"SCHOLARS, STUDENTS AND SANCTIONS" - DISMISSAL AND DISCIPLINE IN THE MODERN UNIVERSITY*

*Michael J. Beloff Q.C.***

THEME

I want to explore the extent to which the law controls the powers of academic institutions to expel their senior and junior members; and to see what lessons can be drawn by the academic institutions themselves to protect themselves against, if not litigation itself, at least litigation in which they are the unsuccessful defendants. For universities like other domestic or quasi-domestic institutions (the controlling bodies of national sports being, in my professional experience another notorious example) have been slow to realise that the wielding of arbitrary power, which has characterised their behaviour - in the case of Oxford and Cambridge and their colleges for several centuries - is no longer compatible with the development of natural justice - and renders them vulnerable to challenge in the new rights - based culture of our times. It is by no means inconceivable that a university which sends a student down for failing examinations will find itself at the receiving end of a writ for negligent tuition.[1] The boundaries of negligence, in the field of education, as elsewhere, are never closed.[2]

---

* Based on a talk given at London School of Economics Law Society: 13th. February, 1997. I am grateful to Sarah-Jane Davies, my colleague at 4-5 Grays Inn Square for her assistance with this talk.

** President, Trinity College, Oxford, Judge of Court of Appeal, Jersey and Guernsey, Master of the Bench of Grays Inn.

[1] See *e.g.* The Sunday Times, 9th. February, 1997, p.1. An earlier example is provided by *Sammy* v. *Birkbeck College* The Times 3rd. November, 1964. See also *De Mello* v. *Loughborough College of Technology* The Times 17th. June, 1970.

[2] *X.* v. *Bedfordshire County Council* [1995] A.C.633.

SOURCE OF POWERS

What is the source of a University's or College's powers to terminate relationships and impose sanctions? In the case of its academic staff the answer lies essentially in contract, qualified by statute. In the case of its junior members, the answer lies essentially in contract too. The recent *Report of the Task Force on Student Disciplinary Procedures* [The Zellick Report] stated:

> "A university derives its disciplinary authority from its contractual relationship with the individual student, and possibly also from the student's membership of the University where that is formally recognised in the instrument of Government. In consequence the student is expressly or by necessary implication required to subscribe to the rules of the institution for the time being in force."[3]

The *loco parentis* theory[4] has long since been discarded, although there are echoes of it in the judgment of Pennycuick J. in *Glynn* v. *University of Keele*.[5] The remedies for breach will be those of private law, damages, injunction, declaration.

But public law remedies may also be appropriate where the University is founded by statute[6] or by statutory order.[7] In *R.* v. *R.M.M.U. ex p. Nolan*, Sedley J. said categorically:

---

[3] C.V.C.P. 1994 p. 1. In his *Report on the Sit-in at Cambridge University* (1973, para.154) Lord Devlin said that the foundation of the disciplinary power was the contract of matriculation. See also generally Lewis, "The Legal Nature of a University and the Student-University Relationship" 1985 15 Ottawa L. Rev. 249.cf Pharoah, "Public Law or Private Contract: Judicial Review in the statutory Higher Education Institutions" 1997 E.P.L.I. vol 2 Issue 3.

[4] Lewis, *ibid.* at 252-253.

[5] [1971] 1 W.L.R. 487 at 494E-H.

[6] *E.g. Spruce* v. *University of Hong Kong* [1993] 2 H.K.L.R. 65.

[7] *E.g. Merdeka University Bhd.* v. *Government of Malaysia* 2 M.L.J. 356 (1982); 2 Malaya L.Rev. 243 where I represented a group of Chinese Guilds and Associations who sought to establish a private university in Malaysia, where the tuition would be in Chinese: and lost in the Court of Appeal: the majority (4) being Malay, the minority (1) being Chinese.

> "The Respondent is a public institution discharging a public function and having no visitor. It is subject to judicial review of its decisions on conventional grounds."[8]

What of the position of universities founded by charter *i.e.* under the prerogative? Professor Wade has argued that a charter confers only the powers of a natural person upon a university. It has no authority to determine the rights of anyone by virtue of its chartered status alone. Its regulations depend for their legal force upon incorporation in a contract. The situation can be contrasted with statutory universities which, while they have jurisdiction only over those with whom they enter into a contractual relationship can thereafter point to statute as a *source* of their rule-making powers.[9] The recent case of *R.* v. *The Jockey Club, ex p. The Aga Khan* certainly suggests that not all chartered bodies are amenable to judicial review.[10]

But a charter is, in my view, a source of powers, as well as a source of capacity: certainly it defines powers. Moreover universities are performing public functions in the modern sense: education is primarily the necessary responsibility of the State. A university's autonomy is not threatened by the use of public law remedies against it; and public law principles (especially as to fair procedures) can inform the relationship of even private persons, where the private authority wields significant powers.[11]

Statute or charter can add to, subtract from or qualify contractual rights: and the governing instruments of universities will certainly be relevant in so far as any contract includes by necessary implication a provision that the university will only act within its powers and in accordance with its duty as laid down in the

---

[8] [1994] E.L.R. 381 at 384.See generally Lewis "Litigation and the University Student"("Lewis on Litigation") Ch. 9 in McManus "*Education and the Courts*" Sweet and Maxwell, 1998 especially at pp 170 - 173

[9] H.W.R.Wade, 85 L.Q.R. 468: 90 L.Q.R. 157.

[10] [1993] 1 W.L.R. 909.

[11] *E.g. Breen* v. *A.E.U.* [1971] 2 Q.B. 175 *per* Lord Denning M.R. at 190.See generally on the availability of judicial review Harris "Judicial Review and Education" in "*Judicial Review and Social Welfare*",Cassels 1997 and "Education and Judicial Review - an Overview" 1997 E.P.L.I. (Issue 5) 24 at p. 25; Farrington "Resolving Complaints by Students in Higher Education" 1996 E.P.L.I. (issue 1) 7 at p 9.

procedures contained in those instruments.

TENURE

Against that background I start with consideration of an academic quasi-myth - that of tenure. It is a legitimate concern of academics that they may be vulnerable to discipline or even dismissal, not on account of the incompetence of their teaching, but because of the unpopularity of their views. It is therefore regarded as a cornerstone of academic freedom that university teachers should have security of tenure for life, or at any rate until normal retiring age, subject only to not breaching the terms of their employment in some significant - in the language of the cases 'repudiatory' - way, or being otherwise guilty of misconduct. Whether t'was ever thus, I shall not explore; it certainly has not been thus usually for the recent past and will not be thus in the perceptible future. Insecurity rather than security of tenure is the dismal prospect for the modern academic - unsurprisingly so when there are too many dons chasing too few jobs.

The concept of tenure was touched on in the celebrated case of *R.* v. *University of Hull Visitor ex p. Page* ['*Page*'].[12] In 1966 the applicant was appointed a lecturer to the university by a letter which, *inter alia*, stated (critically) that his appointment might be terminated by either party on giving three months' notice in writing. The appointment was subject to the university statutes which, *inter alia*, required the applicant to retire from office at age of 67. By section 34(1) of the statutes members of the staff who held their appointment until retirement might be removed "for good cause," and by section 34(3) *subject to the terms of his appointment* no member of the teaching staff could be removed save for good cause. In 1988 the university purportedly terminated the applicant's contract of employment not for good cause but on the ground of redundancy, giving him three months' written notice. He petitioned the visitor of the university for a declaration that such purported dismissal was contrary to section 34 so as to be *ultra vires* the university's powers and accordingly invalid. The visitor, Lord Jauncey of Tullichettle dismissed the claim. The Court of Appeal found there was no presumption in favour of tenure.[13]

---

[12] [1993] A.C.682 (H.L.) & [1991] 1 W.L.R. 1277(C.A.). Cf for Canada Khan. A "Canadian University Academic Tenure Implications" Education and the Law vol 9 no 2 1997 p 109 ff.

[13] Staughton L.J. said *ibid.*:

Notwithstanding that analysis, I was recently instructed on behalf of another University, whose name I cannot for reasons of client confidence disclose, whose

---

"Thus far I have said nothing about academic tenure. *I fully appreciate that importance is attached to job security by those who teach at universities; and I see nothing improbable in the University of Hull in 1966 appointing someone as a lecturer until the age of 67, subject only to good cause. The statute itself contemplated that this might happen. But, equally, I see nothing improbable in the university appointing someone on terms that he should remain until that age, unless three months' notice was given sooner.* Accordingly, it is in my judgment right to approach the problem from a neutral position, without any predisposition to favour one solution or the other. That I have sought to do.

Likewise, I would see nothing improbable in the university binding itself to Mr Page for a longer period than Mr Page was bound to the university, if it chose to do so. But in my opinion it did not."[at 1289] [emphasis added].

Farquarson L.J. said:

"[Counsel for Mr. Page] *approaches the task of construction on what might be described as policy grounds. He submits that the purpose of those sections in the statute is to preserve and guarantee academic freedom. No teacher should be at risk of dismissal because he expresses radical or unpopular opinions.* He is given protection against such a risk by the provision that he can only be dismissed for "good cause" as expressed in the statute, which, broadly speaking, relates to immoral conduct of a disgraceful nature or incapacity. Recognition of the importance of this safeguard is to be found in the Education Reform Act 1988 in section 202(2)(a) and 203(1)(b). The introductory words of section 34(3) of the statutes could not therefore have been intended to remove the protection given to university teachers. [Counsel for Mr. Page] argues that, if the university's construction is correct, the whole edifice set up by the section is destroyed. There would be no point in going through the painful and difficult task of proving disgraceful conduct by or incapacity of a member of the university staff if the problem could be resolved more simply by giving three months' notice.

These are cogent arguments but for my part I find it difficult to spell out the policy suggested from these two sections. *The provisions are equally consistent with a view which might be taken by the university that with falling rolls and increasing expenditure it could not afford a guarantee of employment for a professional lifetime.* I agree with Mr. Burke that the two provisions, that is, in the statutes and in the letter of appointment, sit uneasily together but I do not accept his approach of attributing a policy to the statutes and then seeking to construe them in a way which achieves that policy. If the policy was clearly expressed in the statutes, it might be different but in the present case the task of the court is to derive the true meaning, if it can, from the words of the section themselves."[at 1292] [emphasis added].

solicitor told me that *Page* was regarded among their staff as *establishing* the doctrine of tenure rather than - as was the case - giving it its *quietus*. In point of fact, there are not many academic institution in this country which have selected the second of Staughton L.J.'s two alternatives (*i.e.* appointment until retiring age, subject only to dismissal for good cause[14]); and, such as have, are no doubt cursing the draftsman.

One example is provided by *Pearce* v. *University of Birmingham (No.2)* where Sir Nicholas Browne-Wilkinson V.-C. (sitting as a visitor) held the university had no power under its domestic laws to breach the respondents' contracts of employment by issuing redundancy notices.[15] Under Article 3 of its charter the University of Birmingham only had power to do acts which complied with the terms of its charter itself and statutes. The Vice-Chancellor held that if it implemented the redundancies it would be acting in breach of section XXV of those statutes, which provided that academic staff could only be dismissed for good cause, and made no provision for dismissal for redundancy.[16]

VISITORS

The chief significance of *Page* was that it confirmed the vitality of another ancient concept - but in this case a real, not a fanciful one - the jurisdiction of the visitor. This had been explored in an earlier case in the House of Lords, *R.* v. *University of Bradford ex p. Thomas* ['*Thomas*'].[17]

In *Thomas* the plaintiff was appointed a lecturer in sociology at the University of Bradford and thus became an employee of the University under a contract of service, the holder of office *in* and member *of* the University, [which by Royal Charter was a corporation within a visitor's jurisdiction], and a corporator. The University purported to dismiss the plaintiff. She brought an action claiming, *inter alia*, a declaration that the University's decision to dismiss her was *ultra vires*, null and void by reason of non-compliance with the disciplinary rules and procedures contained in the University's charter, statutes, ordinances and

---

[14] See *ibid.*.

[15] [1991] 2 All E.R. 461.

[16] See now the Education Reform Act s.203(1)(b).

[17] [1987] A.C.795 in which I had appeared for the applicant teacher.

regulations, and incorporated in the contract. She also claimed damages for breach of contract or alternatively arrears of salary.

It was held that where a dispute related to the correct interpretation and fair administration of the domestic laws of the University, its statutes and its ordinances, it fell within the jurisdiction of the visitor and not the courts of law. Notwithstanding that the disputes resolution would affect the plaintiff's contract of employment the plaintiff was not relying upon a contractual obligation *apart* from an obligation of the University to comply with its own domestic laws. Accordingly, her claim fell within the exclusive jurisdiction of the visitor, subject to the supervisory jurisdiction of the High Court.

By way of consolation it was also held that the visitor in the course of his supervisory jurisdiction must be entitled, in order to ensure that the domestic law is properly applied, to redress any grievance that has resulted from its misapplication. This redress might involve ordering the payment of arrears of salary where the visitor decides that the employment has not been determined, or compensation where the complainant has accepted the wrongful repudiation of his contract of employment.

The House of Lords took the view that the visitor's role was no anachronism and rejected several propositions of policy and principle which I advanced to contrary effect.[18]

Lord Griffiths concluded:

> "I cannot accept that the continuation of the visitorial jurisdiction with the scope and powers I have discussed will leave the academic staff of universities at a significant or at any disadvantage to their colleagues working in other fields of education. In the first place the action for wrongful dismissal has largely been superseded by the far wider protection afforded to employees by the Employment Protection (Consolidation) Act 1978. All these rights are available to all university academic staff because Parliament can of course invade the jurisdiction of the visitor if it chooses to do so. If in the course of such proceedings any question arises concerning the interpretation or application of the internal laws of the university, it will have to be resolved for the purpose of the case by the tribunal hearing the application. Such power must be implicit in the remedies provided by the Act, and to this extent, Parliament has given rights

[18] See summary of my submissions, *ibid.* at 802B-C.

that enter and supersede the jurisdiction of the visitor. I cannot accept the suggestion that if in the course of a tribunal hearing a question arises concerning the interpretation of university statutes etc., the case should be adjourned pending a decision by the visitor. This would be altogether too unwieldy a procedure and cannot have been the intention of Parliament.

Secondly, if what is really sought is reinstatement, it is more likely to be achieved by appeal to the visitor than to the courts. As a general rule the courts will not enforce a contract of service and the delay that inevitably results between the dismissal and the date upon which the case comes before the court makes reinstatement all the less likely, for by the time the case is heard the plaintiff's post will have already been filled. The appeal to the visitor is, however, a speedy and informal procedure and reinstatement can be considered without the constraints imposed by the passage of time.

It is true that the decision of the visitor is final and the parties are thus deprived of challenging a decision in the Court of Appeal and perhaps the House of Lords. But is this a disadvantage or an advantage? I rather think it is an advantage. Today the visitors of universities either are or include independent persons of the highest judicial eminence. Would not most people consider it better to accept the decision of such a person rather than face the risk of the matter dragging on through the years until the appellate process has finally ground to a halt. There is also the advantage of cheapness, lack of formality and flexibility in the visitorial appeal procedure which is not bound by the intimidating and formalised procedures of the courts of law.

Finally, there is the protection afforded by the supervisory, as opposed to appellate, jurisdiction of the High Court over the visitor.

....These considerations lead me to the conclusion that the visitorial jurisdiction subject to which all our modern universities have been founded is not an ancient anachronism which should now be severely curtailed, if not discarded. If confined to its proper limits, namely, the laws of the foundation and matters deriving therefrom, it provides a practical and expeditious means of resolving disputes which it is in the interests of the universities and their members to preserve."[19]

---

[19] *Ibid.* at 824C-825D. See also Sir Robert Megarry V.-C. in *Patel* v. *University of Bradford Senate* [1978] 1 W.L.R. 1488 at 1499-1500.

Lord Browne-Wilkinson said supportively:

> "The advantages of having an informal system which produces a speedy, cheap and final answer to internal disputes has been repeatedly emphasised in the authorities, most recently by this House in *Thomas* v. *University of Bradford* [1987] A.C. 795: see per Lord Griffiths at p.825D; see also *Patel* v. *University of Bradford Senate* [1978] 1 W.L.R. 1488, 1499-1500. If it were to be held that judicial review for error of law lay against the visitor I fear that, as in the present case, finality would be lost not only in cases raising pure questions of law but also in cases where it would be urged in accordance with the *Wednesbury* principles (*Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation* [1948] 1 K.B. 223) that the visitor had failed to take into account relevant matters or taken into account irrelevant matters or had reached an irrational conclusion. Although the visitor's position is anomalous, it provides a valuable machinery for resolving internal disputes which should not be lost."[20]

The visitors' jurisdiction extends to all questions arising out of the institution's internal rules, notwithstanding that they involve contractual relations and notwithstanding that the complainant is not a member of the institution.[21]

In *Oakes* v. *Sidney Sussex College, Cambridge*, the Courts refused to entertain action by student who had failed an examination and whom the college refused to readmit.[22] Sir Nicholas Browne-Wilkinson V.-C. held that the jurisdiction of the visitor did not depend on the nature of the plaintiff's membership of the college, but on whether the rights claimed arose under its domestic law; and that, although the plaintiff was not a corporator of the college, but merely a member in

---

[20] *Ibid.* at p.704D-E

[21] For valuable surveys of the law see J.W. Bridge, (1970) 86 L.Q.R. 531; P.M. Smith (1981) 97 L.Q.R. 610 and (1986) 136 N.L.J. 484, 519, 567; Picarda, *The Law and Practice Relating to Charities* (2nd.ed.,1995, Butterworths) at 521-539; Lewis, *Litigation* p 179-180; For the rights of students generally see A.Samuels, [1973] J.S.P.T.L. 252. For recent cases confirming the exclusivity of the visitorial jurisdicition see *Joseph* v *Board of Examiners of the CLE* [1994] E.L.R. 407, *R* v *Visitors of the Inner Temple, ex parte Bullock* [1990] E.L.R. 349; *R* v *University of Nottingham ex p. K* [1998] E.L.R. 185.

[22] [1988] 1 W.L.R. 431.

statu pupillari, his claim was to enforce rights which he enjoyed under the domestic or internal law of the college.[23]

In *R.* v. *Committee of the Privy Council ex p. Vijayatunga* where the complaint was to the appointment of allegedly inappropriate P.C.D. examiners, it was held that a visitor enjoys the widest power to investigate and correct wrongs within his jurisdiction.[24] Simon Brown J. (at first instance) analysed the breadth of jurisdiction thus:

> "I conclude that the visitor enjoys untrammelled jurisdiction to investigate and correct wrongs done in the administration of the internal law of the foundation to which he is appointed: a general power to right wrongs and redress grievances. And if that on occasion requires the visitor to act akin rather to an appeal court than to a review court, so be it. Indeed there may well be occasions when he could not properly act other than as an essentially appellate tribunal. ... he may, indeed should, investigate the basic facts to whatever depth he feels appropriate and he may interfere with any decision which he concludes to be wrong, even though he feels unable to categorise it as *Wednesbury* unreasonable. ... But it nevertheless remains important to recognise that many decisions giving rise to dispute will be subject to considerations which quite properly inhibit the visitors from embarking upon any independent fact-finding role. This is as plainly true of the appointment of examiners as of the decision of such examiners upon the standard attained by a candidate. But in both cases this seems to me less because the university statutes expressly entrust those decisions to the discretion of particular members of the university than that these members are peculiarly fitted by their eminence, experience and expertise to arrive at proper decisions.
>
> My final conclusion, therefore, is that the visitor's role cannot properly be characterised either as supervisory or appellate. It has no exact analogy

---

[23] "It seems to me that in the case of a student at an Oxford or Cambridge college who is not a corporator in the sense of being part of the foundation of the college the fact that he is not a corporator is not necessarily decisive. It may be that, if he is treated throughout as a member and is seeking to rely on his membership, he is subject to the jurisdiction of the visitor." [*ibid.* at 440G-H].

[24] [1990] 2 Q.B.444.

with that of the ordinary courts. It cannot usefully be defined beyond saying that the visitor has untrammelled power to investigate and right wrongs arising from the application of the domestic laws of a charitable foundation; untrammelled, that is, save only and always that the visitor must recognise the full width of his jurisdiction and yet approach its exercise in any given case reasonably (in the public law sense)."[25]

In the Court of Appeal Bingham L.J. upheld this approach:

"I wholly agree with the general principles which Simon Brown J. laid down. The correct approach can, I think, be illustrated by a hypothetical case involving facts remote from the present. I suppose a college whose statutes empowered it to terminate a student's membership, inter alia, if (1) he or she failed after receiving 28 days' written notice to do so to pay any sum owed to the college, or (2) was guilty of persistent insobriety such as, in the opinion of the college, to render him or her unfit to remain as a member, or (3) failed in the opinion of the college to attain the academic standard required of students of the college. I also suppose an appeal to the visitor by students whose membership had been determined under (1), (2) and (3) respectively. In case (1) the visitor's role, although characterised, one hopes, by the cheapness, lack of formality and procedural flexibility applauded by Lord Griffiths in *Thomas* v. *University of Bradford* [1987] A.C. 795, 824 would be essentially that of a first instance judge: that is, he would hear and determine any disputed issue whether the debt was owed, whether notice was given, whether there was a failure to pay and whether any defence of estoppel or a promise of extra time was made out. He would be the judge of the facts and the law. In case (2) his role would be a little different. Here, he would, I think, satisfy himself (if it were in issue) that there was reliable evidence of persistent insobriety not of a trivial kind. He would further wish to be satisfied, if there were any reason to doubt, that the college's decision was taken in good faith and not for any extraneous reason. If satisfied on those points he would not, even if it were different, substitute his own opinion on fitness for that of the college. That is because his responsibility is to

[25] [1988] Q.B.322 at 344.

> see that the college acts lawfully in accordance with the statutes, not to act as an independent arbiter of matters entrusted by the statutes to the judgment of the college and on which its judgment is likely to be better, because better informed and more experienced, than his. In case (3) the visitor would, again, satisfy himself (if it were in doubt) that there was reliable evidence of poor academic performance and that the college's decision had not been tainted by bad faith or extraneous motivation. If so satisfied, he would go no further, for the same reasons as in (2). He could not legitimately override the college's bona fide assessment, based on reliable evidence, of the student's academic performance."[26]

It was confirmed in *Thomas* that the visitor, moreover, is subject to judicial review for breach of natural justice as well as for lack of jurisdiction and of power, but not (by a 3-2 majority) for error of fact or law, the domestic law of the foundation being distinct from that of the law of the land - a species of foreign law; *R.* v. *Hull University Visitor ex p. Page*.[27]

This reinforcement of this ancient institution has modern significance. Although Oxford and Cambridge themselves being civil corporations do not have visitors, their colleges as eleemosynary corporations do.

New universities created by Charter are also eleemosynary corporations and have or are entitled to have a visitor, the universities which have acquired the title only as a result of the Further and Higher Education Act 1992 do not.[28] As Picarda has pointed out the distinction in this context between universities ancient and modern owes "more to history than to logic."[29] The visitors will commonly be the Crown (acting through the Lord Chancellor), unless the Crown or the founder have denominated some other visitor.[30]

---

[26] *Ibid.* at 457D-458D.

[27] *Supra.* n.12.

[28] Picarda, *supra.*n.21 at 522.

[29] *Ibid.*.

[30] Trinity College, Oxford has the Bishop of Winchester as its Visitor. All Oxford Colleges whose Heads are called President have the same bishop as Visitor: but the Bishop is visitor to some Colleges whose Heads are not called President. I owe this analysis to Lord Bingham of Cornhill L.C.J.: even he, however, has been unable to explain the rationale for the position.

Sir Robert Megarry V.-C. was correct to say "the extent of visitatorial jurisdiction in university life has greatly expanded in recent years in *Patel* v. *Bradford University Senate*,[31] although The Education Reform Act 1988 [E.R.A.] has to an extent set limits to that expansion.

THE EDUCATION REFORM ACT 1988

In *Page*, Lord Griffiths had said:

> "If it thought that the exclusive jurisdiction of the visitor has outlived its usefulness, which I beg to doubt, then I think that it should be swept away by Parliament and not undermined by judicial review."[32]

To an extent this has occurred. Elaborate dismissal procedures for universities and colleges have been instituted under the E.R.A. sections 202-8.

Transitional provisions are complicated. For example in *Pearce* v. *University of Aston in Birmingham (No.1)[Pearce No.1]* it was held as a general rule, under the common law all disputes between members of the academic staff and their university fell within the exclusive jurisdiction of the visitor.[33] On its true construction section 206(1) of the E.R.A.1988, being expressed in unqualified terms, had the effect of excluding the visitor's formal jurisdiction in respect of employment disputes between a university and members of its academic staff. It followed, therefore, that since the court always had jurisdiction except to the extent that statute or a rule of the common law excluded it, the effect of section 206(1) was to restore the court's jurisdiction in such matters, while section 206(2) had the effect of preserving the visitor's jurisdiction in such disputes provided that they were referred to him before the relevant date, being the date on which the university commissioners amended the university's statutes to include new procedures made by them under section 203 of the 1988 Act for the hearing and determination of appeals by members of the academic staff who had been dismissed or were under notice of dismissal, but, unless and until such a reference was made and accepted by the visitor, the academic staff were at

---

[31] [1978] 1 W.L.R.1488, affirmed [1979] 1 W.L.R.1066.

[32] *Supra.* n.12 at 694E.

[33] [1991] 2 All E.R.461. See also *Hines* v. *Birkbeck College (No.2)* [1991] 4 All E.R.450.

liberty to bring and continue proceedings in respect of such disputes in the courts. Although such a construction of section 206(1) and (2) might lead to the inconvenient and perhaps costly result that the jurisdiction of the court, once involved, would be ousted if one of the parties to the dispute subsequently made a successful reference to the visitor, that result, however inconvenient, was irrelevant because the wording of the two subsections was clear, and since it did not lead to any absurdity the court was bound to give the statutory provisions due effect. It followed that since the new appeal procedures had not been incorporated into the university's statutes and the relevant date had not arrived, the court had jurisdiction to hear the plaintiff's dispute with the university.

To that extent Parliament has transferred the jurisdiction of the visitor to special statutory bodies and tribunals.

STATUTORY RIGHTS

Where the statutory law of employment protection against unfair dismissal is engaged, it is, of course, overriding.[34] Those rights are currently contained in the Employment Protection (Consolidation) Act 1978 ss. 54-80, as amended.

NATURAL JUSTICE

Whatever the machinery of enforcement, the courts have in general held that academic disciplinary proceedings require the observance of the principles of natural justice: and have been willing to intervene since as far back as the case of *Dr. Bentley*, where the complainant had been deprived of his degrees for alleged contempt of the Vice-Chancellor's Court.[35] The Court enjoyed jurisdiction since the complaint was against the University, as distinct from a College. Fortescue J. plucked precedent from prehistory:

> "I remember to have heard it observed by a very learned man upon such an occasion that even God himself did not pass sentence upon Adam before he was called upon to make his defence."[36]

---

[34] Thomas (supra) at p.824.

[35] *R.* v. *University of Cambridge* (1723) 1 Str. 557.

[36] *Ibid.* at 567.

A university lecturer was, it is true, in one case held by the Privy Council to be a mere contractual employee, so that he could be dismissed without a hearing as explained in the preceding section. This was in *Vidyodaya University* v. *Silva*.[37] This decision has been criticised by high authority, Lord Wilberforce, and is not now a safe guide.[38]

Wade and Forsyth conclude cautiously:

> "But it is at least possible that academic staff of some grades may in law be mere servants. More probably holders of established posts would be regarded as office-holders and so entitled to the benefit of natural justice."[39]

STUDENTS

Students have the protection of their contracts of membership: it will be implied that in return for their fees they will be treated in accordance with the

---

[37] [1965] 1 W.L.R. 77; & *ibid.* at 558.

[38] In *Malloch* v. *Aberdeen Corporation* [1971] 1 W.L.R. 1578 he said:

> "One such, which I refer to because it may be thought to have some relevance here, is *Vidyodaya University Council* v. *Silva* [1965] 1 W.L.R. 77, concerned with a university professor, who was dismissed without a hearing. He succeeded before the Supreme Court of Ceylon in obtaining an order for certiorari to quash the decision of the University, but that judgment was set aside by the Privy Council on the ground that the relation was that of master and servant to which the remedy of certiorari had no application. It would not be necessary or appropriate to disagree with the procedural or even the factual basis on which this decision rests: but I must confess that I could not follow it in this country in so far as it involves a denial of any remedy of administrative law to analogous employments. Statutory provisions similar to those on which the employment rested would tend to show, to my mind, in England or in Scotland, that it was one of a sufficiently public character, or one partaking sufficiently of the nature of an office, to attract appropriate remedies of administrative law."[at 1596F-H].

[39] In *Administrative Law* (7th.ed.,Oxford University Press, 1994) at 564. For a comparison of the way the law treats staff and students in disciplinary issues see Walker and Woolf " Staff and Students Discipline - Similarities or Differences" E.P.L.I. 1997 (issue 1) 13. Commenting on the contractual relationship of the students with the university or college see Farrington, *note 11 supra*, says " Departure from express procedural rules will also give rise to a justiciable claim" Lewis *Litigation* p 173 -4

university or college rules, and be entitled to such protection as those rules confer. In *Herring* v. *Templeman* [*Herring*] the student was dismissed on academic grounds; the recommendation being made by the academic board; confirmed by the principal; and upheld by the Governing Body.[40] It was held the allegations in the statement of claim would be struck out; there had been no breach of the rules of natural justice. One cannot help but note that whatever natural justice was said to apply in theory it proved elusive to identify its requirements in practice. The first two stages of the procedure were said not to attract it because they led to recommendations only, the last because the body lacked the relevant expertise to adjudicate upon academic matters. First of all, by the academic board: no implied obligation to accord a hearing to a student could be imposed on a board which only had power to make recommendations to expel. It was the board's duty to form an unbiassed assessment of the plaintiff's standard of work based on the entirety of his record and potential, and in making such an assessment with a view to deciding on its recommendation it was entitled to take everything it thought relevant into account; the board had taken into account nothing that it was not entitled to do.[41]

Secondly by the principal: there was no ground for implying a term that the recommendation of the academic board should be formally re-opened at a hearing before the principal before he decided whether or not to pass it on as his own.[42]

Thirdly by the governing body: the assumption that the plaintiff was entitled as of right to a full legal trial on every detailed matter was fallacious; the hearing before the governing body was neither a law suit nor a legal arbitration; its purpose was to give the student a fair chance to show why the recommendations of the academic board, which was the competent body to make an assessment, and the principal should not be accepted; it was the duty of the governing body to act fairly. On the evidence there was nothing to show that it had acted unfairly in any way; the plaintiff had been told why the recommendations were made and what the relevant facts were.[43] Natural justice was like the bed of Procrustes, the fit was never perfect.

---

[40] [1973] 3 All E.R. 569 at 585.

[41] *Ibid.* at 584d-f & 585j -586b &e, post.

[42] *Ibid.* at 584d & 586f -j.

[43] *Ibid.* at 587b-e & 588b, c, e & g, post.

Perhaps the clue lies in the concluding words of the judgment:

> "It will be appreciated that for the governing body to accept a recommendation such as this must be distasteful to it; but in a proper case the responsibility cannot be shirked if the public interest in competent teaching in schools is to be protected."[44]

The importance to students of the issues involved has rarely been underrated. In *Herring* Russell L.J. said:

> "In dealing with this aspect of the case, since in every case what are the requirements of natural justice must depend on all the circumstances, we appreciate that the consequences of dismissal are very serious for the plaintiff, who hopes to earn his living in the teaching profession."[45]

In *R.* v. *Aston University Senate ex p. Roffey*, Donaldson J. said:

> "Mr. Pantridge was a student member of the university enjoying the rights and privileges of that status with the chance of achieving graduate status in due time. The sanction which the university was entitled to impose was total deprivation of that status and of the chance of improving it thereafter. Furthermore, as Mr. Pantridge found to his cost, an ex-student member of a university may well be in a more disadvantageous position than one who aspires for the first time to student status. There have been more momentous decisions than that made by the examiners in the case of Mr. Pantridge, but there can be no denying its gravity from his point of view."[46]

However It is a notable feature of the cases on student discipline and dismissal that, either the treatment metered out was found to be fair - or, if it was not, discretionary reasons were somehow found to deny relief.

In the former category (no unfairness) is *Ceylon University* v. *Fernando* where

---

[44] *Ibid.* at 588g-h.

[45] *Ibid.* at 582f-g.

[46] [1969] 2 Q.B. 538 at 552D-E.

the misconduct alleged was cheating in exams.[47] It was held, that in the absence in the relevant clause of the statutes of the University of any express requirement as to the procedure to be followed at the inquiry, such procedure must comply with the elementary and essential principles of fairness. This must as a matter of necessary implication be treated as applicable in the discharge of the Vice-Chancellor's admittedly quasi-judicial functions under clause 8. The Vice-Chancellor could, however, obtain information in any way he thought best, and it was open to him, if he thought fit, to question witnesses without inviting the respondent to be present, but a fair opportunity must have been given to the student to correct or contradict any relevant statement to his prejudice.

In *Ward* v. *Bradford Corporation*, a woman teacher training student was found with a man in her room.[48] It was held that the members of the disciplinary committee were entitled to seek advice from the director of education as a whole on a particular policy, and on the application of that policy to the circumstances of a particular case, so that the case came within the exceptions to the general rule that no person ought to participate in the deliberations of a judicial or quasi-judicial body unless he was a member of it. Accordingly, the participation of the director had not been such as to invalidate the proceedings, though it would be better in future for the director of education or his representative not to participate in the disciplinary committee's deliberations, and that the rules should be amended to make that clear.

Lord Denning said:

> "If there were any evidence that Miss Ward had been treated in any way unfairly or unjustly I would be in favour of interfering. But I do not think she was treated unfairly or unjustly. She had broken the rules most flagrantly. She had invited a man to her room and lived there with him for weeks on end. I say nothing about her morals. She claims that they are her own affair. So be it. If she wanted to live with this man, she could have gone into lodgings in the town and no-one would have worried, except perhaps her parents. Instead of going into lodgings she had this man with her; night after night, in the hall of residence where such a thing was absolutely forbidden. That is a fine example to set to others. And she is a girl training to be a teacher! I expect the governors and the staff all thought that she

[47] [1960] 1 W.L.R. 223.

[48] (1972) 70 L.G.R. 27.

> was quite an unsuitable person for it. She would never make a teacher. No parent would knowingly entrust their child to her care. Six members of the disciplinary committee voted decisively for her expulsion. Not a single vote was cast against it, nor for any less sentence. Three abstained for reasons best known to themselves."[49]

This was a blatant example of substance trumping procedure. Moreover, the requirements of fairness are painted with a broad brush.

A student may be rusticated from his college without an oral hearing, if he has been told the nature of the complaints against him and given a fair opportunity to state his case in writing.[50]

The same conclusion was reached in *Spruce* v. *University of Hong Kong*, where the lecturer was dismissed for indulging in covert practice at the Bar to the perceived detriment of her University responsibilities.[51] Lord Browne-Wilkinson said:

> "There is no general principle that the rules of natural justice require an oral hearing, let alone an oral speech in mitigation."[52]

No appeal is required. In *Brighton Corporation* v. *Parry*, a local authority was held entitled to an injunction to restrain a President of the Students' Union from entering the premises of a teacher training college run and managed by it when restricted by Governors upheld a decision of the academic board.[53] Willis J. said:

> "In my view, the *audi alteram partem* rule was complied with on the facts of this case by the defendant being allowed to make written representations for the board's consideration.
> ... it seems to me, on the facts, first that the defendant knew precisely the nature of the complaints which were made about him; secondly, that he was given an opportunity to state his case; and

---

[49] *Ibid.* at 35.

[50] *Brighton Corporation* v. *Parry* (1972) 70 L.G.R. 576

[51] *Supra.* n.6.

[52] *Ibid.* at 72

[53] *Supra.* n.50.

> thirdly, that the tribunal acted in good faith. In those circumstances, it seems to me - on those three findings - that it is conclusive that there was no breach of the rules of natural justice in the defendant's exclusion from an oral hearing by the board. On the contrary he was, I think, treated with complete fairness throughout. ... He has since acted in the plainest defiance of the authority of the college of which he is a student. It may be that he considers his actions justified as a means of challenging and forcing a change in certain of the college procedures, of which he, and it appears from the evidence filed on his behalf, the National Union of Students disapprove. If so, it seems to me that he must have known that any college, which was not going to abdicate its authority in the face of a student challenge of that sort, would be bound to find such conduct quite intolerable. It seems to me, in all the circumstances, therefore, that this is a case where the plaintiffs are entitled to look to the court to support them when their authority is deliberately and publicly flouted by an insubordinate student, particularly when that student is President of the students' union."[54]

In *Ward* Lord Denning M.R. said:

> "Natural justice does not require the provision of an appeal. So long as the party concerned has a fair hearing by a fair-minded man or body of men that is enough."[55]

In the second category,(discretionary refusal, dspite unfairness) is *R* v. *University of Aston ex parte Roffey*. There the applicants were university students, and special regulations governing their course provided:

> "Students who ... fail in a referred examination, may at the discretion of the examiners, re-sit the whole examination or may be required to withdraw from the course."[56]

---

[54] *Ibid.* at 586.

[55] *Supra.*n.49 at 35.

[56] [1969] 2 Q.B. 538

They were expelled for failure in examinations but succeeded in showing that they had not been treated in accordance with natural justice by the examiners, but because the examiners had themselves decided that they be asked to withdraw after taking into account personal factors as well as examination marks; relief however was refused owing to undue delay in bringing the proceedings.

In *Glynn* v. *Keele University*, a student who had been fined and rusticated for exhibiting himself nude on the campus was able to show that the Vice-Chancellor had failed to observe the requirements of natural justice since he had given the student no hearing initially but had merely informed him that he could appeal against the penalties.[57]

---

[57] *Supra.* n.5 at 494E-H *per* Pennycuick V.-C.:

"The context of educational societies involves a special factor which is not present in other contexts, namely the relation of tutor and pupil; that is to say the society is charged with the upbringing and supervision of the pupil under tuition, be the society a university or college, or a school. Where this relationship exists it is quite plain that on the one hand in certain circumstances the body or individual acting on behalf of the society must be regarded as acting in a quasi-judicial capacity - expulsion from the society is the obvious example. On the other hand, there is a wide range of circumstances in which the body or individual is concerned to impose penalties by way of domestic discipline. In these circumstances it seems to me that the body or individual is not acting in a quasi-judicial capacity at all but in a magisterial capacity, i.e. in the performance of the rights and duties vested in the society as to the upbringing and supervision of the members of the society. No doubt there is a moral obligation to act fairly, but this moral obligation does not, I think, lie within the purview of the court in its control over quasi-judicial acts. Indeed, in the case of a schoolboy punishment the contrary would hardly be argued."

and at 495C-D:

"If a student is excluded from the university it is hard to see how he can carry on his studies at the university.
I have found considerable difficulty in making up my mind as to which side of the line those powers fall. When the vice-chancellor exercises those powers should he be regarded as acting in a quasi-judicial capacity, or should he be regarded as acting merely in a magisterial capacity?
On the best consideration I can give it - but let me say at once it is by no means the end of the matter - I have come to the conclusion that those powers are so fundamental to the position of a student in the university that the vice-chancellor must be considered as acting in a quasi-judicial capacity when he exercises them; I do not think it would be right to treat those powers as merely matters of internal discipline."

Once again, relief however was refused in discretion, since the facts were not contested and the penalties were held to be obviously proper.[58]

There have been some extravagant claims of injustice, *Ex Parte Forster, In re Sydney University*, in which a student claimed an alleged absolute right to remain a member of the university irrespective of examination results, the Court sensibly denied the existence of any such right.[59]

ACADEMIC MATTERS

The courts have always refused to involve themselves in reviewing purely academic matters *e.g.* methods or accuracy of academic valuation. This has often been explained in terms of the exclusive jurisdiction of the visitor.[60] But the true reason is perceived incompetence. In *Thorne* v. *University of London*, Diplock L.J. held:

> "The High Court does not act as a Court of Appeal from University examiners; and speaking for my own part, I am very glad that it declines jurisdiction."[61]

LESSONS

What then are the lessons to be learned?

First, that academic institutions should cause their constituent instruments to be reviewed by competent lawyers with a view to ensuring that they are both clear and fair. The "contracts" are rarely to be found in a single convenient document, signed by both parties. Rather they are dispersed among a number of instruments, statutes, regulations, handbooks and the like, such that their precise identification

---

[58] See also *R.* v. *Oxford University ex p. Bolchover*, The Times, 7th. October, 1970.

[59] [1963] S.R. (N.S.W.) 723.

[60] *E.g. Thomson* v. *University of London* (1864) 33 L.J. Ch. 625 at 634; *Patel* v. *University of Bradford Senate supra.*n.31.

[61] [1966] 2 Q.B. 237 at 243 applied in *M* v *London Guildhall University* [1998] E.L.R. 149. See also *R.* v. *Higher Education Funding Council, ex p. Institute of Dental Surgery* [1994] 1 W.L.R. 242. *R* v *Liverpool John Moores University ex p. Hughes* (1998) E.L.R. 261 per Collins J at 271 " It would be quite impossible for any judge to order that she (sc. the applicant) be awarded an honours degree."

may well be a source of controversy.

In *Ward* Orr L.J. said:

> "The drafting is on any view unfortunate and I agree that ... the disciplinary provisions of the articles should be reconsidered as a matter of urgency."[62]

As Lord Griffiths pointed out in *Page*, disaffected dons or students will be astute to take any points available on badly drafted documents. He said:

> "The learning and ingenuity of those members of the foundation who are likely to be in dispute with the foundation should not be lightly underestimated and I believe to admit certiorari to challenge the visitor's decision on the ground of error of law will in practice prove to be the introduction of an appeal by another name."[63]

Secondly, that the basic rules of natural justice be observed. The teacher or the student are equally entitled to know the case against them; to be given adequate opportunity to reply to it; and to be represented in substantial cases. The body that disposes of their fate should not have among its membership anyone who has been involved in bringing the case against before them. Prosecutors should not be judges.

Thirdly (by way of qualification), no effort should be made to mimic to the letter the procedures and practices of a court. Oral hearings are not required; still less are dons or students entitled to legal representation before domestic bodies. Nor is a don or student entitled as a matter of law to an internal appeal - although the presence of one may dissuade him or her from seeking resort to the courts themselves. Render unto the court the things that are the courts' and unto domestic tribunals the things that are domestic tribunals'.

Fourthly, where misconduct is alleged, reasons ought to be given for any punishment imposed: what the offence consisted of: how it was established: and why the particular punishment fits the crime. There is no legal need, however, for

---

[62] *Supra.*n.49 at 40.

[63] *Supra.*n.12 at 694E.

academic bodies to explain why a student's essay was not up to snuff.[64]

---

[64] In *R.* v. *Higher Education Funding Council, ex parte Institute of Dental Surgery* (D.C.) *supra.*n.61, Sedley J. said:

> "We would hold that where what is sought to be impugned is on the evidence *no more* than an informed exercise of academic judgment, fairness alone will not require reasons to be given. This is not to say for a moment that academic decisions are beyond challenge. A mark, for example, awarded as an examiners' meeting where irrelevant and damaging personal factors have been allowed to enter into the evaluation of a candidate's written paper is something more than an informed exercise of academic judgment. Where evidence shows that something extraneous has entered into the process of academic judgment, one of two results may follow depending on the nature of the fault; either the decision will fall without more, or the court may require reasons to be given, so that the decision can either be seen to be sound or can be seen or (absent reasons) be inferred to be flawed. But purely academic judgments, in our view, will as a rule not be in the class of case exemplified, though by no means exhausted, by *Ex parte Doody* [1993] 3 W.L.R. 154, where the nature and impact of the decision itself call for reasons as a routine aspect of procedural fairness."[at 261B-E].
>
> and at 263A-B
>
> "In summary, then (1) there is no general duty to give reasons for a decision, but there are classes of case where there is such a duty. (2) One such class is where the subject matter is an interest so highly regarded by the law (for example, personal liberty), that fairness requires that reasons, at least for particular decisions, be given as of right. (3) (a) Another such class is where the decision appears aberrant. Here fairness may require reasons so that the recipient may know whether the aberration is in the legal sense real (and so challengeable) or apparent; (b) it follows that this class does not include decisions which are themselves challengeable by reference only to the reasons for them. A pure exercise of academic judgment is such a decision. And (c) procedurally, the grant of leave in such cases will depend upon prima facie evidence that something has gone wrong. The respondent may then seek to demonstrate that it is not so and that the decision is an unalloyed exercised of an intrinsically unchallengeable judgment. If the respondent succeeds, the application fails. If the respondent fails, relief may take the form of an order of mandamus to give reasons, or (if a justiciable flaw has been established) other appropriate relief.
>
> But just as it is outwith this court's powers to judge degrees of excellence in clinical dentistry research, or for that matter the wisdom of a body's administrative arrangements, so it is not open to this court to require the communication of reasons, even where such reasons must necessarily exist, in the current absence of a legal basis for the requirement."

But see also *R* v *University of Cambridge ex parte Evans* (D.C. Sedley J. January 1998 (unreported).

DOUBLE JEOPARDY

The rule against double jeopardy does not prevent academic institutions from adjudicating upon matters which fall within the remit of the courts, especially the criminal courts.

> "The doctrines of double jeopardy qv 1977 A.C. 1 and res judicata do not apply to domestic proceedings whether the first case is in an external forum or in the domestic tribunal itself."[65]

Indeed a conviction by a court may not - unless the university's own rules so specify - be conclusive of commission of an offence before a university body.[66] It was failure to recognise this principle which prompted one of the most famous judicial observations of the twentieth century: "Convenience and justice are often not on speaking terms."[67]

The Zellick report identified four separate situations where consideration had to be given to the advisability of permitting concurrent proceedings - criminal and disciplinary - to take place. Where the conduct is closely related to the academic or other work of the university (*e.g.* theft of library books):

(1) Where the conduct occurred on campus or other university property (*i.e.* assault in the student union) they found no difficulty in engaging the disciplinary machinery of the University.

(2) Where the conduct involved other university members but was off campus (*e.g.* attempted rape of another student at her home) they found a *prima facie* case for action.

(3) Where none of those features were present, but the conduct damaged the university's reputation or threatened the university community (*e.g.* student supplied drugs in town) they also found such a case although they urged caution.

In each instance, of course, it would be necessary to ensure that the university instruments identified the conduct as constituting an offence so that the university had power to react: it was the prudence of exercising a power *ex hypothesi*

---

[65] Forbes, *The Law of Domestic or Private Tribunals*, Law Book Company, 1982 at149; Zellick, *supra*.n.3 at para.32.

[66] *Cf. GMC* v. *Spackman* [1943] A.C. 627.

[67] *Ibid.* at 638 *per* Lord Atkin (*cf.* though Zellick, *supra*.n.3 at para.33).

enjoyed which engaged under consideration by Zellick.

Where the line is drawn is a matter more for judgment than for law: and certainly not everyone agrees with the Zellick boundaries. Oxford has considered them with care - the matter being complicated by the division of responsibilities between University and College. Abstinence from action by the University organs, if the offence is in their judgment clearly made out is not a sensible option. In particular, in that grey area where sexual harassment shades into criminal assault and worse the universities must tread with care but with resolution.

STAY

Of course, the courts may intervene to stay domestic proceedings where they themselves are seized of the relevant issue. In *R.* v. *B.B.C. ex p. Lavelle*, Woolf J. (as he then was) held that a court had power to cause domestic disciplinary proceedings to be adjourned on the grounds that their construction could prejudice criminal proceedings:

> "it will only do so in very clear cases on which the applicant can show that there is a real danger and not merely a notional danger that there would be a miscarriage of justice in the criminal proceedings if the Court did not intervene."[68]

Universities should accordingly ensure that they have provisions to suspend students charged with serious offences: but that such decisions be taken only after according the student a right to make representations, a full review of the facts and even (*ex abundanti cautela*) an appeal mechanism:

> "Universities are not at risk of legal action nor would they have to pay compensation for suspending a student in accordance with their procedures even if the student is subsequently acquitted in the Courts after a lengthy period of suspension."[69]

---

[68] [1983] 1 W.L.R. 241 at 255g-h.

[69] Zellick, *supra.*n.3 at para.29.

ENVOI

Basing himself on the above principles the author drafted a model disciplinary code for the conference of Oxford Colleges. To the extent to which it was adopted, time will tell whether his analysis of what fairness required will be accepted by the courts.