

**THE LAW'S VIEW OF UNIVERSITY
GOVERNORS – Power and Authority,
Responsibility and Unlimited Personal
Financial Liability**

© **David Palfreyman, OBE FRSA, Bursar & Fellow, New
College, University of Oxford; Director, Oxford Centre for
Higher Education Policy Studies (OxCHEPS) –
bursar@new.ox.ac.uk (March, 2017)**

**A perplexed new trustee of a US university to his fellow trustees
(Beardsley Ruml, 1959):**

**This is a funny kind of business! The specific persons responsible,
the Trustees, cannot supervise or manage, if you please – what is
the essence of the business: the educational process itself where it
goes on – and yet that is the heart of this particular kind of
business.**

From Eliot, ‘University Administration’, 1908:

**The kind of man needed in the governing board of a [US] university
is the highly educated, public-spirited, business or professional
man... [and collectively the board] will always maintain a
considerate and even deferential attitude towards the experts they
employ as regular teachers...**

**Where the individual has acted honestly and reasonably and ought
fairly to be excused from personal financial liability...**

(s191 Charities Act 2011, s61 Trustee Act 1925)

.....

A) INTRODUCTION

- 1. I focus only on English law and English universities. By 'Governor' I mean a member of the Council of a chartered university or a member of the Board of a statutory university; the former typically being the pre-92 'old' universities (such as Birmingham or Bristol from the 1900s) or the Oxbridge colleges (say, New College as chartered in 1379), and the latter the 'new' post-92 ex-poly institutions deriving their legal status from Statute (say, Oxford Brookes, Coventry, Huddersfield). These Governors are the directors of the university as a corporation and the majority of them will be 'lay' as externals – only a few universities are registered companies under the Companies Act 2006 (for instance, LMU and LSE), where standard company law applies: this Paper does not consider Governors as the company directors of such institutions (other than to note that the Insolvency Act 1986 applies to such companies and their directors, and hence they need to be very careful about not continuing to trade if insolvency looms! – the IA86 (and its related Insolvency Rules as SI1986/1925) allow for the Court to wind-up a chartered corporation using the provisions for dealing with the actual or threatened insolvency of 'unregistered companies' and then following the same process (s229(1) IA86) for the liquidation). Governors of universities are also, whether chartered/ statutory corporations or registered companies, trustees of their universities as not-for-profit charities – this Paper does not consider the for-profit institutions of higher education. In the peculiar case of the Oxbridge colleges the Fellows on the Governing Body are also its charity trustees, as well as its Governors: since there are no lay externals, they are the academic lunatics in charge of the collegiate asylum!**
- 2. The relevant law is mainly to be found: first, as the obscure and arcane law of corporations, (only) in Volume 24 of 'Halsbury's Laws of England' (Fifth Edition, 2010), which is**

heavily based on 'Grant on Corporations' (1850) and on 'Kyd on Corporations' (1793); and, secondly, as the law of charities (for which there are numerous texts: for instance, Volume 8 (Fifth Edition, 2015) of 'Halsbury's Laws of England'). The common law concerning the conduct of meetings also applies, as does the law of agency re the lawful delegation of decision-making; and also administrative or public law for the statutory universities – again, there being many law texts on these areas of law. Farrington & Palfreyman in 'The Law of Higher Education' (Oxford University Press, 2012 second edition) provide an overview of all these areas of law applicable to English universities, and indeed the entire English law framework within which they operate - including the application of consumer law to the university-student contract and the scope for tort law to apply to the university-student legal relationship, as well as health & safety law, employment law, intellectual property law, data protection law, etc etc.

3. Within this broad legal framework there will be the University's specific constitutional documents (the layers of documentation and the nomenclature within the instrument of governance will vary – Charter, Statutes, Ordinances, Regulations, By-Laws, Standing Orders, etc). These may serve to extend the powers of Governors beyond those to be assumed from the general law found in relevant statutes or cases.
4. This Paper proceeds by exploring: the organisational and political context in which Governors function (the Governance Triangle); their role as charity trustees; their power and authority derived from the general law of corporations, from charity law, and from the institutions' constitutions; the responsibility of Governors to HEFCE (and through it to the Charity Commission); and the theoretical circumstances where (very unlikely and hence hitherto exceptionally rarely) the Governors might face unlimited personal financial liability.
5. Unless the Governor has been well-inducted, he/she, often coming from a commercial background, can be excused for

assuming that the role is essentially one of a company director – which he/she may well be in the day-job. To make this erroneous assumption is especially problematic where the Chair of the Governors (of the Council/Board) in interacting with the university's CEO/VC then wrongly assumes he/she has the (supposed) power and authority of the chair of the board of directors under the Companies Act 2006. There can also be confusion over the appropriate lawful use of Chair's Action, and of powers of delegation. Similarly, the members of the Council/Board might fail to appreciate their exposure to personal financial liability as charity trustees is far greater than the risk of liability faced by company directors running businesses as limited liability registered companies: this could be of growing significance as universities (arguably, increasingly over-)borrow to (arguably, over-)extend their infrastructure (involving risky and costly building contracts) and activities (such as dependency on recruiting ever-more students and on controlling overseas ventures). Put simply, failure by Governors to adequately scrutinise the credibility of the (perhaps over-)ambitious strategic plan of the CEO and executive team could be recklessness or gross negligence leading to unlimited personal financial liability (applied joint and several) to compensate the University as a charity for any loss incurred – unless a Governor has formally voted against the proposed debt/expansion strategy and has had that vote duly recorded in the Minutes (simply abstaining is not sufficient, and even subsequent resignation from the Council/Board still leaves a director-trustee liable where he/she did not vote against an under-researched and ill-assessed risky strategy). Certainly, one hears rumours of grave governance failures – where, say, the Chair alone approves proposals from the CEO/VC for hefty borrowing in support of a strategic plan that itself may not have been given detailed consideration by the full Council/Board (including scrutiny of the sensitivity testing of the plan's assumptions); and sometimes it is the academics via their Senate or Academic Board who are left to ring alarm bells over the unrealistic ambitions of the CEO/VC and his/her executive team, and usually their concerns - at

least initially - being dismissed by the Governors who, of course, express absolutely complete confidence in their CEO/ VC (as football club directors do in their manager until just before he is dumped!).

- 6. By way of context for this Paper, the changing idea and variable ideal of 'The University' since its creation in the Middle Ages is considered in Palfreyman & Temple, 'The University – A Very Short Introduction' (Oxford University Press, 2017 forthcoming); and the issue of the marketization of English higher education with the attendant student consumerism is explored in Palfreyman & Tapper (2014) 'Reshaping the University: The Rise of the Regulated Market in Higher Education'. On the broader non-legal aspects of and on the politics of governance in higher education see: Shattock (2006), 'Managing Good Governance in Higher Education' (Open University Press – in the 17-volume 'Managing Universities and Colleges' series) and Shattock (edited, 2014), 'International Trends in University Governance: Autonomy, self-government and the distribution of authority' (Routledge – in the 25-volume 'International Studies in Higher Education' series). A very disturbing read that those involved in the governance of universities should be aware of is Martin (2011), 'The College Cost Disease: Higher Cost and Lower Quality' (Edward Elgar), as discussed/referenced in Palfreyman & Tapper (2014, pp 144) – he makes the powerful point that higher education is a one-off purchase of an experience good, and that such goods/services trade on the basis of the consumer (student) usually being under-informed and hence there is a great risk of quality-cheating on the part of the supplier (university): there is an agency failure in the governance of universities not being able to protect the student-consumer against the rent-seeking (mis)behaviour of both the Executive and also of the Faculty. (For those of us within the higher education industry it is not a comfortable analysis from a life-long academic economist, who probably only dared publish his thoughts when safely retired from the campus and colleagues!)**

**7. The Paper considers the issues raised in the above paragraphs
– and other issues - in these sections:**

**THE GOVERNANCE TRIANGLE (Governors, Executive, Faculty/
Academics – and the politics of higher education governance)**

CHARITY LAW & CHARITY TRUSTEESHIP

**POWER & AUTHORITY (Delegation, Chair's Action, Suspending/
Dismissing the CEO/VC)**

**RESPONSIBILITY (Signing-off the Annual Report & Accounts in the
HEFCE SORP format, and now also signing-off on teaching quality as
well as degree standards)**

**LIABILITY (Whether as corporators under the law of corporations,
as trustees under charity law, as directors under health & safety
law)**

**CONCLUSION (Why does anybody want to be or remain a University
Governor?)**

B) THE GOVERNANCE TRIANGLE

**8. Picture a triangle and at the top-corner we have the
GOVERNORS (the Governing Body, Council, Board). At the
bottom-left we find the EXECUTIVE (the VC/CEO and the Senior
Management Team), while on the bottom-right we place the
FACULTY/ACADEMICS (the Senate, the Academic Board). The**

three corners are linked by lines with the flow of communication being both ways, but (arguably) the flow between Governors and Faculty may well be weaker – more of a dotted-line linkage, with communication often being via the Executive rather than direct: although that may change if the Governors are now to be able to sign-off to HEFCE that they really do understand about teaching quality and degree standards in their University and can't just do so by taking the Executive's word that all teaching is, of course, utterly excellent! Impacting upon this Governance Triangle typical of the University are stake-holder groups such as non-academic staff and their unions, students and the Students' Union, alumni, probably local councils, perhaps employers that take the institution's graduates, maybe other constituencies (the parents of undergraduates? – perhaps soon to be represented by the formidable MumsNet currently terrorising school heads and school governors!).

- 9. As far as the law of corporations is concerned the folk in charge are the Governors, and they (outside of the Oxbridge colleges as medieval academic guilds where the lunatics really are in charge of the asylum – as also for the academic demos of Oxford University and Cambridge University) will have a majority of lay non-academic members. In our Governance Triangle the power relationship is formally top-down, but the informal communication process may well be two-way: indeed, in an organisationally healthy university it has to be. The University's constitution will, however, almost certainly give some formal powers to the Senate or Academic Board in relation to pure academic matters (as opposed to, say, finance, borrowings, contracting) and will allow joint-appointment procedures for the selection of the VC/CEO – but, in essence, the lay members of the Council/Board run the show. As, indeed, they made very clear when, for instance, the Professors of the newly-created University of Birmingham in the 1900s politely requested use of the grandly furnished Council Chamber for their Senate meetings: the hired-help in gowns were not-so-politely refused entry! And, around the**

same time, at the University of Liverpool the lay members refused to grant a request from the academics that they be allowed democratic and sovereign decision-making with respect to the University's academic governance and management, the controlling business-men commenting that letting the institution be run by the faculty would undermine its credibility in terms of raising funds: 'in order to give confidence to men of business it will be necessary to give power to those who hold the purse'. The organisational authority – if not the formal constitutional power - of the Governors thereafter waned over the decades and by the 1960s it was the era of 'donnish dominion'; but the Governors have re-asserted themselves in recent decades since the mid-1980s (notably the impact of the Jarratt Report on the efficiency of university governance and management) and the creation of the CUC with its issuing of Guides. Much the same story applies in US public or state universities, where recently there have been some notorious clashes between newly-assertive Boards/Trustees and University Presidents judged to be failing (in, say, the Texas public university system, in Wisconsin, and at the University of Virginia – although in the last case the sacked President had to be reinstated when faculty and students protested) – in England VCs as CEOs have also suddenly disappeared, occasionally only shortly thereafter to reappear in an equally well-(over?)paid 'advisory' role once the lawyers have negotiated a gagged settlement! The concept of collegiality (in the USA, shared-governance) within this Governance Triangle is explored in: Tapper & Palfreyman (2010) 'The Collegial Tradition in the Age of Mass Higher Education' (Springer); and for the particular context of Oxford in Tapper & Palfreyman (2011) 'Oxford, the Collegiate University: Conflict, Consensus and Continuity' or of the elite research-focussed university more generally in Palfreyman & Tapper (2009) 'Structuring Mass Higher Education: The Role of Elite Institutions' (Routledge) – especially Chapter 12 on 'What is an 'Elite' or 'Leading Global' University?'.

10. All this illustrates the vexed and vexing complexity and fuzziness of the organisational (as opposed to the strictly legal or formal constitutional) relationship between the Governors and the Executive (and the power relationship of each with the Faculty) within the Governance Triangle – one that exercised the writer of the first comprehensive book on ‘University Administration’ (1908, Charles W. Eliot as the former President of Harvard for forty years). He begins with the role of the ‘University Trustees’ – and then considers in turn the Alumni, the Faculty, the President/Administration. His guidance for Governors is as valid and as necessary today as a century ago (and applies to any governance of institutions of professional/experts by lay folk – as with, say, a School Governing Body or an NHS Trust), and here is some of it:

‘The kind of man needed in the governing board of a university is the highly educated, public-spirited, business or professional man, who takes a strong interest in educational and social problems, and believes in the higher education... He should also be a man who has been successful in his own calling, and commands the confidence of all who know him. The faculty will most need his good judgement; for he will often be called upon to decide on matters which lie beyond the scope of his own experience, and about which he must, therefore, get his facts through others, and his opinions through a process of comparison and judicious sifting...

[That said, while the Board ultimately decides ‘all the educational policies of the university’,] in this function it ordinarily follows the advice of the university faculties... [since] the common custom [is] for trustees to consign to faculties the determination of the requirements for admission, of the methods and limits of instruction, and of the daily routine of duty for students and teachers, the administration of discipline, and the immediate supervision of the conditions of the academic life. Trustees should never interfere with matters once consigned to a faculty by statute or custom... Such interference will impair very injuriously a faculty’s sense of responsibility and its authority...

An experienced board of university trustees will always maintain a considerate and even deferential attitude towards the experts whom they employ as regular teachers... They stand to these experts in an entirely different relation from that in which a business board of directors stands towards its employees... They are not experts in the policy or discipline of a university. They are completely dependent for the competent performance of the university's main work on the attainments and the good-will of the university teachers...

Experience in the management of a farm, a shop, a railroad, a factory, or a bank may be of some use to the business man called to the function of a university trustee; but many of the things he has learnt to value in his business experience he will have to discard absolutely in contributing to the management of a university, because they are inapplicable.'

11. So, the lay Governors have always been expected to sign-off the University Accounts and that is presumably within their 'experience' from their real-world careers, and as with all organisations they rely upon the entity's expert finance staff and on external auditors. But what of the new HEFCE-imposed duty to confirm that teaching quality (and its quantum) and also that degree standards are up to snuff? They can, of course, ask the Executive to confirm the Faculty are professional, but can they trust the Senior Management Team or do they have to employ third-party consultants akin to the role of external auditors in verifying the Accounts? Or do they have to communicate directly with the Faculty? – perhaps thereby risking the Faculty telling them that the Executive have starved the teaching function of adequate resources, while spending too much money on glitzy new infrastructure and too many over-paid managers! Or the Faculty may anyway be in cahoots with the Executive to divert resources from teaching so as to subsidise research as the momentum for climbing the global rankings and as the coinage of career success for academics? – so now the lay Governors can't trust

either the Executive or the Faculty to give a straight answer about teaching, while they may be hearing complaints from the student-consumer paying £9000 pa by way of tuition fees...

12. There is, of course, no easy answer to the above conundrum – but it is painfully clear that this new approach from HEFCE puts the Governors firmly on the spot, as does the impending application of the TEF gold/silver/bronze ratings for undergraduate teaching. And, if the Higher Education and Research Bill gets enacted as it stands at early-January 2017, the pressure is not going to be relieved when the new higher education regulator by way of the Office for Students replaces HEFCE. The century old problem – as well identified by Eliot back in 1908 – of how the lay Governors can manage expert Faculty, or whether they should even try to do so, is back with us in English universities with a vengeance, reinforced by student consumerism and higher education as an industry now attracting the interest of both ‘Which?’ and also of the Competition and Markets Authority. If, say, the University were to be awarded merely a bronze medal for its teaching (even if at the same time rated gold for its research in the REF) and if students could then successfully sue since its marketing hype may well have boasted of the ‘excellence’ of its ‘student learning experience’, might the Governors be liable for the compensation won by hundreds of disgruntled students in literally a class-action if the Governors have been recklessly naïve or grossly negligent in not challenging the glib assurances of the Executive and/or Faculty that all is well with undergraduate teaching? – or in dismissing complaints from students about alleged inadequate teaching, or ignoring low-ratings awarded by students in the National Student Satisfaction survey, or even in minimising Faculty warnings about the Executive starving teaching of resources?

C) CHARITY LAW AND CHARITY TRUSTEESHIP

13. Next I consider the duties and liabilities imposed upon Governors by charity law in terms of their automatically as the corporators in charge of the university under the law of corporations also being charity trustees, all English universities being not-for-profits (other than a couple of for-profit commercial entities). The law is to be found in the consolidating Charities Act 2011 (hereafter 'CA11'), absorbing the Charities Act 2006 as itself a massive shake-up of charity law. The Act requires all charities to register with the Charity Commission (hereafter 'CC') unless 'exempt' or 'excepted' – the latter including the JCRs of Oxbridge colleges because their turnover is less than £100k; and the former including all English universities on the basis that they have a 'principal regulator' in the form of HEFCE (the Oxbridge colleges have no such regulator and, having been exempt charities, are now all registered charities). The CC has less need to oversee and intervene in an exempt charity because of the existence of a principal regulator – but s15(1) CA11 still applies concerning 'apparent misconduct or mismanagement' (neither is defined in the CA11): the CC's 'general functions' include 'Identifying and investigating apparent misconduct and mismanagement in the administration of charities and taking remedial or protective action in connection with misconduct or mismanagement in the administration of charities.'. It is HEFCE's task to ensure universities comply with charity law, but any enforcement action against a university must be undertaken by the CC itself – and, similarly, the CC must consult HEFCE before exercising any specific power under the CA11 (but HEFCE is not able to veto CC action). There is a memorandum of understanding between HEFCE and the CC as to how they will interact: significantly, the CC under s46 CA11 can open a statutory inquiry into an exempt charity only where HEFCE requests it to do so (s46(2) applies). The CC has detailed guidance at its website for exempt charities (especially item CC23 – also items OG717-1/2): presumably and hopefully all new Governors are issued by their university with

such CC guidance documents at induction? And with all the relevant CUC guidance documents? – see para 24 below.

14. When (arguably, rather than if!) an English university gets into financial difficulties, it will perhaps be via the s46 route that the crisis will be addressed - the CC having the power to conduct an inquiry (or to ‘appoint a person to conduct it’), and this power allows, inter alia, for documents to be demanded (s47), for evidence to be given under oath (s47), for a search warrant to be sought from a JP (ss47 & 48, with it being an offence incurring imprisonment for anybody ‘intentionally to obstruct’ the execution of the warrant; and with this power of search extending to the homes of trustees). Under s50 the CC may publish the results of a s46 enquiry. In addition, ss52 & 53 anyway enable the CC to demand documents from and search public records relating to an exempt charity even if a s46 inquiry has not been triggered. Triggering a s46 inquiry might be the result of HEFCE expressing concern to the CC, of a third-party complaining or whistle-blowing to either HEFCE or the CC, or the university concerned filing a ‘serious incident’ report with HEFCE as the principal regulator for universities (charities are required to make such reports if they become aware of a significant financial loss or of something that threatens reputational damage).

15. The CC, following a formal s46 inquiry, might then: a) issue under s75 CA11 ‘official warnings’ to the charity (University) and/or its trustees (Governors as members of the Council/ Board) concerning any breach of trust or misconduct/ mismanagement (but simple failure to follow good practice is not automatically in itself mismanagement); b) ‘suspend a trustee, officer, agent or employee of the charity for up to 12 months’ while also perhaps appointing additional charity trustees (s76); c) appoint ‘an interim manager’ to act effectively as a receiver to mind the charity while its governance and management are sorted out (ss76 & 78); d) exercise its permanent remedial powers under s79 to remove any trustee, officer, agent or employer and even to put the charity into administration; and e) order that certain steps as

‘specified action’ must be taken and/or that particular things must not be done (s84), which might include ordering that the charity be wound up.

16. While the above draconian powers of the CC can be applied to universities as exempt charities and to their Governors only after a s46 inquiry, there are other CC powers that it can exercise and which are applicable (as with the above) to exempt charities such as universities and to their Governors (and indeed also to the Governing Body fellows-qua-trustees of Oxbridge colleges as registered charities): mainly that under s69 CA11 the CC can, in conjunction with the High Court or the Attorney-General, wind-up a charity or appoint/remove trustees, and remove officers or employees. Its general power, however, under s80 to remove a trustee who is bankrupt or mad or will not act or has gone awol, does not apply to an exempt charity unless there has been a s46 process.

17. Finally, s114 CA11 enables the CC to initiate court proceedings (with the agreement of the Attorney-General as the de facto protector of charitable assets while the High Court is the de jure ‘parens patriae’ on behalf of the Crown for protecting charitable trusts) against trustees it thinks have been negligent and hence in breach of trust; while, conversely, ss191 & 192 allow the CC to relieve trustees in breach of trust of their personal liability to compensate the charity for any financial loss where the CC considers them to have ‘acted honestly and reasonably and ought fairly to be excused’. This new power for the CC echoes the long-standing provision for the High Court to relieve trustees under s61 of the Trustee Act 1925, or similarly company directors under s1157 of the Companies Act 2006. It might apply where, say, trustees have not been grossly negligent or reckless in taking decisions, have not been dishonest in conducting business, have not been unreasonable in under-estimating risk, and all in all should fairly and in equity be let off lest their suffering puts off decent folk from ever wanting to take on unpaid voluntary trusteeship duties. Arguably, were Governors to be paid – as if non-execs of a registered company – then the fiduciary

standard of competence and diligence expected of them might increase, or at least the CC or Court might be less willing to agree they 'ought fairly to be excused' where negligence has caused a breach of trust: this would especially be the case if a particular Governor were paid as a Council/Board member for his/her supposed specific expertise of expected use to the institution in, say, property matters, HR issues, financial engineering.

18. The only instance on the record of a university publicly entering a major financial crisis is the insolvency of University College Cardiff in the late-1980s, which involved the sudden departure of its key officers with various members of its Council and its eventual forced merger with an adjacent better-run institution to create Cardiff University after the Government injected c£20m and UCC made c140 academics redundant: all as detailed in Chapter 2 of Warner & Palfreyman (2003), 'Managing Crisis' (Open University Press) and in Chapter 6 of Shattock (1994), 'The UGC and the Management of British Universities' (Open University Press). In the UCC case the intervention came partly via the authority of the DES Permanent Secretary as the accounting office to the Public Accounts Committee being able to 'send' in an investigatory team so as to protect taxpayer funds paid by the UGC to UCC; and simultaneously the UCC Council 'inviting' in a team to assist it in assessing the mess (that team was led by Michael Shattock OBE, then Registrar of the highly respected and successful University of Warwick, and the present author as a minor cog in the Warwick Administration was a part of it). The issue is that English universities are not public bodies under some sort of control by or with direct accountability to central government (unlike, say, US public or state universities, or universities generally across Europe); and hence a mechanism has to be found for the concerned Minister for Universities to stimulate action where an institution seems to be drifting into insolvency – it is suggested that now the route would be via a s46 CA11 formal inquiry, either because HEFCE requests the CC to act or the CC is alerted by a third-party and acts after

consulting HEFCE; that does not prevent, of course, the failing institution itself calling for help from HEFCE and the CC, thereby ‘inviting’ in a team to ‘assist’ it. If the Higher Education and Research Bill (HERB) is passed, there will be two Government departments supplying universities with taxpayer monies, so one assumes the Permanent Secretary of one or other, or of both, will act as did the PS of the DES in the case of UCC. Moreover, under the HER Act (HERA), if the Bill is passed as currently drafted, the Office for Students that replaces HEFCE will be able to deregister a university and end its degree-awarding powers: a decision that can be appealed to the Courts and challenged by judicial review in public law. If, while a particular set of Governors were on watch, a university’s governance, management, quality, and standards deteriorated so far as for the OfS to take such draconian action, it would seem that the Governors as trustees might also face a s46 inquiry.

D) POWER AND AUTHORITY (Delegation, Chair’s Action, Suspending/Dismissing the CEO/VC)

19. The Governors have only the legal powers granted to them under the law of corporations and under charity law, as also specified or expanded by the University’s statutes as its governing instrument. A chartered university can do whatever a natural person can do within the Law and whatever is not specifically prohibited by its instrument of governance; a statutory university can do only whatever its instrument specifically allows it to do or it is empowered to do under certain pieces of legislation relating to universities and higher education. In essence the Governors running either entity need to act honestly, diligently, and prudently in conducting business and taking decisions with reasonable skill and care solely in the best interests of the University. The test for pure charity trusteeship is one of greater caution and prudence than for, say, company directors running a commercial profit-

making business and taking appropriate risks; but the Governors of a university are not just charity trustees since they are also akin to company directors in running the university as a business, albeit a not-for-profit activity. And universities in the C21 are big complex businesses, so, arguably, the test is somewhere between the standards and behaviour required of competent company directors and that expected of prudent trustees. As already noted, the standard expected of Governors might be higher if they were paid rather than being unpaid volunteers.

20. The Governors and the Executive can sometimes be woolly in understanding the legal concept of delegation of power, authority, and decision-making: unless the Statutes allow for decision-making body X to delegate its duty re matter Y to a sub-committee or sub-group Z, the body X must itself take the decision (although a sub-group may well be advising it as typically where a selection panel recommends the appointment of Bloggs to a given post – but still body X must receive sufficient information and devote adequate time to making its own informed and unfettered decision). Similarly, often there is excessive and unlawful use of Chair's Action – unless the Statutes specify wider use, the law of corporations and the common law on the proper conduct of meetings do not allow for the Chair taking major decisions; but the taking of minor decisions by Chair's Action between meetings and subject to their being reported to the next meeting is acceptable. If there is a key urgent decision to be taken between scheduled meetings, an emergency extra meeting needs to be called (*). Put simply, under the law of corporations and under the wider law of meetings, a lawful decision can only be taken by a quorate meeting of the relevant body as duly summoned with proper and adequate notice of the matter being given in the agenda, and also by a majority of those physically present and voting in favour of the decision. It is possible, but very unlikely, that the university's instrument of governance allows for proxy-voting on behalf of non-attenders or for email-voting after the end of the meeting

where a matter has not been reached on the agenda (one is aware of an egregious example of a university Board reaching a key decision on a major matter precisely by such an email circulation after a meeting ran out of time – the decision reached was clearly invalid and unlawful). (*) As an example of the typical wording in a university's constitution, this is for UCL: Chairs 'shall be empowered to take action on behalf of those bodies [Council, the Academic Board, etc], in any matters being in their opinion either urgent (but not of sufficient importance to justify a Special Meeting of the appropriate body) or non-contentious...' (Statute 9 on 'Powers of Chairs').

21. A gung-ho Chair, used perhaps more to the style of a company and its board rather than a corporation that is a university, may especially feel that he/she can suspend, even dismiss, the VC as possibly the Chair of a company board might treat a CEO under his/her rolling contract. The law of corporations recognises no such power and authority vested in the Chair, nor validates any such unilateral action. Only if the institution's own constitution allows such action is it lawful – or perhaps if the VC's contract has been constructed conveniently to allow for quick and easy termination! Almost certainly the Statutes contain a very detailed procedure for the disciplining and dismissal of senior staff (especially in the chartered institutions based on the Model or May Statute inserted into their Statutes to remove tenure after the 1988 legislation), and it is likely to look clunky, cumbersome, and prolonged to the Chair - but it must be followed and is meant then to mimic the process needed not only to achieve a fair dismissal under general employment protection laws but in addition to follow the complex mechanisms under the law of corporations both for the removal of a corporator ('disfranchisement') and also for the removal of an officer of the corporation ('motion'); the VC being arguably all three: an employee, a corporator as a voting member of the Council/ Board, and also an office-holder of the corporation. The danger of the Chair behaving unilaterally outside of the formal

mechanism, even if he/she claims to have taken soundings of fellow Governors, is that, once the VC's lawyers step in, the University ends up signing a cheque for a larger termination payment than might have been needed if due process had been followed – that might suggest the charity has incurred a financial loss for which the Governors joint and several conceivably carry personal liability as discussed in Section C above! One HE institution probably paid out something like £1m in legal fees and compensation to two office-holders whose termination was (allegedly) improperly processed, this saga being semi-revealed by the public domain report of a tribunal hearing under the provisions of the Data Protection Act when the institution refused to explain what a large ('material') sum showing in its Accounts was used for!

E) RESPONSIBILITY

22. The Governors have responsibilities and obligations arising under both the law of corporations and also under charity law as discussed in paragraphs 2 & 19 – and their greatest risk for incurring personal financial liability is probably being accused of breach of trust via a s46 CA11 inquiry as explored in Section C above: see Note A at the end re the duties of company directors and of charity trustees. They will in addition have duties set out in the university's Statutes and Regulations/By-Laws, as well as under the general law of meetings where the institution's constitution is silent (for example, there is no concept of a casting-vote for the chair of a governing body or a university committee under the latter if it is not specified in the Statutes/By-Laws: a decision taken on the basis of the use of an unauthorised casting vote is invalid and ultra vires). There will, moreover, be very clear responsibilities falling upon the Council/Board in relation to duties under health & safety legislation – and, arguably, reckless or grossly negligent inattention by Governors to ensuring the H&S culture across the university that leads to it

being hit with the high level of fines (up to 10% of turnover) now routinely imposed could result in their being personally financially liable to compensate the charity for its loss (its insurance policies will never pay fines on its behalf). But the bod(s) likely to go to jail in the event of the HSE securing a conviction for corporate manslaughter will be the Director of Estates and perhaps even the COO and the VC as CEO, each as senior managers directly involved in setting H&S policy, rather than the Governors - unless they have, say, been so reckless as to sign-off a H&S policy that explicitly put savings from neglecting maintenance ahead of clearly set out H&S risks of death/injury. The directors'/trustees'/officers' liability insurance policy that universities routinely carry clearly can't do porridge on behalf of individuals, just as it will not fund fines imposed on them or the institution: it will probably, however, cover the legal fees for the defence, unless the incident arises from recklessness/negligence so extreme as to risk the policy being voided. Finally, the Governors of universities now carry the explicit Prevent Duty under the 2016 Counter-Terrorism Act.

23.I have discussed the organisational dynamics of the function of Governors in the Introduction in terms of the degree to which they should not micro-manage but should overview the setting of strategy, but there are two very clear key areas where the Governors as directors/trustees are fully and explicitly accountable – for signing-off the Annual Report & Accounts presented in accordance with the HEFCE template that is based on the charities SORP established under the Regulations flowing from the CA11; and also now for signing-off on teaching quality and on degree standards as required by HEFCE under its funding contract with the university. The former is fairly straightforward and, as discussed earlier, the Governors will have the comfort of the role of the external audit and will probably be familiar with the nature of a decent in-house finance function. The latter is more problematic in terms of the competence and capacity of the Governors to feel sufficiently informed to be able to make the appropriate

declarations about their university's teaching quality and the setting of its degree standards. In fact, most academics as experts would be hard-pressed to discuss coherently for any length of time the arcane difference between 'quality' and 'standards' in HE, so there is not much hope for lay Governors!

24. HEFCE launched a new operating model for quality assessment in March 2016, and has now issued guidance for how it will operate its 'Annual Provider Review' process in 2016/17 – which it is expected the proposed Office for Students will incorporate and continue if the Higher Education and Research Bill is passed in 2017 and HEFCE duly is replaced by the OfS. The Governors, of course, have always had a general responsibility under the long-standing HEFCE-University 'Memorandum of Assurance and Accountability' (covering financial sustainability, good management, sound governance, data quality, the handling of student complaints, and value-for-money) to ensure the Executive (in conjunction with the Senate or Academic Board) has followed the HEFCE teaching quality assessment procedures, but in addition from December 2016 HEFCE has introduced the specific responsibility for Governors themselves to provide assurance statements on quality and standards. In essence, the Governors are called upon explicitly to sign-off on their satisfaction that the University has mechanisms in place to secure the continuous improvement of the student experience and of student outcomes, as well as to ensure the reliability of degree standards – this amounts to the Governors being able to formally declare that they really are able to gather in appropriate information about the University's core teaching mission and then are able to competently challenge the assurances they are being given about such information. Thus, there will be 'assurance statements' made to HEFCE by 'accountable officers' acting 'on behalf of governing bodies' whereby a set of Governors duly and annually declares via the HEFCE template wording: 'As a governor and on behalf of the governing body, I [presumably the Chair] confirm that for the

[20XX-XX] academic year and up to the date of signing the return: The governing body has received and discussed a report and accompanying plan relating to the continuous improvement of the student experience and student outcomes... The methodologies used as a basis to improve the student academic experience and student outcomes are, to the best of our knowledge, robust and appropriate... The standards of awards for which we are responsible have been appropriately set and maintained.’. So, do Governors know that and can they explain why, say, the percentage of Firsts has increased dramatically over recent years? – the result of students getting genetically cleverer or working harder, or their being better taught, or the result of academic standards being dumbed-down? Can the Governors be assured that undergraduate teaching in all degree courses runs throughout the third term and does not end after just two terms? Do the Governors know whether the University has a maximum limit for the size of seminar groups or for the time taken to give ‘feedback’ on assessed written work? The Governors’ lawyer will be grateful that his/her clients can try and hide behind ‘to the best of our knowledge’! And indeed the word ‘appropriately’ is helpful since not even the professionals in HE have any idea whether the 2.1 in Sociology at Coketown Met really matches the 2.1 in Sociology at the University of Barsetshire – only where there is a third-party professional body (as in the case of (say) Medicine, Engineering, Pharmacology) is there any reliable comparison of degree standards (the quality-control supposedly achieved by the external examiner system is a bit of a joke, and the QAA never goes near the chalk-face or examination scripts!). But just how clued-up should Governors be or indeed can they be about this expert area of academic activity? – I refer the Reader back to the opening paragraphs on the relative roles of the lay Governors and the expert Faculty, mediated by the Executive within the Governance Triangle. There are, of course, guidance notes from the CUC – for Governors on facing up to their new obligations, including the aptly titled March 2015 document ‘Governance in Higher Education: Don’t Panic’... The

January 2017 CUC ‘Governing Body’s Responsibility for Academic Governance’ mentions the concept of ‘collegiality’ we discussed earlier and like Eliot (1908) as quoted above also reminds Governors that they need to have ‘respect’ for the role of the Senate or Academic Board, it being stressed that the Governing Body ‘isn’t expected to... understand the complexities of academic governance’ – although the Governors at the same time should not be patsies that fall into ‘over-reliance’ on the CEO’s/VC’s ‘assurances on academic matters’. The Note offers ‘A Possible Approach’ for Governors now wrestling with their 2016/17 new responsibility for ‘academic governance’ on top of their more familiar role in what the Notes calls ‘corporate governance’ (see Note B at end). In Note C the current constitutional relationship between Council and Senate is explored; and it is suggested that the new HEFCE requirement for ‘assurances’ is, in fact, nothing more than what Council could – and perhaps should – have been doing all along anyway given the existing university constitution.

F) LIABILITY

25. There is a real risk - if (IF) charity trusteeship is being adequately policed by HEFCE and/or the CC (either perhaps being prodded into action by a ‘relator’ as a third-party intervener, whistle-blower, busy-body) - of Governors as charity trustees facing personal financial liability for any monetary loss caused to the institution as a charity by their breach of trust arising from their recklessness or negligence, although as explored in Section C the CC might relieve them partially or fully of such liability if they have nonetheless acted honestly, reasonably, and ought in all the circumstances fairly to be excused. Moreover, the costs of any High Court proceedings rendered necessary by their misconduct or

dereliction in performing their duties may be awarded against the Governors-qua-trustees personally, on top of any order for them to reimburse the charitable corporation for any financial loss suffered as a result of such misconduct or dereliction. Trustees' and directors' liability insurance may not necessarily cover such legal costs if their recklessness has been such as to invalidate the terms of the cover; and it is even less likely to cover the charity's loss where the High Court or the CC has ordered the trustees personally to recompense the charity. Their lack of diligence and competence amounting to misconduct or general dereliction of duty might include, say, not fulfilling responsibilities under H&S legislation, leaving the university exposed to fines. It could involve being in breach of the Prevent Duty, but this is likely to result 'only' in reputation damage rather than direct financial loss. It might involve a naïve lack of scrutiny of the Executive's strategic plan and inappropriate risks being taken to do with infrastructure expansion and incurring debt to fund it. The risk of personal liability could also now arise from a failure to properly and honestly be able to sign-off on teaching quality and academic standards, while naively doing so on the basis of glib assurances from the Executive which itself is out-of-touch with Faculty and what really goes on (or does not go on) at the chalk-face. If, say, a cohort of students were to bring a successful class-action (literally, class!) and a hefty amount of compensation were awarded against the institution for academic malpractice over teaching quality - or (more likely) for breach of contract based on misrepresentation of the quantum of teaching actually delivered compared to the marketing hype at the time of recruitment - might the Governors-qua-trustees, after a s46 CA11 inquiry, be held liable to reimburse the University for its financial loss by way of legal fees and damages paid out? And it might in due course arise if the University lost its registration and degree-awarding status under the proposed new HE regulator, the OfS: the inevitable question would be whether the Governors were asleep at the wheel, in terms of monitoring the Executive

and Faculty, as the university's academic credibility drained away.

26. There is less risk of liability arising for the Governors-qua-directors for any lack of compliance with the law of corporations since, as with limited liability registered companies, there is not the regime as for charity trustees to bring home personal financial liability to individuals acting as directors – short of fraud and dishonesty on the part of company directors that pierces the protective veil of incorporation. That said, Governors as corporators of chartered/statutory corporations can, of course, be removed ('disfranchisement') under the law of corporations for failure to properly fulfil the duties of a corporator, and any Governor holding an office - such as Chair, Deputy-Chair, Treasurer – can be removed from office ('amotion') if failing to discharge the obligations of that officership. It would be an interesting moot point as to whether the lay Governors recklessly signing-off on teaching quality/quantum and on degree standards – where such recklessness amounts in Law to dishonesty – might also be guilty of fraud under the Fraud Act 2006 in that their false assertion that the University's teaching quality was of a sound standard (and most universities liberally scatter around the word 'excellent' in their marketing material) could, arguably, have led to student-customers paying hefty tuition fees. The offence under s2 FA06 is where an individual (the Governor acting as in paragraph 24 above?) 'dishonestly makes a false representation' (the 'assurance statements' given to HEFCE?), and 'intends' thereby 'to make a gain for himself or another' (the University?) or thereby 'to cause loss to another [HEFCE supplying STEM top-up teaching grant?] or to expose another to a risk of loss [the student wasting tuition fees on an inadequately taught sub-standard degree course?]'.

Similarly, the Consumer Rights Act 2015 provides legal protection against and legal sanctions for fraudulent trading; while the Consumer Protection from Unfair Trading Regulations 2008 reinforce CRA15 in relation to acts or

omissions by the trader that might be misleading for the consumer in making the purchase decision.

27. As noted in the Introduction, an individual concerned over the Council's/Board's seeming neglect of business or seemingly unwise decision-making must take care formally to raise the matter in the right context and/or to vote against the decision in question, ensuring that his/her comments (and voting if applicable) are duly recorded in the Minutes. In extremis, the individual Governor may feel obliged to resign and even to whistle-blow to HEFCE as the University's regulator. Or the Visitor might be invoked for the pre-92 universities where it is a matter of, allegedly, failure to follow the Statutes/By-Laws, since that remains the residual function of the Visitor – enforcing the University's constitution (within the pre-92 as typically a chartered charitable lay eleemosynary corporation aggregate as is its technical legal status) - now his/her jurisdiction over academic contracts and the student-university contract have been terminated by legislation in, respectively, 1988 and 2004.

G) CONCLUSION

The role of Governors as directors of universities as corporations can be fuzzy and confusing – Section A.

The role of Governors within the Governance Triangle is necessarily limited given the complexity of their interaction as non-expert lay folk with the expert Executive and with the professional Faculty – Section B.

The overlapping role of Governors as also charity trustees adds yet greater complexity, confusion, and challenge – Section C; and s46 CA11 introduces a powerful means of holding the charity trustee to account!

The Chair of Governors can, as a result of ignorance or arrogance (or both), especially become confused about his/her power and authority – Section D.

The responsibilities carried by Governors are wide and just got wider with their new duty to sign-off on teaching quality and degree standards – Section E.

In the wake of those responsibilities, especially as charity trustees, comes potential personal financial liability for Governors, joint and several – Section F.

There is, however, extensive guidance for Governors issued by the Charity Commission re their trustee function, by HEFCE, and by the CUC – and, hopefully, universities have sound induction processes for new Governors as well as for those taking on corporate officerships (notably as the Chair).

There is also a body of academic literature that Governors should have access to as a mini-library (barely a short shelf! – paragraph 6) alongside their tea and biscuits when on campus – besides, of course, the neat file of guidance documents (as just referred to) that can easily be supplied to Governors at induction. The shelf could also conveniently contain the CC and CUC guidance notes referred to above.

In particular, Governors face a considerable challenge in fulfilling their new HEFCE-imposed quality and standards duties, both in the context of the traditional interpretation of their limited non-expert lay function within the Governance Triangle and also in terms of their being able realistically and properly to sign-off on the performance of their expert Faculty of professionals – and especially where they have little direct contact with the Faculty and rely on the Executive to provide assurances over teaching quality and degree standards.

Yet it is the Governors who face potential personal financial liability and not the Executive (other than perhaps the CEO/VC as personally a corporator/trustee) and still less the Faculty, if the ‘assurance statements’ issued publicly by Governors to HEFCE prove to be based on misinformation given and

misrepresentations made to them by their Executive of experts and/or their Faculty of professionals that they should and could reasonably have detected and challenged.

Sorting all this out will be a major task in the context of: the imminent TEF gold/silver/bronze classification; the need to sustain institutional reputation as student recruitment gets more difficult; the likely creation of the Office for Students emphasising the status of the empowered student-consumer and having significant powers as a regulator; the increasing involvement of 'Which?' and of the Competition and Markets Authority in applying the Consumer Rights Act 2015 to the higher education industry; and the potential for new for-profit commercial players to enter the higher education market-place and bring intensified competition for student-customers and on pricing by way of tuition fees if the Higher Education and Research Bill is enacted without being watered down by the vested-interest lobbying of the universities as so very well represented in the Lords (compared to the interests of the student consumer now paying c£50k for 'the student experience', as inflated to c£100k with interest over the decades of student loan debt), and the entire transaction almost always being undertaken without a proper university-contract!

Finally, there is the often-overlooked residual role of the Visitor as the interpreter, regulator, and enforcer of the constitution of an eleemosynary chartered corporation (most of the pre-92 universities and almost all of the Oxbridge colleges). The Visitor has extensive quasi-judicial power to investigate abuses of internal governance and management, to rule on the interpretation of the constitution as the internal or domestic law of the institution, and to arbitrate on disputes within the entity (other than between an academic and the university/college under the contract of employment or similarly between a student and the institution under the contract to educate). A wayward Governor could probably be removed by the Visitor if the Charity Commission does not take action first!

It is not immediately clear why anybody would want to become or remain as a Governor of an English university!

NOTE A – ON THE DUTIES OF COMPANY DIRECTORS AND OF CHARITY TRUSTEES

- (I) The duties of the director of a registered company are now partially codified in ss170-181 Companies Act 2006, and are a guide to the duties of a Governor of a chartered or statutory corporation. They include: the duty only to act within the powers given by the company's constitution; the duty to promote the success of the company, acting always in good faith; the duty to exercise independent judgement; the duty to exercise reasonable care, skill, and diligence; the duty to avoid conflicts of interest; the duty not to accept benefits from third-parties; the duty to declare any interest in a proposed transaction or arrangement.**
- (II) The duties of a charity trustee are set out in 'Halsbury's Laws of England' (Volume 8 on Charities, 2015): to execute the trust within its terms (the University's Statutes and the general law applicable); to manage conflicts of interest so that only the best interest of the charity is taken into account; to protect trust property (and there are extra provisions on the investment of endowment, whether permanent or expendable, whether held on restricted trusts or not); to report serious incidents to the CC; to keep accounting records; to abide by the statutory duty of care given in the Trustee Act 2000 – 'to exercise such care and skill as is reasonable in the circumstances having regard in particular to any special knowledge or expertise that he has or holds out himself as having...'.**

**NOTE B – ‘A POSSIBLE APPROACH’ FROM THE CUC (January 2017)
GUIDANCE ON ‘ACADEMIC GOVERNANCE’**

The GB needs to ‘reflect its approach to academic governance’ (sic – presumably the CUC means ‘reflect on its approach?’); and to decide whether it has been provided with ‘the necessary evidence’ in ‘report(s)’ about ‘the work of the Senate/Academic Board’ so that it can make the required ‘assurances’ to HEFCE. This might mean, suggests the CUC guidance, the GB informing itself and knowing all about the ‘methodologies’ of the Senate or Academic Board: its ‘membership and meetings during the year’, including ‘topics covered on pre-/post-meeting seminars/workshops or away days’; its ‘internal periodic programme reviews carried out during the reporting year’ and ‘any action taken as a result’; its consideration of ‘key reports’ and ‘any action arising from their consideration’ by the Senate or Academic Board, such ‘key reports’ including ‘summary of themes’ emerging from programme reviews, external examiners’ reports, reviews by external bodies and as ‘embedded’ external ‘peer or professional review’, reports on students complaints and appeals, faculty reviews, NSS results (and action plans triggered); other activities of the Senate or Academic Board; ‘details of student engagement in academic governance’; any ‘internal audit work’ relating to academic quality and standards; its ‘action plan’ for the next year. Thus, the GB gathers information so as to enhance its awareness of the methods used by the Senate or the Academic Board to ensure ‘the continuous improvement of the student academic experience and student outcomes’; and then the GB hopefully feels able to state that, ‘to the best of our knowledge’, these ‘methodologies’ are ‘robust and appropriate’ – and, in addition, it is duly convinced that: ‘The standards of awards for which we are responsible have been appropriately set and maintained.’. The CUC guidance sees this as the GB expressing an ‘opinion’ that the Senate or the Academic Board is functioning effectively – or rather perhaps that at least it seems to the GB that the Senate or Academic Board is working in a ‘robust and appropriate’ way such that the GB feels able to give ‘assurances’ to HEFCE that the

academic governance of the institution is sound and should be able to maintain teaching quality and the standards of awards.

NOTE C – THE CURRENT LEGAL RELATIONSHIP BETWEEN COUNCIL AND SENATE

- (I) It is usually asserted that Senate has ‘powers’ independent of Council over the academic activities of the University. But just how true is this? Senate by convention may well exercise considerable influence and even authority over academic matters, and be very much left alone by Council to get on with the job: that is indeed the sensible stance urged by Eliot writing in 1908, as quoted at length above. The HEFCE requirement from 2016/17 for Council to provide ‘assurances’ that Senate is up to the job might look like an attempt to make Council control Senate by becoming more engaged with ‘academic governance’, but here I argue that nothing has changed in constitutional terms – Senate has always potentially been totally subservient to Council under the University’s constitution and has remarkably few ‘powers’ independent of what activities Council by convention might allow it to exercise with little or no routine scrutiny. If there was ever a period of ‘donnish dominion’ it was a brief time in the expansionist decades of the 1960s and 1970s when universities were generously funded by the State, and the decline of donnish dominion since the 1980s reflects more a renewed assertiveness on the part of Council of its formal constitutional powers in the context of reducing taxpayer funding than any change in the constitutions of chartered universities over the twentieth-century: the former polytechnics were always much more controlled top-down by their LEAs and institutional boards of governors, and their organisational culture has changed less in recent decades in terms of academics feeling a loss of collegiality. While many critics of the commercialisation, commodification, and corporatisation of the University since the 1980s detect a**

wicked neoliberal agenda of marketization and privatisation, whatever may have been happening in ‘the politics of higher education’ and in the informal balance of influence within the governance triangle it is not the result of any changes to the formal constitutions of universities that have disempowered and marginalised a de-professionalised faculty.

- (II) Consider for instance the constitution of the University of Sheffield as typical of the newly-created 1890s/1900s civics – the 1905 Charter, and the Statutes and Regulations promulgated under its authority. The Council ‘shall be the University’s governing body with responsibility for the management of the University and the conduct of all the University’s affairs’ (Article 4 of the Charter – note the word ‘all’). The Senate ‘shall, subject to the Statutes and the control and approval of the Council, oversee the teaching and research of the University and the admission and regulation of students’ (Article 5 of the Charter – note ‘subject to... the control and approval of Council’). Next the Statutes: they require Council to be ‘responsible for the conduct and activities of the University’ and, so as to be able to be so, it ‘shall exercise all the University’s powers’ (Statute 4.1 – note ‘all’ again). The Senate, however, appears, confusingly, to have in its Statute an existence independent of Council control – the Senate ‘shall oversee teaching and research, and be responsible for the academic quality and standards of the University and the admission and regulation of students’ (Statute 5.1 – as if the Charter wording about ‘subject to’ the authority of Council has been forgotten!). Yet when we drill down to the Regulations we find the obligation of Council in relation to academic governance and also its power and authority over Senate clearly reaffirmed: Regs 7-9 require Council to ‘review the learning, teaching and academic standards of the University’ and detail the powers granted to it over Senate in the Charter as including the ability to ‘review, refer back, control, amend or disallow any act of the Senate and give**

directions to the Senate'. The confusion at Sheffield is reinforced by the Note on 'The role and responsibility of members of Council' which states: 'Council is the University's governing body. Subject to the powers of the Senate in relation to academic matters, it has ultimate responsibility for the affairs of the University.' – such 'powers', it is clear from the Charter and the Regulations (albeit not from the Statutes) are in fact subject to Council and not the other way around!

- (III) The history of the Victorian/Edwardian civics is that they are the creations of their local business communities and of their local municipal councils (the former often dominating the latter); and the former usually providing donations (at the University of Sheffield in its early days a big enough donation duly 'bought' life-long membership of its Council). As with the University of Birmingham Council refusing to allow the Senate to meet in its swanky new Council Chamber, these local worthies were clear that they ran the institution.**
- (IV) And even by the 1960s when we encounter the next wave of 'new' universities the independent status of the academic community was still not formally enshrined within the constitution of, say, York in the way that dondom might have hoped-for. The York mid-1960s Charter stresses that Senate's activities are subject 'to the control and approval of the Council' (Charter, Article 14) which has the 'general control over the University and its affairs, purposes and functions' (Charter, Article 13). Now, admittedly, compared to the Sheffield wording, the word 'general' and the lack of 'all' before 'its' might suggest space is left for Senate to be quasi-independent of Council in relation to its academic business, but the Statutes clarify that the latter has power 'to review, amend, refer back, control or disallow any act of the Senate' (Statute 11.4.d). The Statute 12 concerning the Senate certainly gives it 'powers and functions' to, say, 'express an opinion', to 'advise' Council on this and that, to propose for Council's consideration Ordinances and**

Regulations about degree courses, and to take many 'academic' decisions – but, presumably, come the crunch Council's power under Article 13 and under Statute 11.4.d trumps the Senate's apparent independence?

- (V) There is, however, clearly more scope at York for the academics to think/hope they run the academic side of the University, not just conventionally and informally by way of a light-touch control adopted by Council over Senate (as usually the case across the pre-92 English universities) but also constitutionally and formally given the ambiguities in the wording. That said, since there is no ambiguity in the power and control the York Council (and as at any university) ultimately exercises over all budgets and over the making of all appointments, the 'powers' of Senate over pure academic matters may well in reality amount to no more than to select external examiners and be senior to the faculties and academic departments when it comes to having the final say on various minor academic regulations.**
- (VI) Thus it may not be strictly correct for Shattock in his 'Managing Successful Universities' (2010, p 118) to say that in the pre-92s there is 'a bicameral system of governance where the Senate has 'supreme' [sic] powers in academic matters' – while in the post-92s he is indeed entirely correct to state that there is 'a unicameral system' where 'academic affairs [are] clearly subordinate to the authority of the governing body'. If, however, the use of quotation marks around the word 'supreme' recognises that such supposed Senate sovereignty in 'academic matters' is not de jure under the University's constitution but is 'only' de facto by the convention and by the custom and practice that Council is relatively passive in 'academic governance', then Shattock may well have appropriately nuanced his sentence! Similarly, latter Shattock notes (p121) that: 'In the pre-1992 universities the statutory [presumably meaning constitutional?] position of senates makes their relationship with their governing bodies necessarily more of an equal partnership in a bicameral system of governance.'**

– arguably, ‘necessarily’ means only by convention in the way flagged above by Eliot (1908, op cit).

(VII) Indeed, a 1957 Columbia University review of governance - quoted in Duryea (2000, pp168/169), ‘The Academic Corporation: A History of College and University Governing Boards’ – commented in a similar way to Eliot on what Duryea calls the ‘difficult ambiguity’ (p173) of the formal and informal relationship between faculty and trustees:

‘Where the legal structure of the privately supported American university is unique is that it provides, de jure, a government imposed on professionals (the faculty) by laymen (the trustees)... [But one that works only because of] the restraint with which the individual trustee conducts himself in the unique situation he occupies. The legal supremacy of trustees and their final authority to act is unquestioned, but the most experienced trustees are themselves constantly warning their newer colleagues that over-activity in certain areas – particularly in the area of education itself – is as great a sin against the modern spirit of trusteeship as is neglect.’.

(VIII) Duryea also quotes from a perplexed trustee’s 1959 ‘Memo to College Trustees’ (by Beardsley Ruml): ‘This is a funny kind of business! The specific persons responsible, the Trustees, cannot supervise or manage, if you please – what is the essence of the business: the educational process itself where it goes on – and yet that is the heart of this particular kind of business.’. And Duryea ends by noting that there is growing ‘trustee activism’ in US HE – a process explained as politicians seek greater accountability from universities for taxpayer funding and for hikes in tuition fees: ‘The increase of external pressure on governing boards may account for the increasing authority some boards are exerting over presidents, faculties, and other internal constituencies.’ (p228). The US Supreme Court similarly refuses to recognise the concept of ‘shared-governance’ (‘collegiality’ in UK terms) as the idea and ideal that faculty have some sort of constitutional right to

participate in academic policy-making and hence to share in the governance of the university: and certainly an individual member of faculty can't invoke academic freedom to justify, say, the teaching of course material that is not part of the University's approved course syllabus or curriculum.

(IX) Similarly, Shattock (2010, op cit) notes changes in this conventional very light-touch control of Senate by Council, by way of a shift:

from the 1960s Halcyon Days of donnish dominion described in Moodie & Eustace (1974, 'Power and Authority in British Universities') when they refer to 'supreme authority' lying with the 'academics' for the regulation of 'the public affairs of scholars';

via the 1985 Jarratt Report on the efficiency of universities that called for Councils to 'assert themselves' (p24) – indeed, perhaps to re-assert their authority from the 1900s;

to the delicate position today where he concludes that, if there were a stand-off between Council and Senate, the former 'would not have the power to create and implement an alternative academic structure without the consent of senate' (p122).

(X) In fact, de jure Council could do just that; but de facto it would be jolly difficult! Either way, Shattock appropriately calls for 'keeping governance powers in balance' as the GB becomes 'more important as a control mechanism' and there has been 'a downgrading of respect for the academic contribution to effective governance' (p127): indeed, 'governing bodies' need 'to do a lot better' since 'shared governance' has to work both ways for there to be 'good governance' (pp127/128).

(XI) In Farrington & Palfreyman (op cit, 2012, chapter 5 on 'Governance Structures') we note that in recent decades there has been 'a clear shift' in power/authority from 'internal academic self-government' to 'governing bodies dominated by independent members', and that 'the division

of power is not always clear-cut' (para 5.32, p145). That said, we conclude that the split between Council and Senate 'over strictly academic matters' remains as earlier 'to a greater or lesser degree in theory [the formal de jure constitutional position] and to a large degree in practice [the informal de facto balance].' (para 5.32). We find that it is relatively unusual for the formal powers of Senate to be such that they limit the remit of Council in any way, citing the University of Surrey where Article 14 of its Charter actually states that Senate is the 'governing body of the University in all academic matters' (para 5.40; and see paragraphs II & IV above for the more standard wording).

(XII) Moodie & Eustace (1974, pp97-123), writing at the peak of donnish dominion, recognised that, in fact: 'There is, in legal terms, an element of subordination in senate's relations to council.' – but back then they saw the power of Council as having 'declined steadily' by the 1960s. That said, they quote Lord Radcliffe noting from the University of Warwick constitution that the Warwick Senate as 'the supreme academic authority of the University' (Statute 19) was nonetheless 'subject to the powers of the Council' (Charter, clause 13). For Birmingham University they noted that 'custom and practice' had established Senate as 'a partner rather than an agent of Council'; and commenting more widely, added that 'councils have for long been emasculated, by convention, on purely academic matters'. On Senate (pp75-89) M&E note that some 1960s HE commentators saw Senate as 'the effective ruling body of all the modern universities': 'Academic authority resides, without serious challenge, in senate.'

(XIII) In 'Red Brick University' (1943), however, Bruce Truscot (a pseudonym for a Professor of Spanish at the University of Liverpool), writing some two decades earlier than M&E, recognised that Council was indeed formally the dominant body, but also noted its informal working relationship with Senate as being 'the often difficult and delicate relations' around which 'high politics in the University largely turn'.

He added that those setting up the civic universities of the 1900s ‘took very good care that the academic voice should never sway the decisions of Council’: and thus, ‘the powers of the Council are tremendous’. That said, in practice and anticipating where the reality had got to by the 1960s, the lay members, Truscot explains, ‘usually confine themselves to the business side of their functions’ (to corporate rather than academic governance) and hence ‘relations between Council and Senate can be smooth and even cordial’ – although he was scathing about the quality of these lay members: ‘Laymen with little understanding of academic problems have done untold harm by their activities on university Councils.’ (he was equally dismissive of his lazy academic colleagues, which explains why he had to use a pseudonym: ‘The life of well-established, middle-aged professor in the Arts faculty of a modern university can, if he likes to make it so, be one of the softest jobs to be found on the earth’s surface.’!). In fact, BT looking forward anticipated ‘considerable changes’ in the Council-Senate power balance whereby the former de jure is ‘supreme’ but the latter is in practice ‘the controlling voice in all academic matters’: ‘It is often said that this arrangement works quite smoothly. So does a dictatorship – on the surface’. He foresaw ‘a revolution’ that would end ‘the dictatorship of Big Business, however benevolent, over education’ as being ‘anachronistic’ – as State funding increased, academic autonomy would grow...

(XIV) Truscot was right: the lay dominance of the 1900s-1940s weakened and gave way to Halsey’s ‘donnish dominion’ by the 1950s-1960s as State funding increased, all as detected by M&E in their 1974 analysis. But, in turn, the dons gave ground to a rediscovery and reassertion of lay power from the mid-1980s (Halsey, 1992, ‘Decline of Donnish Dominion’). The similar emasculation of lay control in US universities was noted by Buchanan & Devletoglu (1970, ‘Academia in Anarchy’) as the revolting students of the late-1960s tested the feebleness of academic management that had eclipsed

