

The English chartered university/college: how ‘autonomous’, how ‘independent’, and how ‘private’?

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INTRODUCTION

The English chartered university or college (hereafter ‘HEI’ for ‘Higher Education Institution’) is a corporation (aggregate, lay, eleemosynary, charitable...see the OxCHEPS web-site for the Occasional Paper No. 5 as an update to my *Charity Law & Practice Review* articles, 5 (2) 85-134 (1998) and 6 (2) 153-167 (1999), on the legal status of the Oxford college). As such it is to be distinguished from its cousin, the statutory university (see Chapter 3 of Palfreyman & Warner, *Higher Education Law*, 2002, Jordans). In US legal terms the former is a ‘private’ (‘not-for-profit’) corporation/HEI, and the latter a ‘public’ corporation/HEI. This article explores whether the English chartered HEI would, were its autonomy and independence under threat for political reasons, be as well-protected by English (and EU) Law as its US counter-part has historically been by the US Supreme Court’s interpretation of the Constitution. In the Dartmouth College case (*Trustees of Dartmouth College v Woodward*, 1817-1819 as it progressed through the State’s court hierarchy and then to the Federal Supreme Court; 1 NH 111 & 65 NH 471 to 4 Wheaton 518 or 17 US 518) US Law ultimately and effectively safeguarded Dartmouth’s legal autonomy and private assets against expropriation by the New Hampshire State legislature wanting to redesignate Dartmouth College the private corporation/HEI as the State’s public university. Could the English private HEI, faced by the threat of nationalisation from a hostile UK Government in 2010, similarly rely on the protection of the European Convention of Human Rights (ECHR), either in lieu of or in conjunction with the UK’s Human Rights Act 1998 (HRA)? Or would EU Law be relatively unconcerned about the property rights of the private HEI as a species of university/college virtually unknown in mainland Europe where the concept of the State-funded public university dominates? (One notes, however, that private sector HEIs *are* emerging in Italy, as a Galbraithian private-affluence/public squalor market response to over-crowded State HEIs.) It is appreciated that in the case of UK HE there is an interesting paradox: while in the USA the HEIs are clearly either public or private (and with the latter now split into private not-for-profit and private for-profit, and with

them behaving accordingly in strategic terms) and while in mainland Europe they are an extension of the State (*but* that does not necessarily mean the Government attempts to micro-manage them as public bodies via its control of the purse-strings), the UK HEIs are in theory and *de jure* autonomous and ‘private’, and yet they are in practice substantially State-funded, are closely Government-regulated via its Higher Education Funding Council ‘quango’, and are depressingly weak in terms of asserting their potential independence and taking greater strategic responsibility for their destiny. (See, for example, Cécile Deer (2003, *Higher Education in England and France since the 1980s*, Symposium Books) in comparing the development of UK and of French HE since 1980.) The Councils and Boards, along with the well-paid ‘chief executive’ vice-chancellors, providing ‘leadership’ within the UK HE sector seem unable to let go of Nanny’s hand while at the same time slowly realising that Nanny is not going to increase their pocket-money by the £9 billion or so that UUK – ‘Universities UK’ as the ‘trade’ lobby-group – calculates is the Government under-funding of universities. The one HEI which behaves in line with its private corporation independent status remains, after some twenty-five years, still a very small liberal arts college (the University of Buckingham, at c600 undergraduates - see J. Tooley, 2001, *Buckingham at 25: Freeing the Universities from State Control*, IEA).

THE DARTMOUTH CASE

The significance of the Dartmouth case is recognised by Rudolph: ‘...the decision put the American college beyond the control of popular prejudice and passion’, fostering ‘variety’ and ‘opportunity’ (albeit at the risk of ‘incompetence’) as ‘competition’ prevailed in the face of a (potentially) stifling ‘monopoly’ (Rudolph, F., *The American College and University: A History*, 1990: 207-212, The University of Georgia Press). Similarly, Kaplin & Lee (Kaplin, W. A. & Lee, B. A., *The Law of Higher Education*, 1995: 45-54, Jossey-Bass) explore in a US context ‘the fundamental dichotomy between public and private education’ and how ‘the law protects private institutions from such extensive governmental control’ as otherwise impacts on the US public HEIs; the US Constitution prevents a State from ‘impairing’ the charter of a private HEI once that charter has been granted (although in practice and via other means ‘government does retain substantial authority to regulate private education’). A very perceptive analysis is to be found in E. D. Duryea, *The Academic Corporation*, 2000: 105-144, Falmer Press/Taylor & Francis): he sums up the Dartmouth case as ‘the Magna Carta for private colleges in the United States’ (105).

As Duryea tells the story, in essence the Chief Justice of the Supreme Court, John Marshall, defined the autonomy of the chartered eleemosynary corporation: the State is not able unilaterally to rewrite the College’s 1769 charter which is a kind of contract between the State and the founder/endower of the corporate entity; and the State is not able subsequently to divert the private assets of the corporation to public control even if, over the years, the HEI has been partially State-funded and

it has fulfilled a public need in providing higher education (and hence might also have received from the State favourable tax treatment as a charity). Duryea sees Marshall as having been influenced by the English political philosopher, John Locke, and his concept of a 'compact' (or contract, trust) between the governed and the governing, between 'the People' and 'the Government', whereby the former have and always retain Sovereignty as Citizens. Marshall interprets the chartered corporation as possessing the individual citizen's inalienable right to autonomy within the Law and as also benefiting from the Law's protection of the citizen's property.

Thus, the United States' Supreme Court will block New Hampshire's attempt (as endorsed by that State's Supreme Court) to turn the private corporation of Dartmouth College into the public corporation of 'Dartmouth University' controlled by a State-appointed Board of Overseers. In reaching his judgement Marshall will also have been influenced by a number of relevant earlier cases, including *Bracken v Visitors of the College of William and Mary* in 1790 (3 Call (Va) 574, 1 Call (Va) 161) where Marshall himself was counsel for the College and successfully argued that its Royal Charter made William and Mary a private corporation: the concept of a distinction between 'public' and 'private' amongst corporations not hitherto having been recognised, and certainly not being then (or indeed, technically, now) a concept known to the English Law of Corporations as translated across the Atlantic.

The Court's 5:1 judgement was clear: for example, '...this charter, as the instrument which should enable [the Founder and his Trustees] to perpetuate their beneficent intention... An artificial, immortal being, was created by the crown, capable of receiving and distributing for ever, according to the will of the donors, the donations... the perpetual application of the fund to its object... the corporation... is the assignee... It is a contract for the security and disposition of property...' (Marshall's judgement); and '... It is a franchise, or incorporeal hereditament, founded upon private property, devoted by its patron to a private charity, of a peculiar kind, the offspring of his own will and leisure, to be managed and visited by perusal of his own appointment, according to such laws and regulations as he, or the persons so selected, may ordain...' (Washington's judgement).

THE CHARTERED ('PRIVATE') HEI IN ENGLISH LAW

The chartered corporation is an 'artificial person', and this 'personality' gives it certain legal 'capacities' in common with a 'natural person': it can sue, and be sued; it can contract; it can commit most torts (except, say, assault); it can commit many crimes (but not murder or rape); it can own property; and its powers are limited only by explicit boundaries set out in the charter creating it or in the statutes regulating it (in contrast to a statutory ('public') corporation which can do only what the statute creating it explicitly empowers it to do). (For a full discussion see: Birks, P., *English Private Law*, 2000: 3.18-3.49, OUP; and *Halsbury's Laws of England*, Vol. 9 (2) on 'Corporations', 1998, Butterworths.) So, if the

‘private’ English corporation can, like Dartmouth College, own its assets (even if the corporate endowment is held on a charitable trust to the founder), will the chartered HEI and its property be protected by Law in the event of the State behaving in, say, 2010, like the New Hampshire State legislature did towards Dartmouth some 200 years before? In theory, the HEI’s Charter can only be revoked by the Crown instituting proceedings under a writ of *scire facias* on the grounds that the HEI has abused its Charter (*Halsbury*, Vol. 9(2) on ‘Corporations’ (1998), paras 1136, 1197, and 1202). Providing the HEI, as an exempt charity accountable to the High Court and ‘policed’ by its Visitor and by the Attorney-General, deploys the corporate assets only for its charitable purposes (*Halsbury*, Vol. 5(2) on ‘Charities’ (2001), paras 456-485 and 516), it is unlikely that the very existence of the corporation will be challenged in the courts. But what if the sovereign Parliament decided simply to enact that the private, chartered HEIs will all now become public bodies directly controlled by Government, that they and their property will be ‘nationalised’?

THE HRA/ECHR AND THE ENGLISH CHARTERED HEI

The chartered corporation as an artificial person is protected by the HRA and the ECHR just like a natural person. So, what elements of the HRA/ECHR might our threatened HEIs utilise in an attempt to sustain independence and preserve assets? Would the European Court of Human Rights at Strasbourg in 2010 be as receptive to pleas for HEI autonomy as the Supreme Court in Washington was in 1819? Or could Government achieve a dissolution of the chartered HEIs as easily as in the 1530s and 1540s there was a dissolution of the monasteries? The HRA would certainly be of little aid or comfort: s3 (2) (b) and (c) preserves sovereignty for Parliament; the HRA will not allow the ECHR to be invoked to challenge primary legislation. That leaves a direct appeal to the Strasbourg Court, subject to there being a relevant Convention right, *and* with the chance of an appeal being crucially dependent on whether the right concerned is limited or qualified so as to permit a State to deny that right in particular circumstances; or, if the right, is indeed not absolute, to the Court deciding that the particular circumstances of the UK State wishing to ‘nationalise’ HEIs are not justification for interference with the right. (For example, the Court might accept that it is ‘necessary in a democratic society’ for the UK Government to dissolve the English chartered HEIs as a matter of ‘pressing social need’; or it could give the Government the benefit of ‘the margin of appreciation’ and let it do as it sees fit with these private corporations on the basis that there are local needs and conditions, as determined democratically in the UK, which justify incompatibility with the ECHR.)

The relevant Convention right is seemingly ‘Protection of Property’ (Protocol 1, Article 1): ‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The

preceding provision shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.'

Thus, we have in regard to property a qualified right, not an absolute right (like, say, Article 3, Prohibition of Torture). It is highly qualified because certain States wanted to protect their freedom to nationalise (a fashionable political activity back in the late-1940s when the ECHR was being drafted!). Moreover, the Strasbourg Court has tended to give an allegedly offending State a wide margin of appreciation by applying the 'fair balance' test and seeking to stress the greater good arising from the State being allowed to interfere with the property of the individual.

That said, in *Holy Monasteries v Greece* (1994) 20 EHRR 1 the Court did overturn an attempt by the Greek Government to take disputed monastic land into State ownership, but did so on the basis that insufficient financial compensation was being offered rather than as a matter of great principle (and, anyway, such compensation need not necessarily be at full market value; it just had to be better than the Government's initial offer). In *Papamichalopoulos and others v Greece* (1993) 16 EHRR 440 the Greek Government similarly fell foul of the ECHR for expropriating land and transferring it to the use of the Greek navy. The UK Government, on the other hand, survived a legal challenge under Protocol 1, Article 1 when the Court upheld its political freedom to nationalise shipyards at (from the perspective of shipyard owners) poor levels of compensation: 'The Court will respect the national legislature's judgement in this respect unless manifestly without reasonable foundation.' (*Lithgow v UK* (1986) 8 EHRR 329, at para. 122). Note the application of, as it were, the good old *Wednesbury* unreasonableness approach to judicial review rather than any new-fangled European Law concept of proportionality: see Lavender, I., 'The Problem of the Margin of Appreciation' (1997) 24 EHRR 380, at 383. Finally, the aggrieved property owners also got little legal satisfaction in *James v UK* (1986) 8 EHRR 123 concerning the compulsory transfer of residential property under the Leasehold Reform Act 1967: the Court saw the Act as within the UK's margin of appreciation if the democratically-elected UK Government duly decided that this legislation properly reflected the public interest.

It is, therefore, all a matter of the fair balance test, which may well produce seemingly varying results: *Mellacher v Austria* (1989) 12 EHRR 391, *Spadea v Italy* (1995) 21 EHRR 492, *Scollo v Italy* (1995) 22 EHRR 514 all concerned housing laws controlling the landlord's right to evict; the picture is much the same for cases involving forfeiture of property seized by Customs or concerning the taxation of property. See also the discussion in: a) Frowein, J. A., 'The Protection of Property', in Macdonald, R. St. J., et al. (eds) (1993) *The European System for the Protection of Human Rights*, Dordrecht: Kluwer; b) Kingston, J., 'Rich people have rights too? The status of property as a fundamental right', in

Heffernan, L. (ed) (1994) *Human Rights: A European Perspective*, Dublin: Round Hall Press; c) Smyth, M., 'The United Kingdom's incorporation of the European Convention and its implications for business' (1998) 25 EHRR 273; and d) Mc Bride, J., 'The Right to Property' (1996) 21 E L Rev HRC 40.

Kingston points out that, while (usefully for our chartered HEI) only Article 1 of Protocol 1 within the ECHR specifically states that artificial persons have human rights re property, this right to property is, as noted above, indeed 'highly qualified': in essence, 'it has failed to provide any notable protection to individuals' (he concludes that rich people probably do not have a fundamental human right to remain rich, or certainly not when Government decides it wants a greater share of their wealth!). Frowein stresses that property is the sole economic right protected by the ECHR, but even then expropriation of private assets by the State is likely to be upheld by the Court if it is in the public interest (as, of course, best determined by the State itself) and subject only to the payment of some modest level of compensation. McBride also assesses the ECHR protection of property as limited, given the 'favourable disposition' of the Court towards State actions and its relatively 'undemanding' tests in terms of identifying abuse. Smyth, however, sees the Court now adopting 'a more rigorous analysis' following the 'the Building Society cases' [1997] STC 1466 and (1998) 25 EHRR 127.

WHAT ABOUT ARTICLE 14 INSTEAD?

If the ECHR is not to be relied upon by the English chartered HEI in terms of protecting its assets against 'nationalisation', can Article 14 ('Prohibition of Discrimination') instead usefully be invoked? It reads: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national party, property, birth or other status.' Could the endangered chartered HEI argue that it is being discriminated against by the UK State on the basis of it holding private property which the Government wants to redeploy, via 'dissolution' or 'nationalisation', to public control and use? Or would it argue that the unfair discrimination arises on the basis of its 'social origin' and hence current legal form as a private eleemosynary corporation (the issue of 'birth or other status')? Article 14 is indeed much cited by applicants, although in practice the Court will not bother itself with Article 14 once it has found there to have been a violation of the relevant substantive Article of the ECHR on which the application is otherwise based (see para. 89 of the judgement in *Chassagnou and others v France* (2000) 29 EHRR 615). Thus, even if, as already discussed, the Court may not find any violation of the substantive property right in Article 1 of Protocol 1, it could still go on to consider whether there has nonetheless been a breach of Article 14 in terms of the State's behaviour towards the applicant (see section 1B, para. 9 of the

judgement in the *Belgian Linguistic Case* (1979/80) 1 EHRR 252; and as the Court did most recently in *Nerva and others v United Kingdom* (Application No. 42295/98), 24/9/2002, *Times Law Reports* 10/10/02). But what form would any differential treatment by Government of our private corporations have to take, and against what comparator group, for it to be found discriminatory by the Court?

In the *Belgian Linguistic Case* (para. 10) the Court asserted that ‘the principle of equality of treatment is violated if the distinction has no objective and reasonable justification’; equally, even if there is justification by way of a legitimate aim within the context of a democratic society determining just what is in the public interest, there will still be a need for ‘a reasonable relationship of proportionality between the means employed and the aim sought to be realised’. Thus, as with Article 1 of Protocol 1, the Court in applying Article 14 may well decide that the dissolution/nationalisation of the chartered HEIs is indeed a legitimate aim within the State’s democratic determination of the public interest, and that in achieving the aim it is proportional effectively to convert these private corporations into public institutions owned and directly controlled by Government or its agencies. Moreover, there may not even be any discrimination in need of justifying if, in fact, *all* chartered HEIs are to be treated equally (whether badly or not; in *Lithgow*, for example, all shipyards were being nationalised) and they are merely to be brought into line with their nearest comparator group (the statutory, ‘public’ corporation HEIs). Or, even less risky in terms of the Court finding a violation of Article 14 if, in fact, *all* HEIs (chartered and statutory) are equally treated by the ‘nationalisation’ legislation, in that the technicality of the statutory HEIs being autonomous of Government as exempt charitable corporations was also addressed in that they too were to become directly owned and controlled public institutions.

And the Strasbourg Court may have few qualms over such a stance from the UK State, given that:

- the chartered-statutory division amongst English HEIs is anyway arguably merely a minor quirk of the English Law of Corporations, while recognition of a truly meaningful private-public dichotomy amongst HE corporations is (*post*-the Dartmouth College case) a particularly US legal concept;
- in mainland Europe the HEIs are generally always part of their respective national HE systems, which to a greater or lesser degree are effectively part of the State apparatus (even to the extent that in Germany, for example, academics are civil servants), and hence the UK would simply be coming into line with the rest of Europe (and especially in the context of the evolving EU ‘harmonisation’ commitment to a European Higher Education Area arising from Declarations signed by Member States at, so far, Bologna, Paris, and Prague – Berlin next stop in 2003); and
- for the UK State to, as it were, merge its private and public HEIs, and to then go further by assuming direct control of them, would be well within its margin of appreciation.

WOULD ARTICLE 1 OF PROTOCOL 12 HELP?

Article 1 of Protocol 12 is yet to be ratified, but, assuming it is, it will shift the Article 14 emphasis on finding discrimination to have happened to a clearer starting-point of a recognition of a right of equality before the Law. There remains, however, for our chartered HEI the same problem of identifying the comparator group allegedly receiving better treatment from the State. The only realistic way, therefore, that either Article 14 of the ECHR or the proposed Article 1 of Protocol 12 will operate to offer legal comfort to a private HEI threatened with direct State control would be if it alone, or it with just a few others, were being treated adversely while many others were being left in peace.

Thus, ‘nationalising’ the Oxbridge colleges but not at the same time all other chartered universities might be discriminatory, while an Act to dissolve all English chartered HEIs and to reconstitute them (with assets duly transferred) as public corporations along the lines of the existing statutory HEIs would probably not be discriminatory. The State would be on even safer legal ground if it were then to enact that *all* these HEIs were to be governed by Government-appointed ‘Boards of Overseers’. In essence, all of this would be a matter of politics and not of law, and opinions may well differ as to whether UK HE would be better off moving over to the European monolithic State apparatus model or shifting further towards the US mixed-economy public-private HE model. And, anyway, the issue may well be settled by the UK being increasingly harmonised within the EU, rather than as now being partly oriented towards the USA for reasons of history, language, culture and ‘the Special Relationship’. Such ‘progressive harmonisation’ may include, given time, a significant impact on national HE systems, the first hints of which are to be found in the various Declarations on HE as already referred to: Paris, Bologna, Prague; with sub-groups holding discussions at Salamanca, Goteburg and Helsinki (the Scunthorpes of Euroland never seem to be on the Eurocrats’ map or the route of the Brussels gravy-train).

CONCLUSION

While the Greek monasteries may have been protected by the ECHR, it is not at all clear that the ECHR (still less the HRA) will safeguard the English chartered HEI in the same effective way US Law did Dartmouth College as a private corporation way back in 1819. Indeed, as one commentary on the ECHR notes: ‘In property cases, there is almost a presumption that a national measure is in the public interest’ (p 312 of Ovey, C. and White, R. (2002) *The European Convention on Human Rights*, Oxford: OUP). This may well be because US Law is more firmly rooted in a society and culture which not only possesses a written constitution but also attaches great political value to the fierce

independence of the individual citizen and his/her inalienable rights. It is sad that the Oxford philosopher, John Locke (1632-1704), and his Natural Rights of Man (Life, Liberty, Property) set out in *Two Treatises of Government* (1690), are not more honoured in his own country and continent. Perhaps the independence of English HE will be more effectively protected in the longer term by the WTO and the possibility (probability?) that eventually HE could be covered by the extension of the General Agreement on Trade in Services (GATS) to include HE alongside such other services as transport, financial services, and tourism: then there would be less scope, and perhaps less incentive, for any Government to interfere with and micro-manage HEIs...