**Who Controls University Legal Education?**
**The Case of England and Wales**

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"Here then [with the introduction of the Research Assessment Exercise] was a dramatic moment in the decline of donnish dominion."[1]

## Introduction

Over twenty years ago Elson suggested that 'the leadership of the [practicing] legal profession [in the USA needs to]…use their considerable authority to compel law schools to change', thereby implicitly accepting that the control of university legal education in the USA lay, at that time, in the hands of legal academics.[2] Whatever the merits of Elson's arguments, his intervention illustrates the general importance that is attached to the question of who controls university legal education. Control has both important policy consequences about the direction that such education takes as well as ethical significance, indicating who has ultimate responsibility for those consequences. In this essay I will explore the question of who controls university legal education in England and Wales. Whilst the arguments in this essay are limited to universities in England and Wales the issues they raise are relevant to all other jurisdictions. However, great care is necessary when comparing university legal education in different jurisdictions, with the relationship between academics, practitioners and the state being 'a unique configuration in every country'.[3] One of the arguments put forward here is that what has happened, and is happening, in England and Wales will be of general interest even though the particulars in England and Wales are not precisely replicated elsewhere.[4]

## The Legal Position of Universities and Academics in England and Wales

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[1] Albert Halsey *Decline of Donnish Dominion: The British Academic Professions in the Twentieth Century* (Clarendon Press, 1992)189.

[2] John Elson 'Why and How the Practicing Bar Must Rescue American Legal Education form the Misguided Priorities of Legal Academia' (1996-1997) 64 *Tennessee Law Review* 1135 at p 1135.

[3] Michael Burrage 'Practitioners, Professors and the State in France, the USA and England' in Sinclair Goodlad (ed) *Education for the Professions,* Quis custodient…*?* (Society for Research into Higher Education and NFER Nelson, 1984) 26). See more generally Carel Stolker *Rethinking the Law School: Education, Research, Outreach and Governance* (Cambridge University Press, 2014) and Anthony Bradney "Can There Be Commensurability in Comparative Legal Education?" (2007) 1 *Canadian Legal Education Annual Review/Revue de l'enseignment de droit au Canada* 67.

[4] Even university legal education in the other jurisdictions of the United Kingdom, Scotland and Northern Ireland, although very similar to that in England and Wales, has its own separate nuances. See, for example, James Lorimer, 'The Faculty of Law' (1889) 1 *Juridical Review* 4.

Upon its face the answer to the question who controls university legal education in England and Wales is clear. Legally, universities in England and Wales are, and always have been, autonomous bodies; they are not creatures of the state. The first British university, the University of Oxford, emerges in the 13th century as a medieval corporation.[5] Similarly modern-day British universities are 'a peculiar kind of legal entity, probably best described as a corporation'.[6] With their own legal personality individual universities are free, within the limits of the law, to choose what they do. The legal position of their academic staff is a little less clear.[7] However, 'academic staff of the pre-1992 universities always enjoyed quite different terms of employment from the majority of their co-workers'.[8] Even in the present day the unusual status of academics is recognised by the fact that academic freedom in performance of their duties with respect to research and teaching is protected by statute.[9] Academics are not simply employees but are also members of their University as a corporate body.[10] The independent status of academics has led the courts to conclude that, whilst they are under a contractual duty to do research, 'preparing specific and definable scholarly papers and books, would be outside the course of the academic's employment and [as a result] he would retain copyright as the author of these works'.[11] Similarly, whilst

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[5] MB Hackett 'The University as a Corporate Body' in Trevor Aston (ed) *The History of the University of Oxford: Volume 1: The Early Oxford Schools* (Clarendon Press, 1984). "Emerges" because like other early European universities it is neither possible precisely to date when it first starts or when it first becomes a corporation (see, for example, Gaines Post 'Parisian Masters as a Corporation, 1200-1246' (1934) (*Speculum* 421-425). On the general legal position of European universities at this time see Ann Monotti and Sam Ricketson *Universities and Intellectual Property: Ownership and Exploitation* (Oxford University Press, 2003) 20.

[6] Nicola Hart 'What is a University as a Legal Entity?' in David Palfreyman and David Warner (eds) *Higher Education Law* (Jordans, 2002) 28.

[7] The contractual position of academics provides a paradigmatic example of the conceptual problems caused by employment law jurisprudence which finds its roots the historical notion of master and servant, a somewhat implausible model for many modern workers including academics. On this problem see Jon Clarke and Lord Wedderburn 'Modern Employment Law: Problems, Function and Policies' in Lord Wedderburn, Roy Lewis and Jon Clarke (eds) *Labour Law and Industrial Relations: Building on Kahn-Freund* (Clarendon Press, 1983) 145-152 and Otto Kahn-Freund 'Blackstone's Neglected Child: The Contract of Employment' (1977) 93 Law Quarterly Review 508.

[8] Dennis Farrington and David Palfreyman *The Law of Higher Education* (Oxford University Press, 2012, 2nd ed) 238.

[9] S 202(2)(a) Education Reform Act 1998.

[10] See, for example, Thomas v University of Bradford [1987] 2 AC 795 at 807, R v Lord President of the Privy Council ex parte Page [1991] AC 682 at 694 and Pearce v University of Aston (no 2) [1991] 2 All ER 469 at 473.

[11] Andreas Rahmatian 'Make the Butterflies Fly in Formation? Management of Copyright Created by Academics in UK Universities' (2014) 34 *Legal Studies* 709 at 716, citing a Court of Appeal decision Stevenson Jordan v MacDonald and Evans [1952] (1952) 69 RPC 10 at 18. See similarly William Cornish 'Rights in university innovations: the Herchel Smith lecture for

academics are under a contractual duty to teach, allocating them wholly new teaching without consultation, even if they were qualified to do that teaching, would amount to constructive dismissal.[12] In relation to both research and teaching the courts treat academics as autonomous professionals who are employed but who are largely free to determine how they fulfil their duties.[13]

The legal status of universities and academics suggests that control of university legal education rests with universities and, perhaps, their individual academic staff. Yet, despite this relatively clear legal picture, there is a long-established and still growing literature which suggests that universities and academics no longer have the ability to determine their own direction.[14] Universities, this literature suggests, are hemmed in by regulation and universities in turn tightly control the performance of their academic staff. If this is so the answer to the question of who controls university legal education becomes more uncertain.

**Regulating Universities**

There are a large range of regulatory regimes that relate to universities and academics in England and Wales. Some like the Research Assessment Exercise, now the Research Excellence Framework, are longstanding.[15] Others, like the Office for Students, set up by Part 1 of the Higher Education and Research Act 2017, are very new.[16] The existence of each individual regime is pertinent for the arguments in this essay. However also relevant is the fact of the multiplicity of the regimes. In addition to the regimes already mentioned the Quality Assurance Agency for Higher Education, Research England, the Office of the Independent Adjudicator, the Competition and Markets Authority, UK Visas and Immigration (part of the Home Office) and the Advertising Standards Authority are all part

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1991' (1992) 14 European Intellectual Property Review 13 at 15. For a contrary view see Monotti and Ricketson op cit 273-274.

[12] Allen v Queen Mary University of London [2016] WL 02997048 at para 15. It should be noted that this is an Employment Tribunal decision.

[13] In doing this the courts' views reflect academics own conception of themselves. See, for example, Jane Broadbent 'If You Can't Measure It, How Can You Manage IT? Management and Governance in Higher Educational Institutions' (2007) 27 *Public Money and Management* 193 at 195 and Fiona Cownie *Legal Academics: Culture and identities* (Hart Publishing, 2004) 105-105. Over half of Cownie's respondents said that autonomy was the thing that they valued most about their academic lives.

[14] In relation to law schools in England and Wales see, for example, Richard Collier 'The Changing University and the (Legal) Academic Career – Rethinking the 'Private Life' of the Law School' (2002) 22 *Legal Studies* 1, Richard Collier 'Privatizing the University and the New Political Economy of Socio-Legal Studies: Remaking the (Legal) Academic Subject' (2013) 40 *Journal of Law and Society* 450 and Richard Collier '"Love Law, Love Life": Neo-Liberalism, Wellbeing and Gender in the Legal Profession – The Case of the Law School' (2014) 17 *Legal Ethics* 202.

[15] This form of regulation goes back to the 1980s. On the genesis of the exercise see Maurice Hogan and Stephen Hanney *Reforming Higher Education* (Jessica Kingsley, 2000) 96-98. For the next iteration of the exercise see https://www.ref.ac.uk/.

[16] On the Office for Students see https://www.officeforstudents.org.uk/.

of the landscape for contemporary universities in England and Wales.[17] The Research Excellence Framework is now mirrored by the Teaching Excellence Framework.[18] The landscape sometimes changes. Thus, for example, the Office for Students and Research England recently replaced the Higher Education Funding Council for England and the Office for Fair Access. However, notwithstanding such alterations, regulation itself has become a constant feature for universities in England and Wales and there is no indication that this is likely to change in the foreseeable future. When analysing the impact of this regulation in addition to the number of regulatory regimes that relate to universities it is also necessary to consider the level of detail in those regimes. Thus, for example, despite its relatively short existence, a little more than 8 months at the time of writing, the Office for Students has issued four Regulatory Notices, which are formal requirements made of universities, and 11 statements entitled Regulatory Advice.[19] The content of these various documents includes, for example, references to access arrangements for students, ways of facilitating students' registration for national and local elections and how publication of numbers of university staff being paid over £100,000 per annum should be accomplished.

From the above it might seem that universities in England and Wales are now much like Gulliver bound by the Lilliputians.[20] This being so the legal position of universities may seem to be of little moment. Consideration of the history of some of the earliest regulatory regimes however suggests a more complex story.

*The Quality Assurance Agency*

In 1997 the Quality Assurance Agency (QAA) 'was established as an independent company and registered as a charity'.[21] The Agency's remit was not wholly new in higher education in England and Wales. Polytechnics, for example, had come under the tutelage of the Council for National Academic Awards, a body who were there to 'guarantee standards' in polytechnics and whose 'central concern was with…the negotiation, approval and reapproval of courses through explicit validation procedures'.[22] However polytechnics, whilst they provided higher education, were precisely not universities. Once they became universities, following the passage of the Further and Higher Education Act 1992, they ceased to come under the jurisdiction of the CNAA, which was itself abolished by the 1992 Act. Universities have long sought to maintain their autonomy from forms of external audit

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[17] On these bodies see respectively http://www.qaa.ac.uk/, https://re.ukri.org/, http://www.oiahe.org.uk/, https://www.gov.uk/government/organisations/competition-and-markets-authority, https://www.gov.uk/government/organisations/uk-visas-and-immigration and https://www.asa.org.uk/.

[18] https://www.officeforstudents.org.uk/advice-and-guidance/teaching/what-is-the-tef/.

[19] https://www.officeforstudents.org.uk/advice-and-guidance/regulation/the-regulatory-framework-for-higher-education-in-england/regulatory-notices-and-advice/.

[20] Jonathan Swift *Gulliver's Travels* (JM Dent & Sons, 1975) 15-16.

[21] Ted Tapper *The Governance of British Higher Education* (Springer, 2007) 181.

[22] Harold Silver *A Higher Education: The Council for National Academic Awards and British Higher Education* (The Falmer Press, 1990) 8 and 90.

that were outside their control.[23] However the 1992 Act which, amongst other things set up Funding Councils for the universities, also obliged those Councils to assess the quality of education in universities and to set up bodies to advise them with respect to this.[24]

John Randall, the first Chief Executive of the QAA, was keen to establish its independence from universities themselves as much as from anyone else. In 1998 he wrote that 'the comfortable days are gone: the new stakeholding public no longer accepts the legitimacy of unaccountable priesthoods'.[25] In 1969 Perkins had written that '[u]niversity teaching is the key profession in the twentieth century'.[26] By 2000 Randall, writing as Chief Executive of the QAA, seemed to doubt whether academics were professionals. He would only go as far as saying that '[u]niversity teaching has the opportunity to demonstrate that it is worthy of recognition as a true professional activity'. Only if it did that would have 'earned the right to play a part in the regulation of…[its] own activities'.[27] That right to play a part in regulation would be earned by subscribing to the standards laid down by the QAA. Brown writes of Randall's 'enthusiastic espousal of a "tougher" regulatory regime'.[28]

*The Law Benchmark*

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[23] Individual universities had long appointed external examiners but the universities determined both their appointment and what they did with their reports. Price dates attempts to challenge the autonomy of universities back to the Second World War (Geoffrey Price 'The Expansion of British Universities and their Struggle to Maintain Autonomy: 1943-46) (1978) *Minerva* 357). Goodlad goes even further back suggesting that the 'first step along a dangerous path to State control of universities was taken in a Treasury Minute of 1919 that established the University Grants Committee' (Sinclair Goodlad 'Benchmarking and Templates – Some Notes and Queries from a Sceptic' in Helen Smith, Michael Armstrong and Sally Brown (eds) *Benchmarking and Threshold Statements in Higher Education* (Kogan Page, 1999) 72).

[24] On this history see Roger Brown *Quality Assurance in Higher Education: The UK Experience since 1992* (RoutledgeFalmer, 2004) chp 6 and Tapper op cit pp 167-180. For a recent description of the work of the QAA see Anthony McClaran 'The Quality Assurance Agency' in Roger Ellis and Elaine Hogard (eds) *Handbook of Quality Assurance for University Teaching* (Routledge, 2019).

[25] Quoted in Colin Raban 'Assurance *versus* enhancement: less is more?' (2007) 31 *Journal of Further and Higher Education* 77 at 79. On the inappropriateness of using the notion of stakeholders when analysing the work of universities see Anthony Bradney "Stakeholders in the University Law School: A Note in Dissent" in Fiona Cownie (ed) *Stakeholders and the University Law School* (Hart Publishing, 2010) 225.

[26] Harold Perkins *Key Profession* (Augustus M Kelley, 1969) 1.

[27] John Randall 'A Profession for the New Millennium' in Peter Scott (ed) *Higher Education Re-formed* (Falmer Press, 2000) 168.

[28] Brown op cit 147.

One of the ways in which the QAA sought to fulfil its duties was by establishing a series of Benchmarks for each academic discipline.[29] The QAA wanted Benchmarks to 'describe the nature of study and the academic standards expected of graduates in specific subject areas. They [should] show what graduates might reasonably be expected to know, do and understand at the end of their studies'.[30] John Bell, a member of the first group to draft a Benchmark for Law, itself one of the first Benchmarks drafted, noted the potential problem with a Benchmark. A Benchmark could become a 'national curriculum…[something that] professionals in higher education [did not] wish to see imposed'.[31] There is no doubt that those who drafted the first Law Benchmark sought to work within the pluralistic way that law has been taught in England and Wales for many decades.[32] Nevertheless they also had to grapple with the fact that '[w]hatever its detailed content, it [a Benchmark] must, by its nature, set limits.[33] The educational justification for some of the limits set by the first Law Benchmark was not always readily apparent. Thus, for example, the first Law Benchmark, like almost all other Benchmarks of its time, said that law graduates should have acquired teamworking skills. Whilst such skills might be useful if graduates were seen as potential employees what they had to do with knowledge of or understanding of law was less obvious. Why, on pedagogic grounds, misanthropes should be prevented from graduating in law was not made clear.[34] In this and some other respects the Law Benchmark seemed to subtly limit the autonomy of individual university law schools to decide what and how they wanted to teach.[35]

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[29] On the place of Benchmarks in the QAA's philosophy see Laura Bellingham 'Quality Assurance and the Use of Subject Level Reference Points in the QAA' (2008) 14 *Quality in Higher Education* 265 at 269-274.

[30] https://www.qaa.ac.uk/quality-code/subject-benchmark-statements.

[31] John Bell 'Benchmarking; A Pedagogically Valuable Process?' (1999) 2 *Web Journal of Current Legal Issues* (http://www.bailii.org/uk/other/journals/WebJCLI/1999/issue2/bell2.html). The possibility of Benchmarks becoming a national curriculum has been of general concern for academics. See, for example, Steve Pidcock 'What is the impact of subject benchmarking' (2006) 7 *Active Learning in Education* 111 at 117 and 123 and Goodlad op cit 78.

[32] This has not always been the case with other Benchmarks. Thus, for example, it been argued that the Economics Benchmark does not represent the full range of views about economics as an academic discipline. See, for example, Alan Freeman 'The economists of tomorrow: the case for a pluralist subject benchmark statement for economics' (2009) 8 International Review of Economics 23.

[33] Anthony Bradney 'Benchmarking: A Pedagogically Valuable Process? An Alternative View' (1992) 2 *Web Journal of Current Legal Issues* (http://www.bailii.org/uk/other/journals/WebJCLI/1999/issue2/bradney2.html).

[34] On see further Bradney, 1992 op cit.

[35] Benchmarks had no impact on individual academic autonomy because they described what a graduate could be expected to know because of their degree programme as a whole and do not what individual academics did in their own teaching. Of course a problem would result if all the members of a department declined to teach in a way that was commensurate with a Benchmark's expectations.

Whilst the content of the first Law Benchmark might arguably be seen as a constraint on Randall's 'unaccountable priesthood' the manner in which it was arrived at largely indicates the continuing power of that priesthood. The members of the original benchmarking group were, with one exception, legal academics.[36] In 2007, when the Law Benchmark was revised, the members of the new working group were all academics. By 2015, when the Benchmark was revised for a second time the membership of the group had somewhat altered. A much enlarged group when compared with the first two bodies had three members who represented professional bodies for practicing lawyers and one person who was listed as an employers' representative. Three members of the QAA were also listed as members of the group. However the 17 other members of the revising group were all from universities.[37] The priesthood dominated all three exercises.[38] Revising the Benchmark has enabled adjustments to be made which mean that the Benchmark is now even more closely aligned with actual academic practice in university law schools. Thus, for example, no mention is made of teamworking in the 2015 Law Benchmark; instead the Benchmark merely says that law schools should be 'be clear with students about the benefits and limits of cooperative learning'.[39]

Even the 2015 Law Benchmark sets limits on what law schools can do. One obvious example of this is the fact that law schools are now expected to give students opportunities to discuss 'ethical questions and dilemmas that arise in law and to consider the features of ethical decision making'.[40] An academic, who looks at law from a pure doctrinal perspective, seeking to explicate rules from the internal evidence offered by precedents and statute, will not think that analysis of values falls within the purview of what they seek to do. It is this doctrinal perspective that has historically dominated law schools in England and Wales even though it does not have the same hold that it once had.[41] Given this, as a member of the 2015 working group, even though I do not think the doctrinal position is intellectually tenable, I was somewhat uncomfortable when this formulation was circulated

[36] The sole exception being a representative of a professional practicing body.
[37] https://www.qaa.ac.uk/quality-code/subject-benchmark-statements?indexCatalogue=document-search&searchQuery=Law&wordsMode=AllWords.
[38] In 1999 Brennan suggested that standards in Benchmarks might be set by those from pre-1992 rather than post-1992 universities (quoted in Brown op cit at 141-142). Membership of the various Law Benchmark groups does not suggest that this has been the case in Law. 9 of the academic members of the first 2000 Benchmarking group were from pre-1992 universities and 4 were from post-1992 universities with the chair of the group being from a pre-1992 university. However, in the second 2007 group membership was divided equally between pre and post-1992 universities with the chair being from a post-1992 university. In the third 2015 group the chair was once again from a post-1992 university and 11 of the academic members were from post-1992 universities with only six being from pre-1992 universities (https://www.qaa.ac.uk/quality-code/subject-benchmark-statements?indexCatalogue=document-search&searchQuery=Law&wordsMode=AllWords).
[39] Law Benchmark op cit 3.2.
[40] Law Benchmark op cit 1.4.
[41] Cownie, 2004, op cit, 54-58.

to law schools as a draft.[42] I was, however, surprised when no law school complained about this aspect of the draft.[43] The explanation for this may lie in the comparative demise of doctrinal law with no law school feeling that it would not have academics who wished to explore these matters with students. Alternatively, it may reflect the comparative lack of interest that most academics and law schools have in the Law Benchmark.[44] Either answer suggests that whilst the Law Benchmark regulates law schools it does not do so very tightly.

*The QAA and Institutional Audit*

The Benchmark was neither the only nor even the most important part of the QAA'a proposed regulatory regime. Institutional audit and assessment were also to be part of the picture. By 1997 such interventions were not new to English and Welsh universities. For example, law schools had been one of the first subject areas which had been subject to an external audit of the quality of their teaching. In 1993 and 1994 small groups of assessors consisting of legal academics and usually one non-academic had visited each law school, looked at documentation provided by the law school and sat in on some teaching sessions. After this they then judged the law school's teaching as Excellent, Satisfactory or Unsatisfactory and published a report on the law school. The process had been time consuming for law schools. It had produced little discernible benefit with comparison of the published reports failing to explain why some schools had been graded as Excellent and others as Satisfactory.[45] The experience in law schools was replicated in other disciplines. Whilst some saw merit in the assessment process others were concerned about its cost and its potential threat to academic autonomy.[46]

Previous experience in the universities of institutional audit and assessment was one of the reasons that the QAA was faced with a 'difficult inheritance' when it was first founded.[47] By 1997 universities wanted a reduction in audit. This did not seem to match John Randall's

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[42] On the fundamental problems inherent in the doctrinal approach see Anthony Bradney *Conversations, Choices and Chances: The Liberal Law School in the Twenty-First Century* (Hart Publishing, 2003) 98-101.

[43] This is not because law schools were unaware that the Benchmark was being reconsidered. Many responses to the consultation exercise were received.

[44] In Cownie's 2004 account of the lives of legal academics no mention is made of the Law Benchmark (Cownie, 2004 op cit). This is because none of Cownie's respondents raised the subject (personal communication from the author). Legal academics are not unusual in this respect. In a survey of academic attitudes to audit and quality assurance Cheng found that many of the academics that she interviewed across a range of disciplines were not familiar with the content of Benchmarks (Ming Cheng 'Audit cultures and quality assurance mechanisms in England: a study of their perceived impact on the work of academics' (2010) 15 *Teaching in Higher Education* 259 at 264).

[45] See further Anthony Bradney "The Quality of Teaching Quality Assessment in English Law Schools" *The Law Teacher* (1996) 150. Only one law school was graded as Unsatisfactory in the exercise.

[46] For an analysis of the process see Brown op cit chp 4.

[47] Brown op cit 118. For an assessment of the QAA's place in the politics of higher education see Anthony Bradney 'The Quality Assurance Agency and the Politics of Audit' (2001) 28 *Journal of Law and Society* 430.

view of the QAA's role. The relationship between universities and the QAA proved to be fractious in its early years. Thus, for example, in 1998 a number of universities, including Cambridge, Newcastle and Oxford, were reported as resisting attempts by the QAA to scrutinise them.[48] In March 2001 King's College 'disowned' an adverse institutional audit report from the QAA 'claiming that the agency failed to "intellectually engage" with the college.'[49] In his 2000 essay Randall had written that '[t]he sanction of loss of funding is available if quality is found wanting'.[50] However that sanction lay with HEFCE as the funding body not with the QAA. In the same month as the Kings report was published the Board of the London School of Economics passed a motion saying that it would secede from the QAA because 'it [the QAA] infringed academic freedom, imposed its own bureaucratic and pedagogical agenda, neglected student "intellectual development" and used incompetent and unprofessional reviewers'.[51] Again in the same month the Secretary of State for Education and Employment suddenly announced, seemingly without consulting the QAA, that there was to be a 40 per cent reduction in the amount of external audit of universities by the QAA.[52] After negotiations between various parties, including the QAA, a much reduced process of audit was agreed.[53] Six months later Randall resigned from the QAA.[54] Brown has observed that after what he referred to as 'the Russell Group's putsch' 'the agency had effectively been sidelined'.[55]

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[48] Tapper op cit 177.

[49] *Times Higher Education Supplement* 23rd March 2001. .

[50] Randall, 2000 op cit 167.

[51] *Times Higher Education Supplement* 23rd March 2001.

[52] Brown op cit 131. What exactly precipitated this decision is unclear. Brown suggests that it was due to a combination of factors including lobbying by 'prominent Russell Group vice-chancellors' (Brown loc cit). Tapper suggest that whilst '[t]his may have been the case…[this ought to be put] in the context of the persistent and broadly-based opposition of many pre-1992 universities to the quality assurance regime from 1992 onwards' (Tapper op cit 184)

[53] Brown op cit 134.

[54] Brown op cit 146.

[55] Brown op cit 140 and 147. See further David Laughton 'Why Was the QAA Approach to Teaching Quality Assessment Rejected by Academics in UK HE? (2003) 28 Assessment & Evaluation 309. Randall continued his lonely campaign even after his resignation from the QAA. He concluded a 2002 article with the statement that '[f]or too long the providers of higher education have behaved like princes of all they survey. It is time for the consumer to be king' (John Randall 'Quality Assurance: Meeting the Needs of the Consumer' (2002) 56 *Higher Education Quarterly* 188 at 202). This echoes his 2000 suggestion that students were universities' 'primary client' (Randall, 2000 op cit 165). An extensive literature on the notion of students as consumers now exists. However it is worth noting that a 2017 survey of UK undergraduates based on, amongst other things, interviews with 1019 students found that 53 per cent of students did not see themselves as customers in relation to their university (*Education, Consumer Rights and Maintaining Trust: What Students Want from their University* (Universities UK, 2017) 4 and 5. See also Louise Bunce, Amy Baird and Siân Jones 'The
student-as-consumer approach in higher education and its effects on academic performance' (2017) 42 *Studies in Higher Education* 1958 at 1960-1961.

Nothing in the analysis above should be taken to argue that universities or individual academics found the new QAA arrangements that were put into place to be entirely satisfactory. On the contrary it is easy to show that many academics felt that the '[e]xternal quality monitoring had become burdensome'.[56] Equally many found the resultant internal systems in their universities to be 'overly bureaucratic'.[57] Nevertheless it is hard to conclude that this history is one of audit processes simply being imposed on academics and universities. Whilst the systems, both external and internal, might constrain universities and academics and to some extent comprise their autonomy and their academic freedom universities and individual academics were part of the process, and sometimes a vital part of the process, that settled the degree of constraint and the form of compromise. As Tapper has written, commenting generally on the process of quality assurance in higher education in the United Kingdom, '[i]t seems that no regulatory authority can operate without the support of those whom it regulates'.[58]

*The Advertising Standards Authority*

Neither the manner in which the Law Benchmark was arrived at nor the way in which institutional audit was introduced into universities suggest that audit was simply imposed onto universities. Consideration of the work of the Advertising Standards Authority with respect to universities introduces a further layer of complexity into the relationship between universities, individual academics and audit regimes.

The Advertising Standards Authority unquestionably has a role in auditing the work of universities. Universities produce material which is subject to both the 'UK Code of Non-broadcast Advertising and Direct & Promotional Material (CAP Code)' and the 'UK Code of Broadcast Advertising (BCSAP Code)'.[59] There is a complaints system with respect to both Codes.[60] Complaints can be made by members of the public, competitors to those who have issued the advertising that is the subject of a complaint or members of a group with an 'obvious interest' in the advertising.[61]

Complaints about university advertising have usually related to claims about a university's status in relation to other universities.[62] In 2016 the ASA ruled on two complaints made

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[56] Lee Harvey 'A history and critique of quality evaluation in the UK' (2005) 13 *Quality Assurance in Education* 263 at 271.
[57] Andreas Hoecht 'Quality assurance in UK higher education: Issues of trust, control, professional autonomy and accountability' (2006) 51 *Higher Education* 541 at 555.
[58] Tapper op cit 229.
[59] https://www.asa.org.uk/codes-and-rulings/advertising-codes.html.
[60] https://www.asa.org.uk/make-a-complaint.html.
[61] https://www.asa.org.uk/make-a-complaint.html.
[62] The ASA has issued advice to universities about how they can make comparative claims in such a way as to be compliant with the ASA's Codes (https://www.asa.org.uk/advice-online/universities-comparative-claims.html).

about the University of Law's advertising.[63] One complaint was about the University of Law's claim that it was 'the UK's leading law school'. As is usual in such cases the ASA asked for evidence to substantiate this claim. Since it was unconvinced that readers would interpret the advertising in a way that was consistent with the evidence that the University of Law provided the ASA found against the University of Law. The second complaint was about the University of Law's claims for the salary levels that were attained by successful students. Once again the ASA found that the evidence the University of Law supplied was not consistent with the way in which the advertising was likely to be read and so found against the University of Law. However it is not the way in which the ASA regulated the University of Law that is of the greatest interest for the arguments in this essay; instead the most interesting matter is the identity of the complainants. One case against the University of Law was brought by a 'university law lecturer' and one by a 'retired university law professor'.

It is not entirely surprising to find complaints against universities being brought by academics. In an analysis of who complainants to the ASA are Crosier and Erdogan describe them at one point as being those who were 'well-educated, well-off, exhibited some bohemian tendencies, [and] identified with the chattering classes'.[64] Elsewhere they write that a 'pychographic profile' of complainants that they complied showed 'a clear picture of a social group not far removed from a mixture of university lecturers and the legendary "Disgusted of Tunbridge Wells"'.[65] Legal academics are certainly not the only academics to have made complaints to the ASA. A complaint about the University of Strathclyde's claim that its Physics department was 'ranked No 1 in the UK' and that it was 'number one in the UK for research in the REF 2014' was made by 'an academic'.[66] The fact that academics can and do make complaints about universities to the ASA is important when considering the ASA as a regulator of universities. The ASA itself monitors advertising and has its own Compliance team.[67] It is thus an independent regulator in the same sense that, for example, the QAA is a regulator. Equally, even when it considers complaints made to it, the ASA makes its own judgements about whether or not there has been a breach of one of its Codes. Nevertheless the ASA is not just a regulator imposed on universities; it also can be and sometimes is something that individual academics use to help ensure that standards that they think are important are upheld.[68]

*The Changing Role of the University?*

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[63] An account of the complaints and the ASA rulings is to be found at https://www.asa.org.uk/rulings/the-university-of-law-ltd-and-marketing-vf-ltd-a16-346902.html.

[64] Keith Crosier and Zafer Erdogan 'Advertising Complainants: who and where are they?' (2001) 7 *Journal of Marketing Communications* 109 at 115.

[65] Crosier and Erdogan op cit 118.

[66] ASA Ruling on University of Strathclyde https://www.asa.org.uk/rulings/university-of-strathclyde-a17-390134.html. The complaints were upheld.

[67] https://www.asa.org.uk/advice-online/universities-comparative-claims.html.

[68] On this see further Anthony Bradney 'The success of university law schools in England and Wales: Or how to fail' *The Law Teacher* (forthcoming).

Regulation of the university is intimately bound up with questions about the role of the university. Thus, for example, the external audit of research in universities was first brought in at the behest of the then Conservative Government in the 1980s. However what that Government sought was not simply a record of what research was being done but also reassurance that research funding was 'effectively deployed' which in turn meant that research would 'contribute more effectively to the improvement of the performance of the economy'.[69]

Successive British governments of varying political persuasions have followed the 1980s Conservative Government in arguing that universities ought to direct their attention to servicing the needs of the economy in various ways. There is little to choose between the Conservative Government's 1985 paper above and the then Labour Government's 2009 proposition in *Higher Ambitions* that 'higher education is, and will continue to be, central to this country's economic performance in the twenty-first century'.[70] Similarly the Conservative and Liberal Democrat coalition government which followed the Labour administration said '[t]he Government believes that our universities are essential for building a strong and innovative economy. We will take action to create more college and university places, as well as help to foster stronger links between universities, colleges and industries'.[71] Its 2010 White Paper *Higher Education: Students at the Heart of the System* stated that '[o]ur reforms aim to make the English higher education system more responsive to students and employers'.[72] The argument that students are prospective employees and research should be about economic productivity is repeated in almost every government pronouncement on universities during the last three or four decades.

Yet, having noted the links that governments think there ought to be between universities and the economy, it is important not to overstate this message. *Higher Ambitions*, for example, also accepts that '[r]esearch and learning universities have intrinsic value aside from any economic considerations'.[73] *Students at the Heart of the System* says that '[h]igher education is a good thing in itself. Students may study a subject because they love it regardless of what it means for their earnings'.[74] David Willetts, the then Minister for Universities and Science, who co-authored a foreword to *Students at the Heart of the System* later wrote, in a book published after he had left office, that '[e]ducation is worthwhile in its own right, not just as a means to something else. Knowledge is better

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[69] *The Development of Higher Education into the 1990s* (Cmnd 9524, 1985) para 9.1 and para 1.2. For a history of early iterations of this exercise which concludes that the exercise was ineffective in redirecting research towards the needs of the economy see Katherine Barker 'The UK Research Assessment Exercise: the evolution of a national research evaluation system' (2007) 16 *Research Evaluation* 3.

[70] *Higher Ambitions: The future of universities in a knowledge economy* (BIS, 2009) 53. *Higher Ambitions* said, amongst other things, that the Labour Government would 'ask all universities to produce a statement on how they promote student employability…' (*Higher Ambitions* op cit 51).

[71] *The Coalition: our programme for government*" (Cabinet Office, 2010) 31.

[72] *Higher Education: Students at the Heart of the System* (2011) Cm 8122 27.

[73] *Higher Ambitions* op cit 41.

[74] *Higher Education: Students at the Heart of the System* op cit 38 (see also 14).

than ignorance.'[75] Nor is the acceptance of the notion of education, including higher education, as an inherent good confined to governments; it also extends to regulators. When Sir Michael Barber gave his first speech as the incoming chair of the Office for Students to Universities UK, the representative body for UK universities, he said that

'[t]he acquisition of knowledge - for its own sake - and critical thinking capacity remain fundamental. The challenge is to engender the skills that will allow graduates to thrive in a global economy which is changing rapidly and fundamentally and, at the same time, to engender a love of knowledge and an endless curiosity.'[76]

This passage came in a section of his speech devoted to employability for students. Nevertheless the chair of the Office for Students, the regulator with statutory responsibility for the student experience, chose to assert the importance of knowledge for its own sake when making an important early speech at the beginning of his period of office. Once again examples of such beliefs and statements by regulators could be multiplied.[77] Governments and regulators strongly believe that British universities ought to service the economy but that has never been all that they believe.

**Controlling Universities**

The fact that governments and regulators have spent over three decades trying to redirect the focus of British universities to the economy is testament to the weakness of their position. Successive commentators have noted the continuing power of traditional conceptions of universities as places for the disinterested pursuit of learning and knowledge. In her study of academic identity Henkel, for example, wrote that 'liberal educational ideals still had a significant part in academic discourse'.[78] In a similar fashion Tight contended that what he calls 'the English idea of the university remains both a coherent and highly influential model'.[79] Academics are, of course, aware that what they would like the university to be does not fit in with prevailing political mores. Bosetti and Walker observed that the ten Vice-Chancellors that they interviewed saw this as being one of their key challenges.[80] In one sense this is neither unsurprising nor new. 'The mystery of academia…is how it manages to flourish in a social setting that would seemingly be hostile to its assumptions'.[81] For many in universities in England and Wales the question is how to best manage this situation. As one Vice-Chancellor has written '[t]o be business-like [in

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[75] David Willetts *A University Education* (Oxford University Press, 2007) 122.
[76] Sir Michael Barber, chair Office for Students, speech to Universities UK, 23rd June 2017, http://www.universitiesuk.ac.uk/news/Pages/sir-michael-barber-speech-uuk-june-2017.
[77] Even John Randall wrote that students might pursue knowledge for its own sake (Randall, 2002 op cit 189).
[78] Mary Henkel *Academic Identities and Policy Change in Higher Education* (Jessica Kingsley Publishers, 2000) 256.
[79] Malcom Tight *the Development of Higher Education in the United Kingdom since 1945* (Society for Research into Higher Education & Open University Press, 2009) 316.
[80] Lynn Bosetti and Keith Walker 'Perspectives of UK Vice-Chancellors on Leading Universities in a Knowledge-Based Economy' (2010) 64 *Higher Education Quarterly* 4 at 6.
[81] William Brown *Academic Politics* (University of Alabama Press, 1982) 37.

running a university] does not mean that we must become businesses'.[82] There are pressures upon universities and individual academics in England and Wales, as there always have been. These pressures, especially on individual academics, may be much greater now than they have been in the past.[83] However this does not mean that universities or academics have accepted that their role should be determined by others.

**Conclusion**

The sections of this essay above demonstrate how universities and individual academics have sought to navigate an acceptable course for themselves during a period when doubts have been raised about the acceptability of academic autonomy. Opinions about how successful they have been will vary. Yet the fact of resistance to control cannot be denied. In this context, it becomes clear that university law schools in England and Wales determine the nature of university legal education. As with their parent institutions their legal position and the reality of their everyday lives are in accord in giving them agency with respect to what they do. Others outside the university will have views about what the legal academy should do. The final responsibility for deciding what does happen rests with academics. Trow has distinguished the private life of a university from its public life.[84] What goes on in lectures and seminars is in the end a matter of the private life of a university, something that is determined by those who do the teaching.[85] How they should use this control is not the subject of this essay. There are a range of opinions within the legal academy as to the direction that university law schools ought to take.[86] There is however one final matter that constrains the decision that legal academics make about how they exercise their control over university legal education; that is academic freedom.

Academic freedom is more properly conceptualised as an obligation than as a right. 'Professors and others who teach in universities…have a paradigmatic duty to discover and teach what they find important and true…'.[87] What law schools and legal academics choose to do in legal education is a matter for them but what they choose must be what they think

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[82] Gerard Pillay 'Valuing higher education' (2009) 42 *Higher Education Review* 64 at 66. Elsewhere in his article Pillay writes that 'the university is among the few custodians of the quality of culture and its intellectual sustainability and depth' (Pillay op cit 71).

[83] See, for example, Liz Morrish and Helen Saunton 'Performance Management and the Stifling of Academic Freedom and Production' (2016) 29 *Journal of Historical Sociology* 42.

[84] Martin Trow 'The Public and Private Lives of Higher Education' (1975) 104 *Daedalus* 365.

[85] This not, of course, to deny that others both within and from outside the university may seek to influence what academics do in their teaching.

[86] Cownie, 2204 op cit 30-35. It is, however, clear that for those in law schools, as with the rest of the university, notions of a liberal education continue to dominate thinking (Cownie, 2004 op cit 76-78). Academic drift, the 'tendency of institutions to aspire to and work towards higher status', is likely to have an impact on choices that are made (Malcom Tight 'Theory development and application in higher education: the case of academic drift' (2015) 47 *Journal of Educational Administration and History* 84 at 94.

[87] Ronald Dworkin 'A New Interpretation of Academic Freedom' in Louis Menard (ed) *The Future of Academic Freedom* (University of Chicago Press, 1996) 189.

is important and true not what others think is important and true.[88] If they do anything else, whatever their contracts of employment say, they cease to be academics.

[88] See further Anthony Bradney 'The necessary loneliness of teaching (and of being a legal academic)' in Bart von Klink and Ubaldus de Vries *Academic Learning in Law: Theoretical Positions, Teaching Experiments and Learning Experiences* (Edward Elgar Publishing, 2016) 82-85.