a university to create a conversation about university identity — that is a very productive way to go and can be the basis for, you know, a thoughtful approach to having a university environment that is both really open, but really, really respectful of the fundamental mission of the university.

Gauri Pillai (26:11): To actually pick up on the idea of costs to students from minority communities. So, another right that commonly comes into play in these debates is the right to non-discrimination of these students. And so, on the one hand, it is argued that forms of speech which discriminate against these students by perpetuating their disadvantage, or by violating their dignity, should not be protected as free speech. And on the other hand, the UK Government is very careful, or has been very careful, to emphasise that the new law would not legitimise hate speech, or the incitement to forms of violence and abuse — instead, it would only protect lawful forms of free speech, which the Government claims are currently being suppressed for offending the feelings of over-sensitive students. Professor Stone, in your opinion, is this a fair characterisation of the tension between the right to free speech and the right to non-discrimination?

Professor Stone (27:05): So I think there is a tension. I think there are circumstances in— that I can think of— that involve students' over-sensitivity. But there are also examples that I can think of that involve students making really pretty legitimate claims as to why they ought to— ought to be expected to suffer certain kinds, or really what is harassment and discrimination in their own campuses. The difficulty is drawing the line between the two. And I simply— I don't think that there is an easy way out here, and I don't think by just— it is really fair, just to say that every speaker should be allowed, precisely because at least some speech is going to really be harmful, and I don't think it's plausible to say that no speech causes a harm about which we should be concerned. It's difficult to get this right.

(28:06) I think we ought to remember, as well, that universities ought to be inculcating in their students an attitude of engagement and preparedness, to listen and to respond, and a confidence that will ultimately make them much less susceptible to this kind of discriminatory treatment. But I don't think we can just expect that university— that students turn up at university like that. So it's a process that we engage in over some years, I think, of encouraging our students to be more and more resilient in the face of this. The result is, and I can't put it any better than I already have — there are some, very few, very extreme forms of speech that I think it's not fair to allow to occur on a university campus.

Professor Heinze (28:59): Again, I think I am struggling a bit with, you know, with some of what Adrienne is saying, although I certainly appreciate those, you know— many of the concerns. Now, in addition to anti-

vaxxers, people who question trans identities, or climate change deniers now, we've just added two more categories: intelligent design and eugenics.

Professor Stone (29:20): But those are your categories, not mine — I had said nothing about, trans identity, or—

Professor Heinze (29:26): But many people have, Adrienne, many people—

Professor Stone (29:28): And many of them are wrong.

Professor Heinze (29:29): But that's the point, that's the point, you see! Who— This is where we're setting ourselves up is as Platonic guardians. Society— You know, who's rational and who isn't? Standards of rationality are not constant. But let me— let me get to the more specific question about discrimination because I think it's important. And I absolutely agree that the question of power dynamics has to be taken into account, and here I disagree with many free speech advocates, who simply ignore it. So, here, I think Adrienne, you're entirely right to take— to take these into account— to talk in particular about, you know, a whole history of women being subordinated, not only in society, but in universities, as well as ethnic minorities, and you know, sexual minorities [...] I take that very, very seriously. The approach that I take in my writing, in my book and elsewhere, is that universities have many means of promoting diversity. And more and more they avail themselves of these sorts of means, right? Whether it's through freshers' initiation weeks, or other sorts of campaigns where we absolutely promote values of diversity, of pluralism, of ethnic difference, of women's empowerment, and so forth. I favour all of that. I think universities should have more of those programmes. And it can do those things without having to censor those who disagree. That's my only point. Because one thing is for sure: when you start censoring those who disagree, it doesn't make them go away — it provides just more fuel for their fire. Whereas if you let them go and you put them through a nice solid cross-examination, right, that is often far more effective.

Professor Stone (31:15): We can play this game all day, where you can point to the problem of where you draw the line, and therefore say, "Because of the possibility that we won't draw it in the right place, we mustn't draw it at all." If you're going to take that view, you need to squarely face the consequences of it. And that is, university life will become harder for some members of our community. It will be harder for them to be students. It will be harder for them to be academics. It will be harder for them to do what they come to the university to do, which is to learn and to pursue knowledge through academic inquiry.

(31:57) So my view is that there are exceptional circumstances in which we protect that activity. Now, they're very limited. But can I point out that, if you say to some nefarious group, "You can't come onto campus", you're not stopping them from taking their views to the steps of Parliament House, or Hyde Park Corner, or anywhere on the internet. You are simply saying, "This is our community, and in this community we want to prioritise some other activity."

Gauri Pillai (32:36): Professor Heinze, you talk about how bringing speakers in and subjecting them to, you know, very rigorous cross-examination is the best way forward, in, sort of, your democratic model. So Professor Stone, my question is, do you think that practically, viably, can universities students rigorously cross-examine a speaker that they have externally invited, taking into account the power imbalances that exists, which I think all of us are in agreement is important to consider?

Professor Stone (33:06): So, I mean, I'm very sympathetic to that idea, and I think that's an excellent model that I hope would prevail in most cases. Sometimes what is happening though, and I certainly can think of this happening in Australia, is what is happening is someone's coming onto campus, and they know that it's going to promote a huge reaction, and what they're actually wanting is the reaction, not the debate. So there's a certain amount, I think of... I think, a sort of over-optimistic, even naïveté in the idea that it's going to be possible just because the nature of some of these speakers is deliberately to stir up a melee rather than actually to have some kind of debate.

(33:57) And, you know, Eric, I think— if I could just perhaps lay down a little bit of a challenge to you— I think you really need to be able to say to those students who will be disadvantaged, who will be more disadvantaged than their peers, why it is that they ought to suffer disadvantage to allow a speaker onto campus who does nothing to advance their education, who does nothing to advance the research mission of a university, who does nothing to advance the civic life of the university, who is purely destructive— why that kind— why they should have to suffer that cost and others don't.

Professor Heinze (34:42): Just as a preliminary, just so there's no confusion. My position is not that we have to avoid line-drawing problems because they're difficult — that's not my position at all. My position is that we should not be in the business of line drawing — that is, as a matter of principle, illegitimate. So it's not that it's difficult to do, it's that we shouldn't be doing it at all. Um, but I think, more directly to Adrienne's challenge, you know, what would I say?

(35:15) First of all— my first response would be to answer the question with a question, which maybe Adrienne can pick up. Is it— Does Adrienne have a concrete example in mind of where a controversial speaker was invited and that caused one or more students to be unable to carry on as students, or staff members to be unable? Okay, now again, I'm not talking here about what— about how, you know, sort of, harassment in the more typical sense. Clearly, that is a problem, and that has to be combated, that has nothing to do with free speech (as I've written extensively)[8] — you know, simply using, you know, racist remarks, that sort of thing. I'm only talking about invited speakers and public platforms, okay? That's all I'm talking about. And I'm wondering if there's an example where an invited speaker in a public platform rendered it impossible, as opposed to just upsetting, to carry on. Again, I'm a member— I'm a member of two minority groups — I'm Jewish and I'm gay. I— I and many, like me, would not have problems with Holocaust deniers, or with anti-gay speakers — quite the contrary. According to the democratic model that I proposed, I would have them come over and I would grill them to the hilt.

Professor Stone (36:41): So I think you simply just put it too high. One— Can I point to one single event that made it impossible. I think these things are cumulative, number one, and number two, I don't think the standard should be impossibilities. I don't see why it should become significantly harder for minority students to feel that they're part of a community and that they can take part in their classes because of the atmosphere of political discussion on campus. I think you just putting the bar too high there, to be fair.

Professor Heinze (37:17): Well, okay, but now, if we're going— if I'm putting the bar too high, and now if we're talking about all sorts of cumulative effects, well, again, where does that stop?

Gauri Pillai (37:27): Maybe a helpful way for us to summarise this would be to just think a bit about what the underlying conception of free speech is, that sort of lies underneath what the two of you are saying, and what the two sides of the debate kind of propose. So my question is — do you think that, even if we're not talking about the two extreme spectrums of the debate, the two sides are using the word “freedom of speech” very differently and in some sense, sort of talking past each other?

Professor Stone (37:56): Well, I certainly think we've been talking past each other, to some extent. Now, I know you've sort of raised this question — is there a common meaning that we can attach to freedom of speech which will allow us to resolve this? And actually, no there's not, and it's one of the beauties of being a free speech scholar, that this is a contested concept, and that we're also talking about, you know, “What are the values that this serves?” And you know, Eric and I both agree that freedom of speech is really important. It comes down to— I think we disagree on limited, very limited cases, where we think that— at the point of application to specific controversies, that's really where I think we disagree. And this is an endemic kind of argument that we have about freedom of speech.

(38:42) But here's a question that I take the view of. I think if you take a view like yours, Eric, then I would think you— it would affect— a separate but somewhat important question is: What is the duty of universities to themselves speak out where, say, members of their community are targeted by a controversial speaker? So if you had a controversial speaker on a campus who, for instance, was at least arguably Islamophobic, my own view is that the price of allowing such a speaker onto the campus might be that the university itself ought to make a statement in support of its students — that is, to use its own power of speech to contradict those ideas which have come onto campus because of their effect on some parts of the community. But that's a controversial position — some people think universities ought not to take— make public statements of that kind, whereas I think it's actually entailed by your position.

Professor Heinze (39:52): Oh, absolutely, I'm so glad you said this. It's a lovely point of agreement. Let them speak and yes, let universities take strong positions, why not? Why— again, why put up this pretence? You put my point better than I could have made it. That's exactly right, that the better way to do it is let the speech go forward, but then let the whole academic community, however it wants to do it, and in 100 different ways, express its disagreement, rather than not even letting the debate ever take place.

Gauri Pillai (40:23): So beyond no-platforming, there are some other practices that have been subject to critique from a free speech perspective, such as providing trigger warnings or creating safe spaces for students from specific groups. So trigger warnings warn students that certain material might cause them to have a negative emotional response, while safe spaces provide students with specific groups an environment in which they are guaranteed that they will not be exposed to discrimination, or other forms of emotional or physical harm. Do practices such as being required to provide trigger warnings— Do you see them as restricting or impinging on academic freedom?

Professor Stone (41:03): I don't see them as restricting or impinging on freedom of speech. A trigger warning is a warning, right? It doesn't— You then have access to material, the material can be taught, there's simply a warning on it. Whether or not they're a good idea or not, I don't know, but I don't think that they restrict anyone's freedom of speech. I don't think that they are— I don't really have very strong concerns about them from an academic freedom standpoint either, because the most important thing for me, for example, is that the academic can then teach the content freely, and express the views about that material that he or she has, by virtue of their academic expertise.

(41:50) The reason I think they're controversial is that— I think they're seen to promote an idea that, you know, that students are somehow to be protected against things that they find difficult. I think that there is some material that would be disablingly upsetting. So I think we ought to be a little bit careful with some of our students who are going to be subjected to really difficult experiences. But I don't think that they should ever be widely— very widely used, precisely because I think, for the most part, university should be about getting to grips with things that are a little bit uncomfortable.

Gauri Pillai (42:36): Professor Heinze, do you have a response?

Professor Heinze (42:39): Yeah, yeah, um... I guess what would concern me is whether an academic is being required. If an academic simply wants to, yeah, I agree— then I agree with Adrienne entirely — sure, why not? I like these kind of non-censorship ways of dealing with the problems, rather than censoring. I would, however, want to warn against teachers being required to have trigger warnings, because again, for me— then again— then we're starting to go down— that's only a step away from censorship. And again, I would be very loath to interfere with academics' choices about how they want to conduct a classroom discussion or presentation.

Gauri Pillai (43:30): So maybe I'll pick up on the point that both of you made about being over-protective towards students, and some authors, in fact, claim that practices like requiring trigger warnings or providing safe spaces coddle student minds. So Professor Heinze, my question is to you. You actually write that the policy of providing safe spaces, while originally innocuous, has now come to signify something altogether more alarming. I'd like to ask you why you think that is and how also do you respond to the argument on over-protection of students?

Professor Heinze (44:07): Yes, well, what I meant by safe spaces originally having been innocuous is that originally, as far as I know, a safe space simply meant a kind of a designated area for students to gather who were— who felt provoked by or offended by some campus event, right, where they could come together, right, and talk, and so forth. There again, because— that doesn't entail censoring anybody. So as far as I'm concerned that itself is also freedom of association, and it's entirely legit. It's also freedom of speech, really, right? Freedom of speech and freedom of association pretty much always go together. And so that original idea of the safe space, I have no problem with whatsoever— You know, again, that's for students themselves to decide if they want to do that. Why would one interfere with that, it's their own business?

(45:08) Where I think safe— the concept of the safe space started becoming more dangerous— and again, I've seen examples— I've written about some examples of this— is where it suddenly becomes declared that the whole university has to be a safe space, right? And therefore— again, we therefore have grounds for eliminating controversial speakers. So then safe space just becomes another term for censoring, and, you know, let's then at least be honest about it.

Professor Stone (45:39): Do you know, in my academic life I've never come across "safe space". I sort of regard them as almost urban myths within the universities — they're not a very common practice, and I certainly agree that the entire university shouldn't be a "safe space". But in principle I'm not opposed to measures that provide

students with forums in which they can feel that, just at least for a time, and in a place, they're not subject to some of the rigors of being in a diverse community.

(46:19) I mean, I've been following on Twitter, very recently in fact, some Oxford academic, members of the Law Faculty, people of colour, who have been detailing some of their experiences as academics and students at university, that have impressed upon me just how very tiring it must be to be constantly correcting misapprehensions about yourself by virtue of your skin colour, to be constantly explaining that, yes, you are entitled to be in this place and know that you're not— yes, you are part of this class, and yes, you are a professor, and be constantly subject— you know, really quite— things that are casual in a sense, but also, you know, deeply racist in another sense. Now, I think that giving— if we are going to encourage a lot of freedom within our university, precisely because, you know, it is going to be so much harder for some members of the community really to feel part of it than others, that whatever we can do to give some respite from that, you know, is basically a very good idea.

(47:37) Can I say that I'm mostly— most sympathetic with that in relation to students, and particularly students in their early universities— in the early part of the university experience, that we should be most solicitous of because I would hope as you go through university you will gain confidence in dealing with these really difficult situations and be less affected by it, and we should be committing ourselves to make sure that happens.

Gauri Pillai (48:07): So that brings me to my last question, which is actually something we started with, which is on the issue of backlash and implications. Some claim that these practices, which we've been talking about — which is no-platforming, and trigger warnings, and safe spaces — they foster separateness or polarisation on university campuses, and this leads to increased animosity between groups, which then sets us back on achieving human rights goals, such as racial and gender equality. How would the two of you respond to that? Professor Stone, would you like to start?

Professor Stone (48:41): I would want to see some evidence of that before I was prepared to embrace it. I think we shouldn't assume that that's going to be the result, and it's at least as plausible that a judicious use of those practices creates, on the one hand, an atmosphere of respect, and a kind of form of respite and support that makes living in a university community possible.

Professor Heinze (49:16): I mean, I agree with Adrienne, that evidence about this kind of claim, that these discussions are promoting polarisation... Yeah, it's, you know, it's hard to imagine even what would count as evidence— But let's just assume that, right, even if we're not sure. Well, you know, I'm not sure it's ever been proved that human beings are not to some degree tribal, that we don't somehow tend to gravitate toward those with whom we have affinities. Again, and why deny that, right? Why deny that? Once again, I would say, why would we want the illusion that a university community is going to be a Shangri-La? Yes, people will come with, you know, with identities of any different kinds, of a number of different kinds, and those identities will in turn shape their world views, and therefore shape disagreements with people who have other— who hold other worldviews. And so I can only repeat what I've said before — Let those discussions take place. Let's not be afraid of them.

Gauri Pillai (50:24): That seems to be an excellent note to end this on, and that's all from me as well. So thank you so much to the both of you for participating, and I loved being a part of this conversation, and I hope the two of you enjoyed it is well.

Professor Heinze (50:37): I've enjoyed it immensely.

Professor Stone (50:39): Thanks, Gauri. Thanks, Eric.

Gauri Pillai (50:51): RightsUp! is brought to you by Oxford Human Rights Hub. The Executive Producer is Kira Allmann. This episode was produced and hosted by Gauri Pillai and edited by Christy Callaway-Gale. Music for the series is by Rosemary Allmann. Show Notes for this episode have been written by Sarah Dobbie. Thanks to production team members — Mónica Arango Olaya and Natasha Holcroft-Emmess — for their valuable feedback in putting this episode together.