

CHAPTER 4

The Political Cosmetology of Academic Freedom

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INTRODUCTION

Academic freedom is under threat in various parts of the world. Promoted by authoritarian governments, the rise of the concept of “illiberal democracy”—arguably an oxymoron—is consubstantial to a reduction of academic freedom—think of Hungary, Poland, and Turkey¹—all this in a context where totalitarian states, such as Russia, China, or Iran, are becoming increasingly assertive in the promotion of an “alternative” model to the Western liberal one.

Needless to say that academic freedom, as this concept has been understood in liberal democracies for the past century or so, is at best a figment of the imagination in such states.² Even in one of its birthplaces—the United States—academic freedom is challenged by populist politicians who, under the guise of defending either a mythical national narrative or an equally mythical vision of American society, oversee legislative projects deliberately seeking to forbid the discussion of various topics or critical approaches, such

¹ Vanessa Frangville et al., *La liberté académique: Enjeux et menaces* (Brussels: Éditions de l'Université de Bruxelles, 2021).

² In all three countries, academic freedom is almost nonexistent, and even decreasing; see “Academic Freedom Index,” <https://academic-freedom-index.net/>.

as Critical Race Theory. All this takes place in a context where some militant groups associated with the so-called woke left sometimes resort to strategies or practices that effectively hinder free speech in academic settings; this is what is now commonly referred to as the “cancel culture.”

Canada is not immune to such dynamics. In 2018, the Government of Ontario implemented a policy targeted at “upholding free speech” in the province’s universities and colleges. It was followed the next year by the Alberta government, and, in 2022, the Quebec National Assembly enacted the Act Respecting Academic Freedom in the University Sector (hereinafter designated as the “AAFUS”).³

Although I will look at all these initiatives in this chapter, I will primarily focus on the Quebec legislation, as the context in which it was adopted reveals the influence of social variables that tend to play out more significantly in the United States and some European countries than in English-speaking Canada. As well, Quebec’s critical position vis-à-vis some policy choices largely supported in English-speaking Canada might be relevant. I shall analyze the broader political context in which the Act arose and examine the legal regime it puts in place. I will then argue, in light of Ontario’s experience, that the reporting obligations imposed upon universities in this legislation will likely be of limited effectiveness with a view to tangibly protecting academic freedom. Particularly in light of the fact that it pays lip service to a most important precondition of academic freedom, that is, institutional autonomy, I will argue that the Quebec legislation represents an expression of an increasingly widespread phenomenon that I call the “political cosmetology of academic freedom,” which is far from being confined to Quebec.

DEFENDING ACADEMIC FREEDOM: A NEW POLITICAL INTEREST

In August 2018, after a series of perceived speech-related incidents in Ontario universities, the provincial government issued a directive on freedom of expression in academia.⁴ From January 1, 2019, any university (or

³ AAFUS, RLRQ, c. L-1.2.

⁴ Ontario Government, “Upholding Free Speech on Ontario’s University and College Campuses,” news release, August 30, 2018, <https://news.ontario.ca/en/backgrounder/49950/upholding-free-speech-on-ontarios-university-and-college-campuses>; Ontario Government, *Ontario Protects Free Speech on Cam-*

college) receiving public funding was required to have developed and made public its own free speech policy and to meet a minimum standard set by the government in doing so. Since then, university policies on the subject, applicable to teaching, administrative and support staff as well as to students and guests, must: (1) define freedom of expression by taking up the principles set out in the University of Chicago Statement on Principles of Free Expression; (2) ensure that the disciplinary regulations in force apply to student actions disrespecting the policy; (3) ensure that student associations comply with the policy through negative incentives such as nonfunding or withdrawal of institutional recognition; (4) use existing university complaint resolution mechanisms to resolve complaints based on a violation of the freedom of expression policy, with unresolved complaints to be referred to the Provincial Ombudsman; and (5) report annually to the Higher Education Quality Council of Ontario on the application of the policy, this council being responsible for monitoring the implementation of the government's directive at the university level and ensure compliance.⁵ In the event of failure to file the required annual report or if the council finds that a university is not respecting its policy, the latter may see a portion of its government grant reduced.

In the summer of 2019, the Alberta government followed in the footsteps of its Ontario counterpart by issuing a similar directive, aimed at requiring the adoption by the board of each Alberta university of a policy on freedom of expression, also inspired by the University of Chicago Statement on Principles of Free Expression. Such a policy must at least incorporate the following parameters: (1) the exercise of freedom of expression in an academic context must not violate Canadian law; (2) the university must be recognized as a place where any idea or subject can be discussed and where each member of the community has the greatest possible latitude when it comes to expressing themselves, listening, questioning and learning; (3) members of the university community have the right to criticize and question the opinions expressed by other people on campus, without however being

puses Mandates Universities and Colleges to Introduce Free Speech Policy by January 1, 2019, August 20, 2018, accessed April 26, 2023, <https://news.ontario.ca/en/release/49948/ontario-protects-free-speech-on-campuses>.

5 O. Reg. 336/06: Higher Education Quality Council of Ontario under Higher Education Quality Council of Ontario Act 2005, S.O. 2005, c. 28, Sched. G, Art. 9.

able to obstruct the latter's exercise of their own freedom of expression; (4) the university should not attempt to shield students from ideas or opinions with which they disagree or find offensive and although mutual respect and civility should be valued, they do not justify in themselves the imposition of constraints on freedom of expression; (5) the university may regulate when, where and how freedom of expression is exercised to ensure that the ordinary course of its business is not interfered with; (6) the university may restrict forms of expression that violate the law, defame a person, constitute a threat or harassment or violate privacy or compromise the confidentiality of information; (7) the fact that ideas are perceived, even by a majority of people, as being offensive, reckless, immoral or misguided does not constitute a reason to prevent their discussion; (8) it is for individuals, not the university, to pass judgment on such ideas without seeking to prevent their expression but rather by contesting them openly and vigorously.⁶ The Alberta government indicated that the conformity of the university policy adopted in response to its directive would be the subject of a meticulous examination by the responsible ministry without however mentioning, unlike its Ontario counterpart, specific sanctions in the event of noncompliance.

In February 2023, following the cancelation by the University of Lethbridge of a lecture that was to be given by a professor who had criticized the Black Lives Matter movement and spoken of possible benefits that may have resulted from the operation of residential schools,⁷ the government of Alberta added to the obligations initially imposed on the province's universities that of submitting an annual report on conflicts involving academic freedom on campuses.⁸

Rather than opting for action by the executive power, through a directive, as the Ontario and Alberta governments had done before, the Quebec government preferred to draft a statute aimed at strengthening the guarantees of the exercise of freedom of expression on campuses, with of course all

6 Office of the Minister, Alberta Advanced Education, "Letter to Mr. Michael Phair, Chair, Board of Governors, University of Alberta," July 4, 2019, www.ualberta.ca/provost/media-library/FoE/letter-from-minister-nicolaides-free-speech.pdf.

7 Jason Herring, "In Reversal, University of Lethbridge Cancels Controversial Professor's Guest Lecture," *Calgary Herald*, January 30, 2023, <https://calgaryherald.com/news/local-news/university-lethbridge-bar-controversial-prof-frances-widdowson-guest-lecture-campus>.

8 Alberta Government, "Strengthening Free Speech on Campus," February 3, 2023, www.alberta.ca/release.cfm?xID=86483F3395F5B-DB9F-3F72-8E60723CABE7A341.

the symbolism attached to the legislative process, especially in a jurisdiction where the law is partly anchored in the Romano-Germanic tradition. The AAFUS thus defines the “right to university academic freedom” as “the right of every person to engage freely and without doctrinal, ideological or moral constraint, such as institutional censorship, in an activity through which the person contributes to carrying out the mission of an educational institution,” which includes the freedom “(1) to teach and discuss; (2) to research, create and publish; (3) to express their opinion about society and about an institution, including their respective institution, and about any doctrine, dogma or opinion; and (4) to freely take part in the activities of professional organizations or academic organizations.”⁹

The AAFUS also requires universities to adopt a policy on academic freedom, specifying that it must provide for the establishment of a committee representative of the community, including students, leaders, and members of the staff. This committee is responsible, among other things, for monitoring the implementation of the policy and examining complaints relating to infringements of academic freedom, and, if applicable, for making recommendations concerning such complaints or about any other matter relating to university academic freedom.¹⁰ The AAFUS expressly states that the policy can neither prevent the discussion of ideas or subjects likely to shock during activities contributing to the university’s mission nor impose that such activities be preceded by a trigger warning.¹¹

Each university must appoint a person responsible for the implementation of its policy. The minister responsible for the AAFUS is also given the power to have the necessary corrective measures taken by the person he or she designates if an institution fails to comply with the obligations to which it is subject. Last, an annual reporting obligation, specifying in particular the number of complaints handled and the measures taken in their regard, is imposed on each university.

Interestingly, all three provincial initiatives on the protection of academic freedom have paradoxically been characterized by a massive intrusion into universities’ internal affairs. In the Quebec case, in addition to imposing upon them evaluation criteria for actions or activities located at the heart

⁹ AAFUS, s 3.

¹⁰ AAFUS, s 4.

¹¹ AAFUS, s 4.

of their mission, they are required to put in place a process allowing for the implementation of such criteria and to establish a monitoring system for their decisions. All this is in a context where the principle of the autonomy of universities from the government is nowhere to be found in the statute's prescriptive provisions.¹²

THE CONTEXT OF THE THREE PROVINCIAL INITIATIVES

At the inception of the Ontario, Alberta, and Quebec academic freedom initiatives was a perception that this particular freedom, and more generally, free speech was under threat on campuses. It is not the purpose of this chapter to measure the magnitude of this threat, if any. However, it is worth noting, first, that governmental attempts at censoring academic speech still represent a marginal issue in Canada, as opposed to other countries such as the United States where several states are currently prohibiting the discussion of some topics, mostly pertaining to race or gender. Secondly, although some incidents have been reported in Canada involving academics having been stigmatized, and sometimes formally sanctioned by their university, for something they had said and that had offended students or other academic stakeholders, it would be an overstatement to say that there is a censorship pandemic in the country.

It is, rather, informal forms of censorship, irrespective of formal legal sanctions taken against “offenders,” that have prompted some Canadian provincial governments to take a stance on academic freedom. And they have done so, in part at least, for political reasons, as incidents involving academic freedom can easily be turned into wedge issues. Indeed, although “culture wars” are not as salient in Canada as they are in its neighbor to the South, they exist nonetheless. For example, it has been argued that the Ontario government’s decision to issue a directive on academic freedom served electoral goals linked to a conservative agenda:

By bringing together two very different constituencies. On the one hand, there are those on the right who have chosen to weaponize free expression, pushing relentlessly and aggressively at the outer boundaries of

12 The AAFUS alludes to university autonomy, but only in its preamble, which has no prescriptive effect.

speech and vilifying those who express concerns. ... How better to do that than to use the rhetoric of liberalism to attack one of the principal repositories of liberal, Enlightenment values—the university? The other constituency [the] Ford [government] is seeking to draw in are those who genuinely care about universities and have come to believe, from the high-profile media stories of campus free speech controversies, that campus free expression is endangered. This is a potentially larger constituency than his core right-wing base. Ford’s campus free speech policy aims to unite these two very different groups against an unspecified university and university-educated “elite” that has betrayed its own liberal values.¹³

The motivations were arguably the same in Alberta.¹⁴

Using academic freedom as a wedge issue was possibly in the mind of the Quebec government’s strategists as well, at least initially. To wit, the government’s sudden interest in academic freedom was triggered by an event involving the “n-word” at the University of Ottawa, which is a bilingual university in Ontario, not Quebec. A lecturer had used that word in the context of a course that dealt with how various minority groups “resignify” demeaning words that were used against them by majority groups. In that case, the “n-word” was not used as an insult. However, several students objected to its use by the lecturer, arguing in essence that it should never be pronounced, particularly by a non-Black person, and this, irrespective of the context and intent of the use. The university’s administration briefly suspended the lecturer, and the university’s president by and large adopted the students’ narrative, arguing that the reconciliation of the instructor’s academic freedom and the students’ right to dignity justified the university’s action in that case.¹⁵ A labor relation grievance was filed as a result by the lecturer’s union, and the arbitral award is still awaited at the time of writing.

13 James L. Turk, “Universities, the Charter, Doug Ford, and Campus Free Speech,” *Constitutional Forum* 29 (2020): 31, 35–36.

14 Canadian Press, “Post-secondary Schools Must Report on Free Speech Efforts on Campus, Minister Says,” *Toronto Star*, February 3, 2023, accessed April 26, 2023, www.thestar.com/news/canada/2023/02/03/post-secondary-schools-must-report-on-free-speech-efforts-on-campus-minister-says.html.

15 Jacques Frémont, “Message du recteur Jacques Frémont au sujet d’un incident récent à la Faculté des Arts,” October 19, 2020, www.uottawa.ca/notre-universite/medias/nouvelles/message-du-recteur-jacques-fremont-au-sujet-dun-incident-recent-faculte-arts.

It is beyond the purview of this chapter to analyze the substance of this case. Suffice it to say that it created a deep rift within the University of Ottawa community as to the meaning and limits of academic freedom and, more generally, freedom of expression. Over this particular dividing line was superimposed another one, not so clear-cut, but yet unmissable, that is, one between the views held by what seemed to be the majority of the English-speaking faculty, leaning toward the objecting students' views, and those held by what appeared to be a majority of the French-speaking faculty, more inclined toward a robust defense of academic freedom.¹⁶ The same type of divide would be reproduced within Afro-descending communities, with French speakers being far from unanimous about the legitimacy of a blanket prohibition of the n-word while most of their English-speaking counterparts seemingly supported that prohibition.¹⁷ Interestingly, this n-word incident and its treatment by the University of Ottawa made the headlines in Quebec's French-speaking press while being much less noticed in the rest of Canada. This probably explains why it caught the Quebec government's attention, which saw in it an opportunity to promote its political agenda of criticizing Canadian multiculturalism and its potential pitfalls.

It would be unfair, however, to reduce what led to the Quebec legislation on academic freedom solely to a political instrumentalization of this incident at the University of Ottawa. Although it is true that the government opportunistically used it to further what could be characterized as its "antiwoke" agenda, it nevertheless took the issue seriously enough to set up an independent commission responsible for inquiring about the state of academic freedom in the province. The creation of such a commission had previously been recommended by the province's chief scientist in a report on the university of the future published in 2020. In it, the chief scientist identified the protection of academic freedom against the influence of "extra-academic values" as one of the major challenges facing universities and called upon the provincial government to elaborate a "document" addressing the issue.¹⁸ In

16 Pierre Anctil, "De message en communiqué, ou comment l'Université d'Ottawa trace les contours d'une crise," in *Libertés malmenées: Chronique d'une année trouble à l'Université d'Ottawa*, ed. Anne Gibert, Maxime Prévost, and Geneviève Tellier (Montréal: Leméac, 2022), 235–259.

17 See the analysis of one of Quebec's most famous novelists, incidentally of Haitian origin: Dany Laferrière, "Le poids d'un mot," www.academie-francaise.fr/le-poids-dun-mot.

18 Rémi Quirion, *L'Université québécoise du futur: Tendances, enjeux, pistes d'action et recommandations*, recommandation 3, (Québec: Gouvernement du Québec, 2021), <https://cdn-contenu.quebec.ca/cdn->

that sense, it would indeed be a mistake to assimilate, without making all the appropriate caveats, the Quebec initiative to the purely political, in the partisan sense, instrumentalization of academic freedom by the Ontario and Alberta governments.

The independent commission set up by the Quebec government was composed of reputable academics, and headed by a former government minister with legal training. It held several audiences, conducted polls, and received briefs from various stakeholders such as universities, academics, unions, and human rights organizations. Its report noted that the legal regime concerning academic freedom in Quebec was formed of a patchwork of various provisions of collective agreements and university policies, that academic freedom was probably insufficiently protected in some universities, and that a general regime applicable to all universities would lift potential doubts as to the legal status and scope of academic freedom. It thus recommended the adoption of a law protecting that freedom, which led the way to the enactment of AAFUS.¹⁹

TOP-DOWN APPROACHES AS PAPER SATISFACTIONS?

Legal sociologists distinguish between the concrete (or instrumental) and symbolic effectiveness of legal norms.²⁰ Concrete effects are those that flow directly from the application of such norms, which may be desired or adverse,²¹ and that can be observed by examining the behavior of the social

contenu/adm/min/education/publications-adm/rapport-reflexion-consultation/Rapport-universite-quebecoise-futur.pdf.

19 Commission scientifique et technique indépendante sur la reconnaissance de la liberté académique en milieu universitaire (A. Cloutier, chair), *Reconnaître, protéger et promouvoir la liberté universitaire* (Québec: Ministère de l'enseignement supérieur, 2021), <https://cdn-contenu.quebec.ca/cdn-contenu/adm/min/education/publications-adm/enseignement-superieur/organismes-lics/Rapport-complet-Web.pdf?1639494244>.

20 Valérie Demers, *Le contrôle des fumeurs: Une étude d'effectivité du droit* (Montréal: Éditions Thémis, 1996), 67–86.

21 An example of a potential adverse effect, at least from a provincial government standpoint, of the Quebec statute (and of the Ontario and Alberta directives) could be that these initiatives will possibly subject all universities in these provinces to the application of the Canadian Charter of Rights and Freedoms, at least when the implementation of such initiatives is concerned. Government action—executive in the cases of Ontario and Alberta, and legislative in the case of Quebec, which forces universities in these provinces to act within specific parameters to protect expressive freedoms in the academic context—in all likelihood makes that charter applicable to such universities, even when they are not private in the sense that they are not controlled by the government. Indeed, as LaForest J. stated in *Eldridge v. British*

actors targeted by them. At the opposite end stands the symbolic effects of legal norms, which designate the effects that these norms may have on representations, attitudes, opinions, and so on. For example, norms that enshrine broadly enunciated values, such as academic freedom, may have symbolic effects even if their actual concrete effects are unfathomable. Symbolic effects “take on meaning by symbolizing the public affirmation of social ideals and norms.”²² They may also help shift social representations or public opinion.²³ It is obviously reductionist to analyze the effectiveness, or lack thereof, of legal norms from such a dichotomic perspective, as if there were no gray areas between effectiveness and ineffectiveness.²⁴ Yet, the concrete vs. symbolic dichotomy is useful for the sake of making sense, albeit provisionally, of the impact of Quebec’s AAFUS.²⁵

As to the concrete effects of the AAFUS, it seems fair to predict that it will level the field between potential claimants grounding their claim in academic freedom, irrespective of whether or not they and their university are bound by a collective agreement. In so doing, the AAFUS will alleviate the burden placed on those evolving in universities without such agreements. Prior to the adoption of the AAFUS, such claimants had to demonstrate that academic freedom was indeed protected in their university; moreover, they had to map its scope. On this question, whenever the scope of conventional protections of academic freedom is narrower than what the AAFUS provides for, the latter will in all likelihood prevail. Being a public order stat-

Columbia (Attorney General), [1997] 3 SCR 624 at para 43: “In order for the Charter to apply to a private entity, it must be found to be implementing a specific government policy or program.” As several authors have noted regarding the Ontario and Alberta directives, this type of governmental action, which imposes very specific guidelines on entities that are a priori private and the implementation of which is monitored by reporting obligations, is likely to trigger the application of the Canadian Charter; see Jamie Cameron, “Compelling Freedom on Campus: A Free Speech Paradox,” *Constitutional Forum* 29 (2020): 5, 17; Turk, “Universities, the Charter, Doug Ford, and Campus Free Speech,” 31, 42.

22 Lawrence M. Friedman, *The Legal System: A Social Science Perspective* (New York: Russell Sage Foundation, 1975), 265.

23 Demers, *Le contrôle des fumeurs*, 73.

24 Jean Carbonnier, *Flexible droit: Pour une sociologie du droit sans rigueur*, 8th ed. (Paris: Librairie générale de droit et de jurisprudence, 1995), 132–134. On the various “shades” of legal effectiveness, see also Yann Leroy, “La notion d’effectivité du droit,” *Droit et Société* 79 (2011): 715–732.

25 I say “provisionally” because the effectiveness of legal norms can be examined over various periods of time, and it is not impossible that previously unnoticeable effects eventually surface a few years after the enactment of the norms examined. Legal effects can indeed be deferred, wilfully or not.

ute, it now supplements the infra-state legal orders where academic freedom is not formally protected.

The AAFUS thus establishes a minimal protective threshold for academic freedom. It is not irrelevant to observe, however, that the first so-called gain stemming from the AAFUS, that is, providing a normative foundation for academic freedom across Quebec, is more theoretical than anything. Indeed, the only university in the province whose professors do not work under a collective agreement is McGill. Yet, that university's policies formally protect academic freedom, and it is difficult to imagine a situation where a court would not take that into consideration when adjudicating a claim based on that freedom. From that perspective, the second "gain" allegedly brought about by the AAFUS, that is, a formal definition of academic freedom applicable across the province, is likely to be more useful.

The third innovation of the AAFUS resides in the obligation imposed upon universities to adopt policies concerning academic freedom, with a local committee monitoring their implementation. Since the AAFUS expressly specifies that the said policies cannot forbid addressing ideas or topics that may be deemed offensive, or to compel the use of trigger warnings, some academics may perhaps be reassured about the scope of the formal protection they now enjoy under the AAFUS.

The primary implementation mechanism envisaged in the AAFUS for monitoring universities' behavior pertaining to the protection of academic freedom lies in the imposition upon them of annual reporting obligations to the government. This focus on accountability is typical of the New Public Management approach, which has hugely influenced governmental policies on academia since the 1990s. Governmental policies adopting this approach tend to induce institutions to comply with social norms without formally directing them on what to do.²⁶

This begs one crucial question: to what extent is such an approach susceptible to actually curbing the threats to academic freedom in university settings? If one reflects on this question from the perspective of the rights holders—in essence, those participating in the realization of the university's mission, mainly faculty, lecturers, and graduate students—the likeliest

²⁶ Christine Musselin, "Vers un marché international de l'enseignement supérieur?" *Critique internationale* 39 (2008): 13–24.

answer is not much. Indeed, the reporting obligations essentially focus on “(1) the number of complaints processed and the time frame in which they were processed; (2) the measures applied, if any, and (3) any other information requested by the Minister concerning the implementation of this Act.”²⁷

Imagine a hypothetical situation where a professor engages in a certain discourse with students who, in turn, find it offensive. Suppose further that the professor invokes their academic freedom to shield this speech from possible complaints, especially considering the fact that the speech held to be offensive by students is perfectly legal. Next, imagine that a student files a complaint. Under the AAFUS, the process would look like this: (1) the committee or body responsible for reviewing the complaint would look into the student’s complaint; (2) even if it found something wrong with the “manner” used by the professor in his speech and even if it was really offensive, insofar as it is legal, it is probable, even certain, that the complaint would be dismissed; (3) the university where this event allegedly took place would allude to the complaint in its annual report to the government and mention that it was internally resolved.

Yet, the plaintiff student would probably remain aggrieved or unsatisfied if nothing else is done—and I am not even talking about sanctioning the professor. It is thus open to wonder how the AAFUS can really facilitate the resolution of conflicts caused by the exercise of freedom of expression in a university context, at least if one attributes to the process envisaged the underlying mission of pacifying tense situations.

It seems very unlikely that the top-down solution envisaged in the AAFUS would equip universities to effectively resolve some types of speech-related crises. Think of an event that took place in 2023 at McGill Law School, that is, a conference involving Robert Wintemute of King’s College that could not be held because the demonstration of trans activists protesting against the speaker had gone out of control. The activists opposed the views on gay marriage and conversion therapy of a group to which Wintemute is affiliated, which they deemed transphobic.²⁸ Wintemute’s academic freedom and freedom of expression were indeed violated as a result of the in

²⁷ AAFUS, s 8.

²⁸ Daniel J. Rowe, “McGill Speaker’s Talk Cancelled after Trans Activists Protest,” *CTV News Montreal*, January 10, 2023, <https://montreal.ctvnews.ca/mcgill-speaker-s-talk-cancelled-after-trans-activists-protest-1.6224317>.

situ cancelation of the conference. Yet, McGill never canceled it in advance despite prior information that a demonstration would be held. By so doing, the university upheld academic freedom. It is only when serious security concerns arose as the demonstration unfolded, on the very premises of the conference, that the event was canceled.

Thus, we are not faced here with a situation where a “woke administration” preemptively caved in to potential protesters. What is to be noted for this chapter is that, in the kind of situation in which McGill found itself, the AAFUS does not provide any useful tool to effectively protect academic freedom, as it simply does not address that type of external threat. Rather, by imposing obligations solely on universities, it seems to envisage academic freedom as a zero-sum game between these universities qua institutions and the holders of that freedom. More precisely, it is as if threats to academic freedom could only come from actions taken or omissions made by university administrations.

However, it is trite to observe that a significant number of events nowadays associated with “cancel culture” are not caused by the cowardice of academic administrators (although some are). They are instead provoked by militants whose practices, sometimes bordering on illegality, raise reasonable concern about the safety of participants in the events targeted. Moreover, institutionally recognized student associations may also adopt policies or make decisions that are susceptible to abridging academic freedom or freedom of expression. The AAFUS is useless to both universities and academic freedom in such situations, as those who are substantively responsible for violating that freedom remain invisible through the prism of this piece of legislation.

My skepticism with regard to top-down approaches in the management or regulation of academic freedom is, in a way, reinforced by the nature of the follow-ups that have resulted from the implementation of Ontario’s policy on freedom of expression in postsecondary institutions. Recall here that under the directive adopted by the Ontario government, the Higher Education Quality Council of Ontario has been collecting since 2019, as required by the governmental directive, information from institutions subject to the reporting obligation. The information collected under the directive is essentially the same as what the AAFUS contemplates.

Consulting the first four reports (2019–22) is quite telling. In its first report (2019), the Higher Education Quality Council of Ontario noted the ambiguity of the government's directive in the event of a conflict between freedom of expression, on the one hand, and aspirations related to civility and respect, on the other hand, noting that university policies adopted under the aegis of the directive are often ambiguous, whereas one should logically infer from the policies, which supposedly enshrine the principles put forward by the University of Chicago, that they will ensure the primacy of freedom of expression over the largely moral duties of civility and respect.²⁹ In the four reports it has published so far, the council has observed that Ontario colleges and universities have reported just a few events every year, which were all resolved internally. The 2020 report mentions that it is apparent that the methods of collecting information vary largely according to the school, with the uncertainties that may result from this when it comes to having a truly reliable inventory.³⁰ For 2021 and 2022, the COVID-19 pandemic, which has forced institutions to hold many events online rather than in person, may account for the still limited number of incidents.³¹

Yet, it is perhaps the 2021 report that is the most interesting, except for what it does not say rather than for what it says. That report covers a time interval during which high-profile incidents occurred, in particular, the one provoked at the University of Ottawa by the use of the “n-word,” which I mentioned earlier. The report summarizes what happened during the period covered in two laconic sentences: “Four formal complaints were reported across the system during the 2020/21 reporting cycle. All of these were, to the involved institutions’ knowledge and understanding, resolved internally.”³² In other words, during the period covered, it was business as

29 Higher Education Quality Council of Ontario, “Freedom of Speech on Campus: 2019 Annual Report to the Ontario Government,” <https://heqco.ca/wp-content/uploads/2020/02/HEQCO-2019-Free-Speech-Report-to-Government-REVISED-3.pdf>.

30 Higher Education Quality Council of Ontario, “Freedom of Speech on Campus: 2020 Annual Report to the Ontario Government,” <https://heqco.ca/wp-content/uploads/2020/12/FINAL-HEQCO-Free-Speech-on-Campus-Annual-Report-to-Government-December-2020.pdf>.

31 Higher Education Quality Council of Ontario, “Freedom of Speech on Campus: 2022 Annual Report to the Ontario Government,” <https://heqco.ca/wp-content/uploads/2022/12/HEQCO-2022-Free-Speech-on-Campus-Annual-Report-for-web-site-December-2022.pdf>.

32 Higher Education Quality Council of Ontario, “Freedom of Speech on Campus: 2021 Annual Report to the Ontario Government,” 3, <https://heqco.ca/wp-content/uploads/2021/11/HEQCO-Free-Speech-on-Campus-Annual-Report-to-Government-November-2021.pdf>.

usual. Yet, the n-word incident at the University of Ottawa created a deep rift within the university with, in addition to a labor grievance, an internal committee headed by a former Supreme Court justice,³³ ripple effects in the media and political arena, as well as books published in the wake of the controversy.³⁴

Can anyone be surprised by the narrative provided by the Higher Education Quality Council of Ontario's 2021 report? Probably not, since the whole system put in place under the provincial directive relies on self-declaration, and seeks to obtain only a minimum of qualitative data on what actually happens on the ground. In this respect, reading the report submitted by the University of Ottawa to the council for that year is very instructive.³⁵ This report, which, we must assume, tells the truth, informs us that during the reporting period, the university did not receive any formal complaints concerning freedom of expression on its campus. More specifically, the university states that no formal complaint has been received about the application of its policy on freedom of expression with regard to: (1) events related to its curriculum or extra-curriculum; (2) instances where the university misapplied its policy; (3) cases that would have resulted in sanctions under this policy; (4) cases that could have been forwarded to the Provincial Ombudsman. In its previous report for 2020, the same university had reported four formal complaints, the first due to the comments of a professor who, on social media, had argued that members of a particular demographic group were racist, the second about posters put up on campus and perceived to be racist, the third because of another poster that questioned and denigrated psychology, psychiatry and psychotherapy as scientific disciplines, and, finally, the fourth because of the sexist nature of comments made by a male professor about menopause in women. Each of these complaints was handled internally and dismissed on the grounds that while the

33 Michel Bastarache (chair), *Report of the Committee on Academic Freedom* (Ottawa: University of Ottawa, 2021), www.uottawa.ca/about-us/sites/g/files/bhrskd336/files/2021-11/report_committee_academic_freedom_en_final_v9.pdf.

34 Rachad Antonius and Normand Baillargeon, eds., *Identité, "race," liberté d'expression: Perspectives critiques sur certains débats qui fracturent la gauche* (Québec: Presses de l'Université Laval, 2021); Gilbert et al., *Libertés malmenées*.

35 University of Ottawa, "Freedom of Speech Annual Report Template (2021)," www2.uottawa.ca/about-us/sites/g/files/bhrskd336/files/2022-03/free_speech_annual_report_2021_-_university_of_ottawa_-_final.pdf.

controversial speeches could be considered offensive, they were not illegal and therefore did not violate the university's free speech policy.³⁶

We can perhaps rejoice that freedom of expression (or, where applicable, academic freedom) prevailed in these cases. But is this result really attributable to the specific policy that the provincial directive had imposed upon universities to adopt? The fact is that such universities, with or without an academic freedom policy, could hardly sanction speech that is perfectly legal anyway, unless it also qualifies as harassment within the meaning of employment law, in which case it would then become illegal. In fact, analysis of the accountability mechanism put in place by the Ontario policy reveals that this accountability to a governmental body, insofar as it is largely formal, in no way makes it possible to take the measure of all the complexity of the dynamics that take place in the field and that intertwine formality and informality, as well as law, politics and the micromanagement of human relations.

The formal "victory" of a member of the teaching staff, if indeed one can speak of a "victory" because of the primacy—justified in many respects—of academic freedom, is in no way a guarantee of an actual pacification of social relations. In the absence of more targeted interventions rooted in the reality of the field, nothing can prevent the "winner" from continuing to be the object of informal pressure from their colleagues or other members of the university community encouraging them to change their teaching practices, or even to be stigmatized on social networks or elsewhere for having held an otherwise legitimate discourse in a university context. And if, by chance, they really made an honest mistake by speaking this way but apologized for it, this clumsiness could haunt them for a long time to come in a context where social actors seem less and less inclined to recognize in their interlocutors that they can sometimes wander without having acted with malice. In an increasingly polarized world, forgiveness is becoming a scarce resource.³⁷

Formalist and bureaucratic approaches may therefore not be very effective in countering the informal dynamics of exclusion, stigmatization, or even harassment, which influence the concrete turn taken by conflicts arising

36 University of Ottawa, "Freedom of Speech Annual Report Template (2020)," www2.uottawa.ca/about-us/sites/g/files/bhrskd336/files/2022-03/university_of_ottawa_-_free_speech_annual_report_english_september_3_2020.pdf.

37 Rachida Azdouz, "Éloge de l'indulgence," *Vaste programme*, December 22, 2022, <https://vasteprogramme.ca/2022/12/22/eloge-de-lindulgence/>.

from the exercise of academic freedom or freedom of expression in a university context. This is a major stumbling block against macroscopic, somewhat overhanging initiatives aimed at protecting academic freedom, whether they take the legislative route or take the form of policies noncompliance with which can ultimately be sanctioned by the government exercising its spending power, that is, by cutting its funding to “delinquent universities.”

A second pitfall stems from the very nature of the standards invoked in the context of contemporary debates on academic freedom. Although macroscopic government initiatives seek to define, directly or indirectly, academic freedom, the proposed definitions retain an element of indeterminacy. In fact, whether it concerns academic freedom or, more broadly, freedom of expression, or even the right to dignity, we must be aware that these rights and freedoms are by and large enunciated as legal *principles* rather than as legal rules strictly speaking, that is to say, norms whose meaning and scope are largely undetermined and whose actualization takes place in particular contexts.³⁸ Moreover, the reconciliation of competing rights and freedoms is an eminently casuistic exercise, where the relative weight of the principles in question—which is not “declared” in advance³⁹—varies according to the circumstances.⁴⁰ These observations equally apply to the Quebec legislation that, while elevating the protection of academic freedom as a matter of public order, still has to be construed with other normative instruments of the provincial legal order. This includes the Charter of Human Rights and Freedoms that not only protects one’s freedom of expression but also the “right to the safeguard of his dignity, honour and reputation” and the “right to full and equal recognition of his human rights and freedoms, without distinction, exclusion or preference based” on various prohibited grounds of discrimination.⁴¹ In such a normative ecosystem, academic freedom is just a right among others, even if one grounds the protection of its expressive dimension on constitutional or quasi-constitutional instruments. It can thus

38 Chaim Perelman and Raymond Vander Elst, *Les notions à contenu variable en droit* (Brussels: Bruylant, 1984).

39 George P. Fletcher, “Two Modes of Legal Thought,” *Yale Law Journal* 90 (1981): 978.

40 On the balancing of competing rights, see Jean-François Gaudreault-DesBiens, “Les hiérarchies passagères, ou de la contingence dans l’équilibre entre droits fondamentaux,” *Revue québécoise de droit constitutionnel* 4 (2012): 7.

41 Charter of Human Rights and Freedoms, RLRQ, c. C-12. Freedom of expression is protected at s 3, the right to dignity at s 4, and the right to equality at s 10.

be justifiably restricted in a free and democratic society on the basis of competing rights or other social interests. From this perspective, the air of absolutism conferred on the protection of academic freedom under the AAFUS must be relativized.

CONCLUSION

In this chapter, I have expressed some skepticism about the AAFUS' effectiveness with a view to tangibly protecting academic freedom "on the ground." Only time will tell if my skepticism was justified or not. Yet, for now, a question must be raised: could anything else, other than the AAFUS, have been done to better protect this freedom?

A first step could have been to elevate the juridical status of academic freedom by *explicitly* enshrining it, as well as the principle of institutional academic autonomy, in Quebec's Charter of Human Rights and Freedoms. As of now, it is only the expressive dimension of academic freedom that is arguably protected by the charter, under the guise of freedom of expression. That protection is thus merely derivative and implicit. Providing explicit, quasi-constitutional protection to academic freedom and institutional autonomy would have sent a stronger message than ordinary legislation, not only to the academic community but to the general public as well. Moreover, it would have reinforced the idea that academic freedom and institutional autonomy are consubstantial to democracy itself.⁴² Furthermore, in all likelihood, litigation over academic freedom would have become more public and transparent, instead of being confined to the relative obscurity of labor grievances or administrative processes, as it currently is most of the time. Ultimately, the enshrinement of academic freedom in quasi-constitutional legislation could perhaps have served a pedagogical role by inducing citizens to take that freedom more seriously.

Notwithstanding that first step, a second one could have been to impose upon legally accredited student associations obligations to protect and promote academic freedom, as defined in the AAFUS, and freedom of expression, and to annually report to the government in this respect. Sanctions could have been imposed on associations failing to uphold such freedoms,

42 In practice, s 3 of AAFUS, which protects and defines academic freedom, could have been incorporated in the Charter of Human Rights and Freedoms as a new, autonomous freedom, but with the addition of university autonomy as a second prong of academic freedom so protected.

either by action or by omission. It must be noted that in Quebec, the Act Respecting the Accrediting and Financing of Students' Associations recognizes the right of individual students to belong to a student association and to participate in its activities and administration.⁴³ It also establishes a framework for the accreditation of such an association, which, once accredited, is regarded as the sole representative of the student community vis-à-vis the educational institution where it operates, with ensuing obligations imposed on the latter, such as the duty to provide some spaces and services to the association. In a nutshell, this Act creates between the educational institution and the accredited student association a legal relation akin to that existing between a union and an employer. Since the Act contains provisions specifying the (mostly procedural) conditions for obtaining the accreditation but also for revoking it, the protection and promotion of expressive freedoms within the student community and the university could have been incorporated as a duty imposed upon all accredited associations, with the potential revocation of their accreditation for failing to do so.⁴⁴ Such a legislative measure would convey the important message that students, as rights holders themselves, are also responsible for protecting and promoting expressive freedoms in universities. Admittedly, it would only impact accredited associations rather than the myriad of interest-based student associations that animate student life. A further limit to the effectiveness of such a measure might also be that many students, who nowadays tend to adopt a very expansive definition of "harm"⁴⁵ and who, on that basis, are increasingly inclined to report comments that they find offensive,⁴⁶ simply do not value expressive freedoms as much as their predecessors did. Should this hypothesis be

43 Act Respecting the Accrediting and Financing of Students' Associations, RLRQ, c. A-3.01.

44 Technically, the internal bylaws and regulations of a university may provide for sanctions on student associations that fail to respect them, but, again, the legal status of such bylaws and regulations cannot be compared to that of a public order statute.

45 Kate Hidalgo Bellows, "More Students Endorse an Expansive Definition of 'Harm.' Colleges Aren't So Sure," *Chronicle of Higher Education*, May 3, 2023, www.chronicle.com/article/more-students-endorse-an-expansive-definition-of-harm-colleges-arent-so-sure?sra=true&cid=gen_sign_in#:~:text=With%20this%20expanded%20definition%20comes,everyone%20is%20embracing%20this%20rhetoric.

46 Jessica Blake, "'Teaching on Eggshells': Students Report Professors' Offensive Comments," *Inside Higher Education*, July 21, 2023, www.insidehighered.com/news/students/free-speech/2023/07/21/students-likely-report-instructors-offensive-comments?utm_source=Inside+Higher+Ed&utm_campaign=a7ac1237a7-DNU_2021_COPY_02&utm_medium=email&utm_term=0_1fbc04421-a7ac1237a7-236422286&mc_cid=a7ac1237a7&mc_cid=5caa7f21ba.

correct, it would point to a cultural-generational paradigm shift that the law would have a hard time capturing.

That being said, imposing duties to promote and protect expressive freedoms to both university administrations and student associations is the path that the UK Parliament has taken in May 2023, with the enactment of the Higher Education (Freedom of Speech) Act 2023, which amends the Higher Education and Research Act 2017 to insert various measures protecting academic freedom and freedom of expression in universities.⁴⁷

In a nutshell, the new UK law requires universities to take measures to protect the freedom of expression of their staff, members, students, and potential guests, by ensuring that no individual or legal entity is prevented from using university premises because of objections relating to their ideas, beliefs, policies, or objectives.⁴⁸ Academic freedom is defined as the freedom of members of the academic staff to express themselves, within the limits of the law, to challenge accepted ideas and put forward new ideas as well as controversial or unpopular opinions, without fear of direct or indirect disciplinary sanctions.⁴⁹ The Act also requires universities to adopt a code of practice explaining how their values promote freedom of expression and specifying the procedures to be followed by members of staff and the student body when holding conferences, meetings, or other activities on university premises, the conduct expected of them during such activities and, finally, the criteria used to assess whether or not an activity may be held.⁵⁰ As mentioned, this Act places equivalent obligations on student bodies to those of universities.⁵¹ Interestingly, it also creates a right of action against universities or student bodies that fail to comply with their legal obligations in relation to freedom of expression, when a complaint made by a person victim of a violation of that freedom has previously been upheld by the Office for Students. However, such an action can only be successful if that person demonstrates that they have suffered a pecuniary or nonpecuniary loss as a result of the violation.⁵² Moreover, the Office for Students is made responsible for setting up a mechanism for investigat-

47 Higher Education (Freedom of Speech) Act 2023 (UK), 2023 c. 16, www.legislation.gov.uk/ukpga/2023/16/enacted.

48 Higher Education (Freedom of Speech) Act 2023, s 1 (A1 (1), (2), (3), (4)).

49 Higher Education (Freedom of Speech) Act 2023, s 1 (A1 (6) (7)).

50 Higher Education (Freedom of Speech) Act 2023, s 2 (A2).

51 Higher Education (Freedom of Speech) Act 2023, s 3 (A4, A5).

52 Higher Education (Freedom of Speech) Act 2023, s 4 (A7).

ing complaints based on alleged breaches, by action or omission, of provisions protecting freedom of expression and academic freedom, and is therefore empowered to examine and rule on such complaints.⁵³ This body is further allocated the task of ensuring that organizations comply with their legal obligations in terms of freedom of expression and academic freedom; failure to do so could even lead to the imposition of fines in the case of student associations.⁵⁴ The monitoring mandate of the Office for Students goes as far as encompassing potential violations of freedom of expression occurring in the context of activities organized by universities or student unions with overseas funding.⁵⁵ Finally, a kind of free speech ombudsman—the Director for Freedom of Speech and Academic Freedom—is created to oversee the performance of the Office for Students in discharging its duties toward the protection of expressive liberties in universities.⁵⁶

The new UK law adopts a much more granular approach than Quebec's AAFUS. In this respect, and again time will tell, it could perhaps be more successful than the AAFUS in effectively curbing threats to freedom of expression in universities. However, the flip side is that it encroaches more significantly upon the universities' administrative autonomy than its Quebec counterpart. Moreover, what the effects of the new statutory tort created in the Act to remedy violations of expressive liberties on campuses will be is unknown. On the one hand, its breadth is such—for example, any visiting speaking engaged in lawful speech could potentially target a university where they have been deplatformed (this could theoretically include a flat earther who has managed to get an invitation ...)—that one may legitimately fear that this new tort could trigger an open season on universities. On the other hand, the requirement that proof of a pecuniary or nonpecuniary loss be made could severely reduce its concrete usefulness. These potential challenges to the implementation of this new statutory tort raise questions as to whether its creation is not first and foremost a mere symbolic exercise.

Irrespective of its level of granularity, any top-down legislative intervention regarding academic freedom is bound to face hurdles in its concrete implementation, which takes place in different academic, ideological,

53 Higher Education (Freedom of Speech) Act 2023, ss 5, 6, & 8.

54 Higher Education (Freedom of Speech) Act 2023, s 7 (69B).

55 Higher Education (Freedom of Speech) Act 2023, s 9 (69D, 69E).

56 Higher Education (Freedom of Speech) Act 2023, s 10.

and social contexts. As alluded to earlier, there are limits as to what laws can do when they try not only to grasp but to change deep cultural dynamics. In this respect, it is arguable that in several jurisdictions, particularly English-speaking ones, the combined action of some variables has created a new cultural dynamic that can only be superficially affected by formal legal intervention. One such variable lies in the rise of academic capitalism, with the culture of customer service (students, donors, etc.) that accompanies it, which may induce university administrations to cave in to the most frivolous claims for fear of not meeting the expectations or desires of these clientele. Another one is the acute ideological polarization observable on many campuses, which, with the echo chambers it flourishes in, undermines the dialogical environment that is necessary to tackle difficult questions in a complex manner. When coupled with some form of radical identity politics, left and right, this deleterious impact can only be amplified.

Thus, beyond its symbolic function and occasional concrete effects,⁵⁷ the explicit consecration of academic freedom, particularly in its expressive dimension, by legislation or a governmental policy risks being of little help, from a normative point of view, in order to resolve the complex situations emerging on the ground. It therefore seems appropriate to meditate on these words of Jean Carbonnier:

No sooner do we perceive the evil than we demand the remedy; and the law is, in appearance, the instantaneous remedy. Whether a scandal breaks out, an accident occurs, an inconvenience is discovered: the fault lies with the gaps in the legislation. Just make one more law. And we do it. It would take a lot of courage for a government to deny this paper satisfaction to its public opinion.⁵⁸

The expression “paper satisfaction” is crucial here, as “paper satisfaction” goes beyond what we often call a “paper tiger.” The latter refers to the enactment

57 See my observations in this chapter on the concrete effects, including positive ones, that the Quebec and UK legislations might bring about, as opposed to the “soft law” approach adopted by Ontario and Alberta.

58 Jean Carbonnier, *Essais sur les lois* (Paris: Défrénois, 1979), 276. Translation of: “Il faut donc se méfier des exercices de cosmétique législative ou politique, qui offrent un faux sentiment de sécurité aux titulaires de la liberté académique et qui répondent peut-être davantage à des objectifs politiques qu’à un véritable engagement des pouvoirs publics à l’égard de l’objet de la loi ou de la politique.”

of merely ineffective or inefficient laws—tigers with no claws, so to say—while the former seeks to grasp a political impulse that deliberately instrumentalizes legislation as an appropriate response to some *alleged* popular demand, irrespective of the effectiveness, efficiency, or even soundness of the law so enacted. Such a response fundamentally illustrates a cosmetic, and sometimes populist, approach to the elaboration of public policies.

We must therefore be wary of exercises in legislative or political cosmetics, which offer a false sense of security to holders of academic freedom and which perhaps respond more to political objectives than to a real commitment by the public authorities with regard to the purpose of the law or policy. Such legislative or political initiatives may sometimes be well-intentioned and sometimes stem from more cynical electoral calculations. In an interesting twist, such initiatives, as evidenced in Ontario, Alberta, and Quebec, seek to achieve their objectives not only by being silent on the vexing issue of the protection of university autonomy, but also by actively interfering in that autonomy by increasing universities' reporting obligations to governments, but to a much lesser extent than the UK's Higher Education (Freedom of Speech) Act 2023.

It is hard not to think, in that context, that these initiatives are part of a broader trend that the expression “cosmetology of academic freedom” decently captures in my view. My point is not to reduce the controversies that have surrounded academic freedom in the past few years to mere manifestations of a “moral panic.” There certainly is evidence of such a panic, which is meticulously entertained by right-wing commentators,⁵⁹ but there are also genuine threats facing academic freedom, stemming both from the right and from the left, and this, everywhere on the planet. They need to be taken seriously, beyond purely formal and managerial satisfaction.

59 In the context of Quebec, see Francis Dupuis-Déri, *Panique à l'université: Rectitude politique, wokes et autres menaces imaginaires* (Montréal: Lux Éditeur, 2022).