Factors influencing the antisemitic environment on UK campuses

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Factors Influencing the Antisemitic Environment at UK Universities

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The context of antisemitism on UK campuses is presented here, along with the legislation that impacts on it, the issues surrounding the legislation, and the attempts to challenge it.

The Source of Antisemitism on Campus

Antisemitism on campus mostly stems from student Palestine societies, whose criticism of Israel by means of their social media activity and their campus behavior promotes the image of a Jewish state that is racist and bloodthirsty. This creates a hostile campus environment for Jewish students, who are assumed to support Israel, regardless of their personal perspective on the Israeli-Palestinian conflict. This hostile campus environment is especially bad at certain times, such as during "Israel Apartheid Week," or in the aftermath of conflict between Israel and Hamas, such as in spring 2021. An additional source contributing to the hostile environment for Jewish faculty is the lecturers' academic trade union, the University and College Union (UCU), which frequently passes resolutions at its branch meetings around the country condemning Israel's "occupation" and "oppression" of the Palestinians. In the wake of the Israel-Hamas conflict in May 2021, a motion passed by the university branch of the UCU at my own university, Sheffield Hallam University, as well as by several others, condemned Israel as "an apartheid state" and called for a "free Palestine."

Confusion about the Limits of Free Speech on Campus

As environments of research and learning, universities are considered to occupy a special role in encouraging vigorous debate, free exploration and exchange of ideas, free speech, and freedom of enquiry. To this end, universities have a duty under the Education (No.2) Act 1986 and the Education Reform Act 1998 to promote and protect freedom of speech within the law. It is therefore important that universities are tolerant of expression of a wide range of views, and that they do not interfere with students' rights to freedom of speech, including the right to criticize a particular regime or express views on a contentious topic.

This does not mean, however, that universities should tolerate racist speech. While Article 10 of the European Convention on Human Rights (ECHR), which is incorporated into UK law by virtue of section 3 of the Human Rights Act 1998, protects speech that is offensive, provocative, or controversial, it does not protect racist speech, including antisemitic speech, where the harm to the victim outweighs the free speech rights of the speaker. This is by virtue of Article 10 (2) ECHR and decisions of the European Court of Human Rights. Thus, when universities allow a hostile campus environment to persist, they show their lack of awareness and/or understanding of the relevant law. Indeed, many UK universities behave as if freedom of speech on campus were an absolute right, rather than a qualified right.

Those universities which are aware of the restrictions of Article 10 (2) on racist speech suffer from a further problem. They do not recognize and understand where offensive, controversial, and provocative speech ends and unlawful antisemitic speech begins. Unfortunately, the adoption of the International Holocaust Remembrance Alliance (IHRA) Working Definition of Antisemitism by over 100 universities does not seem to have made much of a difference, as there is little understanding of how to use and apply the definition in practice.

Much of the confusion about the boundaries of speech on campus exists because university administrators and academics tend to confuse freedom of speech with academic freedom. Academic freedom is indeed a species of free speech, but it is not the same. It is a principle that only extends to the classroom, research activities, conference papers, academic publications, and course content. Specifically, under section 202 of the Education Reform Act 1988, academic freedom refers to the right of universities to be free from state and political interference; the right of university academics to be free to test received wisdom and to express controversial views without being fired; the right of universities to be free to appoint staff and admit students; and the right to decide what to teach students and what research to undertake. Academic freedom does not equate to absolute free speech, as many academics believe. Unlawful antisemitic expression, such as speech that can potentially lead to violence, cannot be defended on the grounds of academic freedom. On the other hand, academic freedom does protect speech that is merely offensive, and such speech would be unlikely to be considered "harassment" under the Equality Act 2010. This is why the inability of university administrators and academics to distinguish between hate speech and offensive speech is so problematic. In addition, although offensive remarks made in a lecture are unlikely to be caught by the "harassment" provision of the Equality Act due to the principle of academic freedom, academic freedom does not justify conduct that violates the rights of others, such as the right of university students to be treated with dignity and respect by the academic staff. Accordingly, most universities have "Acceptable Behaviour at Work" policies, whose overriding aim is to promote an inclusive learning environment where diversity is valued, and educational opportunities are open to all students regardless of race, ethnicity, and religion. These university policies place further limitations on free speech on campus.

Student Unions and Student Societies

Student unions and societies acquired charitable status in 2010 and became governed by charity law. This law requires them to act within their charitable objectives, as set out in their constitutional document. As educational charities, the charitable objectives of student unions and their societies are normally to advance the educational experience of their student members. As such, they are not permitted to engage in activities or incur expenditures which are not intended to advance the educational experience of their members.

It is only permissible for students' unions and societies to engage in political activity that supports the society's charitable objectives, and it must be done in a balanced and non-discriminatory way. For example, a stated charitable objective of a student Palestine society

might be “to raise political awareness,” but this would need to be done by debating political issues in a balanced and non-discriminatory manner that is educational. At my own university, Sheffield Hallam University, the newly formed Palestine society’s stated charitable objective of “Palestinian solidarity” was rejected by the students’ union as breaching charity law because it lacked an educational purpose.

Generally, while it is lawful for students’ unions and societies to hold events of an educational nature that criticize Israel legitimately, it is not lawful for them to hold events that vilify Israel, causing emotional harm to, and impairing the educational opportunity of, Jewish students.

What Can Be Done to Reduce Campus Antisemitism

The students’ union is an autonomous organization that is separate from the university. It is a registered charity governed by its own board of trustees. However, under Part II of the Education Act 1994, the governing body of the university is required to ensure that its students’ union operates in a fair and democratic manner and is also accountable for its finances. Specifically, under section 22 of the Education Act 1994, each university has a legal obligation to monitor its students’ union’s expenditure for compliance with charity law and the university can withhold funding where there is a breach. Similarly, the students’ union can withhold funding to its student societies when they are in breach of charity law. Complaints about students’ unions can be made to the university under section 22 (2) Education Act 1994.

Many universities, students’ unions, and student societies still do not comply with the legislation to prevent campus antisemitism. The frequent refrain of many universities in response to complaints concerning antisemitism is that their students’ union is entirely separate, and that they have no power to control its activities. In fact, however, they do have power, as they can withhold its funding.

Free Speech on Campus and the Equality Act 2010

Under section 149 of the Equality Act 2010, universities are responsible for ensuring that students, faculty, and staff are protected from discrimination, harassment, and victimization, and are obliged to foster good relations between students of different ethnic and religious groups, including by tackling prejudice and promoting understanding. This is called the Public Sector Equality Duty (PSED), and it applies to Jewish students who are protected as a “religious” and a “racial” group under the law. In exercizing its function of providing an educational environment, each university must seek to ensure that minority students, including Jewish students, can realize their full educational potential without fear, threat, or intimidation. Compliance with the PSED requires each university to place some limitations on free speech, and indeed this is recognized by each university’s “anti-harassment” policy and other codes, such as the “acceptable behaviour at work” policy and the student charter, which typically promises to provide students with a safe and supportive educational environment. The PSED is arguably flouted whenever a university fails to take reasonable steps to prevent or remove campus expression that is antisemitic, thereby

causing a hostile environment for Jewish students which, in turn, contributes to the harassment of Jewish students.

The Equality Act 2010, Section 26

Wherever a university allows a hostile antisemitic campus environment to persist, a Jewish student can pursue a claim for "harassment" under section 26 of the Equality Act 2010. Section 26 defines "harassment" as "unwanted conduct related to a protected characteristic which has the purpose or effect of violating a person's dignity or creating an intimidating, hostile, degrading humiliating or offensive environment for him." "Jewish" is a protected characteristic under UK law – Jews are protected as both a "race" and as a "religion."

The Report of the Equality and Human Rights Commission's Investigation into Antisemitism in the Labour Party, published on October 29, 2020, found that illegitimate criticism of Israel, such as using the trope of equating Israel's actions to those of the Nazis, amounted to the unlawful harassment of its (Jewish)members, contrary to section 101(4)(a) of the Equality Act 2010, related to race (Jewish ethnicity). The commission is a statutory body established by the Equality Act 2006 to promote and enforce compliance with the equality and non-discrimination laws in England, Scotland, and Wales. While this decision does not set a precedent, it would presumably be highly persuasive in a claim by a student against a university for hostile environment harassment caused by antisemitism under section 26 Equality Act 2010.

In 2016, the dismissal of a complaint alleging antisemitic hostile environment harassment against Sheffield Hallam University was brought before the Office of the Independent Adjudicator for Higher Education (OIA), a statutory body that was established by the Higher Education Act 2004 to consider the handling of university student complaints. The OIA found that it was unreasonable for the university to have refused to use the EUMC Working Definition of Antisemitism, now known as the IHRA Working Definition of Antisemitism, as a guide to determining whether criticism of Israel by the student Palestine society had crossed the line into antisemitism. The OIA also found that it was unreasonable for the university to have refused to consider whether the social media activity of its student Palestine society had been likely to cause a Jewish student to feel harassed. The social media activity in question consisted of blood libels against Israel and the Nazi-Israel trope. The OIA ordered the university to pay the Jewish student complainant £3000 compensation for having failed to consider his harassment complaint properly under section 26 of the Equality Act. This decision has no precedent value, but it would presumably be highly persuasive in a claim by a Jewish student against a university for hostile environment harassment on account of antisemitism under section 26 of the Equality Act.

The Macpherson Principle

Another factor that would strengthen the chances of a successful claim for antisemitic hostile environment harassment against a university is the Macpherson Principle. This principle was stipulated in the Macpherson Report, published in 1999, which documented Macpherson's inquiry into the racist killing of Stephen Lawrence. The Macpherson Principle states that a racist incident should be defined by the victim. This does not mean that

students who report an experience of antisemitism are necessarily right; but rather that they should be taken seriously and assumed to be right until an informed decision can be made on the available evidence. The contemporary practice on campus when dealing with allegations of anti-Black racism is to apply the Macpherson Principle, but it does not appear to be used in relation to student allegations of antisemitism.

Anti-racism and Diversity Training

The only anti-racism and diversity training provided in the UK university sector focuses on promoting educational opportunity for Black-Minority-And-Ethnic (BAME) students. Jewish students are not included in that group, despite being legally classed as a "race" and an "ethnic minority" under the Anti-Discrimination Law. The exclusion of Jewish students from the BAME category might stem, in part, from the belief that Jews are white, privileged, and come from families that are well integrated into British society. Moreover, Jewish students do not under-perform at university and are not regarded as needing help. Another factor that comes into play is the fact that their legal status as comprising a "race" as well as a "religion" is not widely known, not even by university administrators.

The IHRA Definition of Antisemitism

Following government intervention in October 2020 to address rising campus antisemitism, more than 100 universities in the UK have now adopted the IHRA definition. However, there has been no significant change in the hostile environment for Jewish students on campus. This is because the definition, while technically adopted, is not being used either as an educational tool or as a guide to campus activity. The definition remains highly controversial and is thought to restrict free speech on Israel, despite its clearly stated protection of criticism of Israel. Academics who are hostile to Israel promote the Jerusalem Declaration on Antisemitism (JDA) as an alternative to the IHRA definition. The JDA protects expressions of hostility to Israel. Another factor is that university administrators have had no antisemitism training, and do not understand the IHRA definition, or how to use it. Indeed, they have little knowledge of antisemitism in general, other than in relation to the Holocaust.

In summary, there needs to be greater clarity regarding what constitutes free speech and antisemitism at UK universities. In addition, universities need to take more responsibility towards ensuring that the laws that protect against antisemitism on campus are upheld and that student complaints are adequately addressed. This, in turn, requires a greater willingness on the part of universities to use the IHRA definition as both an educational tool and a guide to conduct.

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