

UNIVERSITY AUTONOMY AND ACADEMIC FREEDOM IN SOUTH AFRICA

by

CHARLES ROBINSON MANDLENKOSI DLAMINI SC

submitted in accordance with the requirements
for the degree of

DOCTOR OF LAWS

at the

UNIVERSITY OF SOUTH AFRICA

Promoter: Prof. M Wiechers

Joint Promoter: Prof. W Bray

NOVEMBER 1996

SUMMARY

Throughout the history of universities, university autonomy and academic freedom have come to be regarded as indispensable if the university has to fulfill its function of generating and disseminating knowledge and information for the benefit of society. Although these are often conflated, they are distinguishable though interdependent. Autonomy relates to the self-governance of the university without external interference. Academic freedom entails the freedom of an individual academic to hold whatever views, orthodox or unorthodox, without censure or other penalty. It also entails critical inquiry.

Although academic autonomy and freedom are critical to the academic function, they are not beyond dispute. There is always a continuous debate on what are the proper boundaries of legitimate academic autonomy and freedom. These boundaries are not fixed and keep on shifting. The shifting is often caused by government intervention into university education by way of subsidising it.

As a quid pro quo for subsidizing university education, the government often feels entitled to stipulate conditions for the granting of such subsidies. Various governments follow different ways of doing this. There is a general trend in terms of which the government is defining the degree of academic autonomy. With autonomy it emphasizes accountability and with academic freedom it emphasizes responsibility. These are not mutually in conflict.

Although universities cherish their autonomy and academic freedom, these are always subject to threat. These cannot flourish in an authoritarian culture, but can only thrive in a democratic culture where other civil liberties are respected. The reason for this is that human freedom is indivisible and academic freedom cannot survive when other rights are violated.

The South African Constitution protects academic freedom. This is not generally done in most constitutions of the world. The reason why the South African Constitution expressly protects academic freedom is because academic autonomy and freedom were severely violated in the past. Although the protection of academic freedom in the Constitution does not provide indefeasible security, it makes the way of a transgressing government difficult. This is important because even a democratic government can violate academic freedom.

Title of Thesis

UNIVERSITY AUTONOMY AND ACADEMIC FREEDOM IN SOUTH AFRICA

Key Terms

Academic autonomy; academic freedom; institutional rights; individual rights; critical inquiry; pursuit of knowledge; pursuit of truth; university education; dissemination of information; holding of unorthodox views; constitutional protection.

TABLE OF CONTENTS

	PAGE
PREFACE	i
SUMMARY	iii
CHAPTER 1: INTRODUCTION AND CONCEPTUAL FRAMEWORK	
1.1 INTRODUCTION	1
1.2 THE ROLE AND FUNCTION OF A UNIVERSITY.....	2
1.3 UNIVERSITY NEUTRALITY	7
1.4 UNIVERSITY AUTONOMY AND ACADEMIC FREEDOM IN GENERAL	10
1.5 UNIVERSITY AUTONOMY AND ACADEMIC FREEDOM DEFINED AND DISTINGUISHED	11
1.6 THE RATIONALE FOR UNIVERSITY AUTONOMY AND ACADEMIC FREEDOM	21
1.7 STATEMENT OF THE PROBLEM	32
1.8 AIM OF INVESTIGATION	38
1.9 CONCLUSION	41
FOOTNOTES	45
CHAPTER 2: THE HISTORICAL EVOLUTION OF UNIVERSITY AUTONOMY AND ACADEMIC FREEDOM FROM THE MIDDLE AGES	
2.1 INTRODUCTION	55
2.2 DEVELOPMENT OF UNIVERSITIES AND UNIVERSITY AUTONOMY	57
2.2.1 Reasons behind the establishment of universities	57
2.2.2 Autonomy and the role of the guilds	59
2.2.3 Autonomy and the role of the chancellor ..	59
2.2.4 The great dispersion	64
2.2.5 The struggle continues	66
2.2.6 Autonomy in internal matters	67
2.2.7 The role of the students	68
2.2.8 The role of the faculties	71
2.2.9 Course content	74
2.2.10 Teaching method	74
2.2.11 Physical facilities	75
2.2.12 Colleges	76
2.3 ACADEMIC FREEDOM	78
2.4 FROM THE RENAISSANCE TO THE NINETEENTH CENTURY	81
2.4.1 The fourteenth and fifteenth centuries ..	81
2.4.2 The Reformation	82
2.4.3 The age of Enlightenment	83
2.4.4 The nineteenth century	84
2.4.5 Models of autonomy	88
2.4.6 The land-grant institutions of the United States of America	94
2.4.7 Academic freedom among American universities	95
2.4.7.1 The early period	95
2.4.7.2 The influence of Darwinism	96
2.4.7.3 The German influence	96

2.4.7.4	Academic freedom and big business	108
2.4.7.5	The establishment of the AAUP and its influence on academic freedom	113
2.4.7.6	The Second World War and its aftermath ..	127
2.5	CONCLUSION	134
	FOOTNOTES	136

**CHAPTER 3: THE HISTORICAL EVOLUTION OF UNIVERSITIES AND
UNIVERSITY AUTONOMY AND ACADEMIC FREEDOM IN
SOUTH AFRICA**

3.1	INTRODUCTION	144
3.2	EARLY DEVELOPMENTS OF HISTORICALLY WHITE UNIVERSITIES IN SOUTH AFRICA	145
3.3	THE UNIVERSITY OF THE CAPE OF GOOD HOPE AND THE UNIVERSITY COLLEGES	146
3.4	TOWARDS AUTONOMOUS UNIVERSITIES	149
3.5	THE DEVELOPMENT OF HISTORICALLY BLACK UNIVERSITIES	153
3.5.1	Early period of university education for blacks	153
3.5.2	The establishment of the South African Native College	154
3.5.3	Towards the establishment of black university colleges	155
3.5.4	The Extension of University Education Act and its implications	161
3.5.5	The case for the "open" universities	184
3.5.6	The development of black university colleges	201
3.6	FURTHER DEVELOPMENTS RELATING TO WHITE UNIVERSITIES	211
3.6.1	The definition and nature of a university	
3.6.2	The conscience clause	212
3.6.3	University autonomy and academic freedom .	213
3.6.4	The university and professional councils .	215
3.6.5	The university and the state	216
3.6.6	The university and other tertiary institutions	218
3.6.7	Transition from school to university	218
3.7	ACADEMIC FREEDOM	223
3.7.1	Security legislation and freedom of speech	224
3.7.2	Contempt of court	227
3.7.3	Censorship laws	228
3.7.4	Restrictions on freedom of research	229
3.7.5	Restrictions on freedom of assembly and the right to protest	230
3.7.6	Restrictions on individual liberty	235
3.8	The National Commission on Higher Education	237
3.9	CONCLUSION	242
	FOOTNOTES	244

**CHAPTER 4: THE CONSTITUTIONAL PROTECTION OF UNIVERSITY
AUTONOMY AND ACADEMIC FREEDOM IN SOUTH AFRICA**

4.1	INTRODUCTION	262
-----	--------------------	-----

4.2	PROTECTION OF ACADEMIC FREEDOM IN THE CONSTITUTION	264
4.3	UNIVERSITY AUTONOMY IN THE CONSTITUTION ..	278
4.3.1	Chancellor	284
4.3.2	Principal or Rector and Vice-Chancellor and his Deputies	285
4.3.3	The Registrar(s)	290
4.3.4	The Council	291
4.3.5	The Senate	296
4.3.6	The Convocation	299
4.3.7	Faculties and Departments	301
4.3.8	Staff of the University	303
4.3.9	Students	306
4.4	EXTERNAL CONTROL	315
4.4.1	Powers of the minister	315
4.4.2	Committee of University Principals	320
4.5	LIMITATIONS TO UNIVERSITY AUTONOMY	321
4.6	THREATS TO UNIVERSITY AUTONOMY	324
4.7	MANAGEMENT STYLE OF UNIVERSITIES	345
4.8	CONCLUSION	347
	FOOTNOTES	350

**CHAPTER 5: UNIVERSITY AUTONOMY AND ACADEMIC FREEDOM:
A COMPARATIVE PERSPECTIVE**

5.1	INTRODUCTION	364
5.2	BRITAIN	365
5.2.1	University autonomy in general	365
5.2.2	Historical development of university autonomy	367
5.2.3	The Education Reform Act	373
5.2.4	Other persons/bodies in the university- government relationship	375
5.2.5	The structure and governance of the university	379
5.2.6	Redefining academic autonomy	380
5.2.7	Academic freedom	384
5.2.7.1	Academic freedom and tenure	386
5.2.7.2	The Education Reform Act and the abolition of tenure	387
5.2.7.3	Academic freedom debates and the amendment	389
5.2.7.4	Academic freedom and responsibility	392
5.3	UNITED STATES OF AMERICA	394
5.3.1	The evolution of constitutional academic freedom	394
5.3.2	Towards a definition of constitutional academic freedom	398
5.3.3	The aftermath of Sweezy	408
5.3.4	The limits of judicial intervention	416
5.3.5	The Supreme Court and institutional academic freedom	423
5.3.6	Academic abstention	430
5.3.7	State constitutional law	432
5.3.8	Institutional academic freedom and the first amendment	439
5.3.9	Individual versus institutional academic freedom	444
5.3.10	Institutional autonomy and tenure cases ..	452

5.3.11	The public-private dichotomy	462
5.4	GERMANY	466
5.4.1	University autonomy and academic freedom in general	466
5.4.2	The student unrest	470
5.4.3	Results of legislative reform on academic freedom	475
5.4.4	Turning point	482
5.5	AFRICA	492
5.5.1	Introduction	492
5.5.2	UGANDA	499
5.5.2.1	Introduction	499
5.5.2.2	The Makerere College Ordinance of 1938 ...	501
5.5.2.3	The post-colonial control of Makerere University	506
5.5.2.4	The Makerere University, Kampala Act 1970.	507
5.5.2.5	The Makerere University, Kampala Act (Amendment) Decree, 1975	509
5.5.3	ZAMBIA	513
5.5.3.1	Introduction	513
5.5.3.2	The University of Zambia Act 1972	514
5.5.3.3	The University of Zambia Act 1987	515
5.5.4	ZIMBABWE	517
5.5.4.1	University autonomy and academic freedom in general	517
5.5.4.1.1	Historical background	517
5.5.4.2	The era of Unilateral Declaration of Independence	520
5.5.4.3	The post-independence era	525
5.5.4.4	The Zimbabwe Act of 1982	528
5.5.4.5	The university-government relations	528
5.6	CONCLUSION	532
	FOOTNOTES	534
CHAPTER 6: CONCLUSION AND RECOMMENDATIONS		553
	FOOTNOTES	575
BIBLIOGRAPHY		576

PREFACE

After I had completed my third LLD entitled The Administrative Law of a Typical South African University with the University of the Western Cape, my interest was pricked by the concept of university autonomy and academic freedom in South Africa. This led to this present investigation.

There are a few people who contributed directly or indirectly to the completion of this research project.

To Professors M Wiechers and W Bray promoter and joint promoter respectively, I am extremely grateful for the guidance and support as well as constructive comments during the writing of this thesis.

I owe Ms K Breckon, the law librarian at UNISA, a debt of gratitude for the efficient way in which she assisted me with research material.

The initial typing of this thesis was done by Mrs M Nel and I am grateful to her. When she retired, the lot fell on my secretary, Mrs K Adlam, to type and retype the manuscript which she did patiently and in the most professional way. I am extremely indebted to her. I do not know what I would have done without her assistance.

Ms T M Msomi assisted me with acquiring part of the research material. She deserves my thanks for that.

I would also like to express my appreciation to the staff of the inter-library loan section of the Library at the University of Zululand for obtaining for me some literature through the inter-library loan system.

My family deserves my sincere thanks for perservering through another ordeal.

The Lord is to be thanked for the health, strength and interest to do this research. To Him alone be glory!

I declare that University Autonomy and Academic Freedom in South Africa is my own work and that all the sources I have used or quoted have been indicated and acknowledged by means of complete references.

C R M DLAMINI
NOVEMBER 1996

CHAPTER 1

INTRODUCTION AND CONCEPTUAL FRAMEWORK

1.1 INTRODUCTION

A university is the most important institution in the educational system of any country. For this reason it has been described as an "educational institution at the pinnacle of the country's educational system operating at the highest level of teaching and research, centred on the pursuit of learning of a sort fundamental to the understanding of the physical and human world and necessary for the practice of certain professions and occupations requiring advanced knowledge."

According to this definition, the role and function of a university is the generation and transmission of knowledge through teaching and research and the training of students for certain professional occupations which require advanced knowledge. A university therefore occupies an extremely important position in society.

Owing to the important position which the university occupies in the educational system of this country in particular, it requires critical consideration especially during this period of transition in order to establish whether it is operating effectively. This necessitates a re-evaluation of its role and mission and of its fundamental assumptions. This is nothing new. The history of universities in general has been punctuated by periodic debates on the idea of a university and

what is regarded as its proper function and mission.² Even in South Africa this has been the case. The recent establishment of the National Commission on Higher Education in this country bears eloquent testimony to this. The purpose of this Commission is to consider the whole position of higher education in South Africa. Universities as providers of higher education are in the centre of this investigation.

1.2 THE ROLE AND FUNCTION OF A UNIVERSITY

A university is undoubtedly unique and different from other educational institutions because it not only teaches but also does research. It differs from other research institutions because it not only does research but it also teaches. Teaching and research form an inseparable part of the university system. While teaching relates to the transmission of existing knowledge, research is concerned with the discovery or creation of new knowledge through the creative exploration and re-interpretation of existing knowledge.³ This puts a university in a special position. As the saying goes, knowledge is power. Knowledge is power because it has the ability to change things and in particular the quality of life of the people. By generating and disseminating knowledge, a university is therefore in a powerful position. It is this potential power of a university which often puts it in conflict with organs of state power and certain sections of society.

Although a university is sometimes loosely referred to as a school, it is different from a school. A school is mainly

concerned with the transmission of existing knowledge and skills whereas, as has been said, a university is also engaged in the important task of research and the advancement of knowledge.⁴

In order to do this effectively, a university has to have not only libraries, laboratories and other facilities essential for research and teaching, but it also has to have the ability to recruit the ablest and most creative people that can be lured into the academic life. It also has to provide an environment of freedom where free inquiry can flourish and where professors can do their work without constraints or external direction. Highly intelligent and imaginative people often resent and resist orders from above. They do not do their best under those conditions but prefer a free environment. Freedom of the mind and university autonomy often go together. Free thinkers resent restraints on the kinds of ideas and hypotheses they can publicly entertain. Such restrictions stifle the spirit of "venturesome inquiry while blocking off entire fields of investigation that seem threatening to those who have strong interests in maintaining the status quo"⁵.

Free inquiry and creative thought also go together. As to which should predominate, teaching or research, is not easy to say although, as has been said, both of them are important. In the words of Brook:

"To ask whether teaching or research is the more important is like asking whether the engine or the

wheels are the more important in a motor-car. A stationary engine is useful for some purposes, and anybody who has fixed four wheels to a soap-box knows that a useful vehicle can be constructed without an engine, but neither the stationary engine nor the soap-box on wheels would be a motor-car and neither would be able to do all that a motor-car can do."⁶

In considering what the nature and function of a university should be, the van Wyk de Vries Commission described it as essentially that of advancing knowledge by bringing to light the knowledge amassed through the ages, by systematising it, and by incorporating every facet into the various disciplines as a component of the whole structure of knowledge, and by new discoveries through investigation and research. This knowledge and research should be applied for the betterment of society.⁷ In this respect the Commission was emphasising the fact that the role and function of a university is not simply that of preserving and transmitting knowledge, but also that of creating new knowledge as well. It also emphasized the fact that knowledge is for the benefit of society.

As the Commission further pointed out, the function of the university is also to educate and mould a student into a mature person by developing his gifts and talents. It should inculcate in him certain qualities like scholarliness and honesty, a scientific and enquiring mind, perseverance and an ability to apply one's mind to issues and should cultivate in him or her the attributes of a cultured person and an outlook

on and a philosophy of life which will enable him to be a balanced person. Moreover, the Commission further contended that it must also prepare students to practise a profession requiring university education. It should also transmit culture to the student and instil in him good citizenship⁸, although the transmission and preservation of culture should always be accompanied by constant re-examination in the light of new discoveries. In this way a university can make an important contribution by demonstrating why older views should be discarded as well as by preserving the past⁹. One might add that a university should be committed to universal values of knowledge, truth, justice and intellectual humility.¹⁰

In further expanding on the role of the university, the Commission circumscribed it as that of being "intensely active in a scientific manner in the field of politics, to gather knowledge of this field from South Africa and from all over the world, to process this knowledge scientifically and to publish the product in a scientific manner, however critical it may be of the national system, government policy, party policy or prevailing views in society and the community; the State shall continue to respect and protect this function of the university; the university shall not allow this function to degenerate into pure politicking or into pseudo-scientific politicking, or tolerate the improper use of the university, its teaching staff or students as an active political instrument in the politics of the country since this cannot be proper to its functions, falls beyond its capacity and would lead to revolution and not reformation."¹¹

This view is apparently based on the assumption that a scientific approach to knowledge is to the benefit of society even if it may be critical of the current repositories of political power or the current views of society. While it is accepted that a university should not "allow this function to degenerate into pure politicking or into pseudo-scientific politicking" the views of the Commission are a bit restrictive and somewhat exaggerating when it says the university should not "tolerate the improper use of the university, its teaching staff or students as an active political instrument in the politics of the country since this cannot be proper to its function, falls beyond its capacity and would lead to revolution and not reformation". It is not the role of the university to prevent its staff or students from being active political instruments in the politics of the country. On the contrary it should encourage them to do that. Nor does such political activism necessarily imply support for revolution. Admittedly the improper use of the university by staff and students is unacceptable. What is regarded as "improper", however, may be debatable.

What is supported, however, is political neutrality on the part of the university which is conducive to free inquiry." Although university neutrality is a desirable ideal, it is by no means incontrovertible. Some regard neutrality as a myth, as they hold the view that universities generally espouse particular political stances." Admittedly even a scientific approach is not value neutral. There will obviously be a value implicit in the theory or methodology an inquirer adopts which may in turn influence perception and cognition of what

we regard as true facts and objective truth. This does not imply that we should disclaim truth and fact, but that we should realise that what we perceive as truth or fact is often mediated by values and theories, and it takes place within the confines of fallible human cognition¹⁴. This may also be the case with university neutrality. Having said that, it is still necessary to consider the issue of university neutrality in some detail.

1.3 UNIVERSITY NEUTRALITY

There is no doubt that the attainment of absolute neutrality may be difficult, and, some might even say, impossible.¹⁵ Yet the complete rejection of the concept of university neutrality is equally open to considerable criticism. The problem is that the ideal of neutrality is sometimes misconstrued as a reality or description instead of an ideal.¹⁶ Moreover, what is meant by university neutrality is often misconceived. If by neutrality is meant the absence of any social or political effects of any action or inaction by the university, then no university is or can ever be neutral. This is because even the very process of education itself has enormous consequences for society as it creates an educated class of persons who behave differently from the way they would have behaved if they had not been educated. Even the decision to adopt a neutral stand on social and political questions has social consequences. The traditional theory of university neutrality does not postulate that the university should avoid taking any action which could have social consequences, but that it is open to the expression of all points of view and does not assume

institutional stands on all controversial social and political issues. This means "that the implicit theory of neutrality is not a neutrality of effects (consequences, results) but a neutrality of institutional intent. Of course, the university has effects on controversial social and political questions, but its institutional intent is education not politics."¹⁷

The main reason behind this is that university neutrality facilitates both university autonomy and academic freedom. If a university were to take a rigid stand on certain political and social controversies, it would assume the role of a political agency and it would stifle debate and scrutiny from those who do not agree with its point of view. It would in other words, contradict its very mission of being committed to free inquiry and of providing an arena where all points of view are aired and freely examined and criticized.¹⁸

Knowledge is more likely to be advanced through free inquiry than through collective endorsement or rejection. This is the basis of rationality to which universities are committed. But even if a university may make pronouncements on certain controversial issues, the concept of university neutrality is not seriously compromised, as long as such pronouncements are still open to critical scrutiny. Anything to the contrary stifles alternative answers to the questions under discussion and it frustrates the ideal of rationality and academic freedom.¹⁹

It is also important to bear in mind that neutrality relates to the university as a corporate body and not to the

individual members. A university is a complex entity. For this reason a distinction should be drawn between it as a corporate entity and its individual members. While individual members are free to be committed to certain positions, the university as an institution should not or should strive not to.²⁰ Such institutional commitment should be avoided, because as Lowenthal puts it, it is not only "incompatible with the spirit of free inquiry," but also because, as he further puts it,

"no university is entitled to pronounce on the political questions of the day on behalf of its members on the basis of majority decisions. Nobody who joins a university, whether teacher or student, does so in order to expose the view of a particular political grouping, or intends to empower his colleagues to speak in his name on current political issues. In that sense, the university as an institution must be neutral between the political parties and on the various issues disputed in a democratic community at any given moment, both to respect the freedom of opinion of each of its members and in order to preserve its own primary commitment to the unbiased search for truth and to the principle of tolerance."²¹

The need for neutrality can also be justified on the basis that in a complex society for a university to adopt a particular position is to expose it to powerful political and cultural attack which may eventually seek to restrict academic

members' freedom of thought.²² What is therefore crucial is that university neutrality is important for both autonomy and academic freedom. It facilitates both.

While what has been said is true, there will obviously be exceptions to this rule, where the university as an institution would be entitled or compelled to take a particular stand. This may be so in cases of national emergency or where the safety of the nation is at stake as where there is a threat of war against the country. These are cases where there is consensus rather than controversy, although the determination of whether there is controversy or consensus may itself be controversial.²³ A university may also take a stand on political issues which generally threaten its autonomy and academic freedom. This has been the case against apartheid.²⁴ The policy of apartheid not only violated university autonomy and academic freedom, but it also militated against justice and equality and against political freedom and tolerance. A university may also take a political stand if some of its educational objectives are at stake.²⁵ There may well be others. But the few that have been mentioned will suffice.

1.4 UNIVERSITY AUTONOMY AND ACADEMIC FREEDOM IN GENERAL

From the above discussion it is clear that there are certain attributes which a university must possess in order to carry out its function of generating knowledge and pursuing truth and thus fulfilling its role effectively. University autonomy and academic freedom are the two most important ones. There

are obviously others, but these two are the most critical. In many, and especially western societies, these are regarded as fundamental rights. They are considered to be the foundation stones of the university system.²⁶ It is for this reason that they deserve closer analysis and re-evaluation. It has been said that "academic freedom, like other 'great, abiding truths', is only 'abiding' in so far as each generation reinterprets and makes that truth its own. The concept of academic freedom is, like all concepts, subject to some reassessment in the light of changing needs and changing social circumstances, though the core of belief remains unchanged."²⁷ This is the spirit which animates the present investigation.

1.5 UNIVERSITY AUTONOMY AND ACADEMIC FREEDOM DEFINED AND DISTINGUISHED

The definition of university autonomy and academic freedom has exercised the minds of many scholars so that no one can claim to have the final answer. Although these are often conflated, they are distinguishable from each other, and it is important to draw this distinction. It is important because, as will appear here below, while some may support the idea of academic freedom, they may treat university autonomy with scepticism and yet the two are mutually supportive. Autonomy entails the collective activities of a university, and it relates to the corporate freedom of an institution in society which includes the powers of self-government by the university in respect of its affairs free from extraneous regulation. These encompass the academic, managerial and administrative aspects of the

university. Of fundamental importance is the power to manage the university and to regulate its affairs. Autonomy is concerned with its independent status as an institution in relation to other external institutions including the government, the church, the organised industry and business and other organizations. Academic freedom, on the other hand, is concerned with the working conditions and conditions of service of staff and students as regards teaching, learning, research, the expression of opinions and the publication thereof. It entails the freedom of an academic to perform his functions without unnecessary restrictions.²⁸

From this distinction academic freedom can be regarded as a subset of a bigger set of university autonomy, although the two can exist without each other. For this reason autonomy has been regarded as a necessary though not sufficient condition for academic freedom.²⁹ Generally, university autonomy has been considered as embracing the four essential freedoms "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study".³⁰ Although this has later on been found to be a bit restrictive,³¹ it still remains one of the most authoritative statements on academic freedom in the form of institutional autonomy, not only here, but also in the United States of America.

Owing to the nature of the function of the university, appointment to it must be based on high intellectual merit and high academic standards. Once a person has demonstrated high academic ability through teaching and research, this must be

respected and must be beyond control. The university's decisive autonomy lies in its choice of people who will do its job. In order to maintain the intellectual calibre of the institution, a uniform and fair system of collegial appointment should be established. That is the only way of ensuring equality of opportunity to individuals and to sustain the morale of those involved in co-operative research. Moreover, a university must also have autonomy in such pedagogical issues as the selection of students, the grading of their examinations and the setting of the level and nature of study. It should also be able to define its character and mission³².

The autonomy of a university is, however, not absolute; in any case no right is absolute. In South Africa in particular, university autonomy is qualified by the nature of the university which circumscribes its capacity and function. It is also qualified by the fact that its essential structure unites scholars, the community, society and the government, and all of these have to be taken into account in the exercise of all self-governing powers in order to preserve a harmonious equilibrium among them. This is obviously not an easy task. There are various areas where government may interfere with university autonomy to regulate the admission of students and the hiring of staff. It may further be qualified by the general law of the country or statutory law relating to its establishment and functioning,³³ and today in the context of a constitution which entrenches fundamental rights, it may have to be balanced with other rights. But apart from these important considerations, it is undesirable that university

autonomy should be unnecessarily restricted. It is well known that there is always a threat of government intervention in the running of universities.

University autonomy also does not imply that the university is insulated from and is not subject to external influence. It is impossible for the university to be completely free from external influences. But once an external influence becomes irresistible, then the autonomy of the university is seriously undermined.³⁴

The nature and function of the university largely determine the content of its academic freedom. This freedom is confined to the academic field although it is related to other freedoms³⁵. The autonomy of the university as an institution consists of its power to regulate, organise and control all the facets of its academic function in its discretion without extraneous regulation by the government or society. As pointed out already, this relates to the powers of the university to appoint academic staff, to lay down curricula and standards, to decide who must be admitted as students, who should be taught and how to strike a balance between teaching and research.

The academic freedom of a teacher or student entails the intellectual freedom for each to exercise his respective functions. The teacher is free to perform his teaching function according to his own conception of fact and truth, to express and publish his views, to study, investigate and to do research of his own choice and to be free from discriminatory

treatment on the grounds of sex or convictions or any other impermissible grounds. The student is entitled to study, learn, do research and publish in intellectual freedom and should not be discriminated against. This freedom, may be curtailed by the nature and function of the university or by the university itself in order to be able to carry out its functions effectively.³⁶

According to Tight:

"Academic freedom refers to the freedom of individual academics to study, teach, research and publish without being subject to or causing undue interference. Academic freedom is granted in the belief that it enhances the pursuit and application of worthwhile knowledge, and as such is supported by society through the funding of academics and their institutions. Academic freedom embodies an acceptance by academics of the need to encourage openness and flexibility in academic work, and of their accountability to each other and to society in general".³⁷

This definition attempts to stress that academic freedom is for the benefit of society. It is, however, confined to the academic freedom of teachers and not that of the students. But, as already pointed out, academic freedom is not a privilege of the academics alone; students are also entitled to it. For this reason an examiner has no right to penalize a candidate for reaching a conclusion different from that he has

reached himself as long as the candidate gives sound reasons to support his view.³⁸ If that were so, it would stifle the growth of knowledge. Despite the above attempts at defining it, academic freedom has been regarded as defying precise and final definition.³⁹

Although one type of definition has been used for academic freedom, the matter is not a simple one. On the contrary three types of definition have been propounded, all of which reflect certain political and philosophical underpinnings. According to one version, academic freedom "is a fundamental right in the service of the disinterested pursuit of knowledge, and a right to be defended against interference from the state and other movements or organisations outside the university"⁴⁰. This view of academic freedom often goes with the ivory tower conception of the university. According to this idea the pursuit of knowledge is intrinsically valuable on its own and has to be pursued irrespective of its immediate benefit to society although this may also benefit society.⁴¹

In terms of the second version of academic freedom, academic freedom is only a privilege afforded universities so that knowledge can be acquired for the good of the community. It is a privilege which has been used by elitist educational institutions in South Africa to hide their fundamental activity of serving the political and economic interests of the white elite. This view belongs to the people's university idea. According to this view universities must be democratized and made relevant so that the control thereof is

taken away from the reactionary forces and placed in the hands of the progressive forces. In this way university education would become available to the broad mass of the people and research programmes would be geared to immediately benefit the broad mass².

According to the third view, academic freedom is seen as sometimes useful although "often distracting, fetish that academics have as they go about what it is held ought to be their main business" which is the training of students to service the economy. This model of academic freedom is compatible with the supermarket model of the university. This view regards universities as similar to markets or factories, the main business of which is the buying, selling and production of commodities which in the present case is education. In line with this approach, a good university is one where there are courses for which students and employers have a demand³.

Although these various models express important elements of academic freedom, they tend to exaggerate and are not mutually exclusive. There is no doubt that universities are, or ought to be, centres of rational inquiry and of knowledge acquisition and dissemination. Consequently, their focus is necessarily wider than the purely economic. Their role is not merely instrumental, but it is also critical and transformative of society⁴.

Even a university that enjoys autonomy can restrict academic freedom and in many cases institutions treat their staff

unfairly or with bias or prejudice.⁴⁵ It is, however, doubtful whether academic freedom can exist in the absence of autonomy. There is no doubt that academic freedom can only exist in a free and democratic state although even within a limited autonomy there can be academic freedom.⁴⁶ The reason why academic freedom cannot exist in an unfree society is that violations of general liberty will always impinge on the freedoms of the university. For this reason it has been said that academic and human freedom are one and indivisible.⁴⁷ This, however, does not mean that for conceptual purposes it is not possible to separate academic freedom from other freedoms.⁴⁸ Although the university is not a product of a liberal-democratic society, it has contributed to the development of liberal democracy and has in turn benefited from liberal democracy in the pursuit of its mission.⁴⁹

It is important to emphasise that academic freedom is not an end in itself. The same can be said of university autonomy. University autonomy facilitates academic freedom. The purpose of academic freedom is to facilitate the untrammelled attainment of the mission and goal of a university which is the pursuit of knowledge through teaching and research. This is to the benefit of society in general,⁵⁰ although some would argue that in a university "knowledge is its own end and not merely a means to an end".⁵¹ There is no real conflict here. It is a matter of emphasis, which implies that society should not place unnecessary restrictions on the extension of knowledge on the grounds that it is not of immediate benefit to society. Ultimately all true knowledge is to the benefit of society, even if in the interim it may not be perceived to be so.

University autonomy is an institutional, and not an individual right. It is the right of the institution to govern itself and to direct its affairs free from external interference. Although academic freedom is not a general human right but an institutional one, it is also an individual right in that it has to be exercised by an individual. University autonomy and academic freedom are institutional rights because they are rights which derive from being and belonging to an institution and not from being human in general.⁵²

Individual or human rights in general are those rights which human beings have or are deemed to have by virtue of their being human. They have these rights irrespective of race, gender, or perhaps age, noble or ignoble descent, social class, national or ethnic origins, and regardless of wealth or poverty, occupation, talent, merit, religion, ideology or other personal idiosyncrasy. It also means that they are inalienable and cannot be transferred, forfeited or lost by having been usurped or by failure to exercise or assert them for any length of time.⁵³

These rights are also referred to as fundamental rights. This means that they are important and that they should not be easily sacrificed on utilitarian grounds. It does not necessarily imply that they are absolute and may never be curtailed for any purpose in whatever circumstances. As has been said, no individual right is absolute as every right is limited by the rights of others and other considerations. What it means is that "they are entitled to special protection enjoying at least a prima facie, presumptive inviolability,

bowing only to compelling societal interests, in limited circumstances, for limited times and purposes, and by limited means."⁵⁴

Individual or fundamental rights are generally rights against or upon society as represented by the government and its officials. A good society is therefore, according to the theology of human rights, one where individual rights flourish, and where the promotion and protection of individual rights constitute a public good. Although conflict often arises between the protection of individual rights and some other public good, according to the ideology of human rights, in the resolution of this conflict individual or fundamental rights should not be lightly sacrificed on utilitarian grounds of the greater good for the greater number, or even for the general good of all.⁵⁵ In accordance with this line of reasoning the dichotomy between the individual and society is only temporary and superficial. In the long run it is in the best interests of society if the individual's right is protected.⁵⁶

Although university autonomy and academic freedom are institutional rights, they are also fundamental rights because they are indispensable to the existence of a university and ultimately for the benefit of society. A university without autonomy and academic freedom is a contradiction in terms. It is a fire that burns not. They are also fundamental because they enable a university to attain its mission. It is essential to stress that they are rights and not privileges or concessions, nor are they something that depends on the whim

of the authority either inside or outside the institution which authority can deal with as it pleases. On the contrary they are something inherently bound up with the performance of the university's role, "something as necessary for that performance as pen and paper, as classrooms and students, as laboratories and libraries"⁵⁷. For this reason they should be treated with care and not be easily sacrificed, qualified or denied.

1.6 THE RATIONALE FOR UNIVERSITY AUTONOMY AND ACADEMIC FREEDOM

The rationale for university autonomy and academic freedom is, as already mentioned, to be found in the nature and function of the university. As already pointed out, the function of the university is the generation, advancement and dissemination of knowledge through teaching and research. This is not an end in itself. The advancement of knowledge is essential for the improvement of the quality of life of society whether it be physically, socially, economically, spiritually and politically.⁵⁸

Knowledge can be advanced only if there is freedom of inquiry which entails freedom of thought and expression as well as to criticize without fear of sanctions however unpopular or unorthodox the views expressed may be.⁵⁹ As Turner puts it:

"Academic freedom is not therefore some arcane and anachronistic privilege. It is to the academic what judicial independence is to judges, freedom of

conscience to the clergy, the protection of sources of information to the journalists, parliamentary privilege to the MP, the exercise of clinical judgment to the doctor, the right of pursuit to the policeman. It is the simple and basic condition for the job".⁶⁰

There is ample evidence that throughout history considerable progress has been made as a result of the growth of knowledge which has led to the better understanding of ourselves, our institutions, and the environment in which we live. Notwithstanding this, experience teaches us that great discoveries and advances in knowledge are often highly unsettling and distasteful to the existing order. It is rare that individuals have the intelligence and imagination to conceive those ideas and the courage to express them openly. If we place a high premium on progress, we cannot afford to restrict such persons by imposing orthodoxies, censorship and other artificial barriers to creative thought⁶¹.

It does not mean that all intellectual thoughts are infallible. For this reason it has been said that commitment to academic freedom is more a matter of faith than a product of logic and empirical demonstration. It is always likely that the exercise of this freedom can produce mistakes and misperceptions that may mislead the public or lead to the adoption of faulty and harmful policies. A solution to this is not to censor academic freedom but to encourage it so that in the process ideas can be subjected to critical scrutiny and

errors can be corrected through continuing argument and debate⁶².

Academics should be allowed to subject any idea or practice to critical scrutiny however hallowed by veneration or practice. Indeed one of the most important roles of a university, in its service to the society that sustains it, is constantly to subject to critical scrutiny and review that society's institutions, policies, goals, value systems, and its self-image.⁶³ In doing this, the university should not be what has been regarded as an "ideological handmaiden of the state".⁶⁴ On the contrary, the university and its graduates should be able and free to act as critics and agents of social renewal and reconstruction. This does not mean the destructive criticism of the state or plotting its violent overthrow, but rather it implies that social, moral and political issues of contemporary modern concern are subjected by universities to debate while alternative value systems are compared and critically examined. Universities should also be able to challenge existing beliefs and conventions if they are in conflict with justice and truth.⁶⁵

As Rawls once put it:

"Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well arranged must be reformed or abolished if they are

unjust. Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override ... The only thing that permits us to acquiesce in an erroneous theory is lack of a better one; analogously, an injustice is tolerable only when it is necessary to avoid even greater injustice. Being first virtues of human activities, truth and justice are uncompromising."⁶⁶

The fundamental question is, as Pontius Pilate once put it: "What is the truth?" While no attempt will be made here to answer that question, it is the very existence of that question which necessitates free inquiry so that no one can claim to have the monopoly of truth. There must be a continuous search for truth which implies the challenging of conventional wisdom and accepted conventions. Moreover, while no attempt will be made here to define justice, there is no doubt that justice is important and that the continued appraisal of societal practices is essential if justice has to be done among fellow human beings. It would not be possible to challenge existing theories and practices if academic freedom were restricted. It is for this reason that academic freedom has been regarded as the very lifeblood of a university. In its absence the mission of a university in society atrophies.

Academic freedom entails that a university should be free to follow its traditional role of pursuing the truth. As Higgs points out, "a university must be free to weigh up different schools of thought, political, economic and social, a university must be free to disseminate insights flowing from

scholarly activities; a university must be free to appraise trends and tendencies in society, based on scientific research; a university must be free to pass on its knowledge to all students who are capable and wish to learn; and a university must be free to establish a climate in which its members may contemplate and be creative."⁶⁷

As has been said, academic freedom can only thrive within an autonomous and democratic institution and in a democratic and free society. The reason why university autonomy is essential for facilitating academic freedom, is based on the assumption that those who manage and direct the affairs of the university are best equipped by knowledge and experience to run a university and to determine the parameters of academic freedom. As Brook points out:

"Put in its simplest terms the case for academic freedom for university teachers rests on the belief that, provided he is fit for his job, the man on the spot knows best. This is true of most kinds of work, but there are many occupations, of which university teaching is one, that lose their meaning if there is any attempt to interfere with the independence of the man who is carrying out the duties of that occupation. Those who are paying the salary of the man concerned do not thereby acquire the right to interfere with the way in which he does his work and the first test of fitness to undertake work to which the term 'professional' is often applied is the

determination not to allow the paymaster to abuse his position. A doctor's diagnosis and treatment would be valueless if they were prescribed by those who paid his fee, and an accountant must be prepared to arrive at conclusions whose publication will expose and ruin his client. The university teacher should make a similar claim. It is essential that a university teacher or researcher should follow an argument to its conclusion, whatever that conclusion may be, and he cannot hope to do that if his job depends on his reaching one particular conclusion. The success of universities depends on the quality of the teachers and students that they can attract, and neither teachers nor students of the right quality are likely to be attracted to universities unless they enjoy freedom. People are fond of saying, in connection with government grants to universities, that those who pay the piper must call the tune, but, if there is any truth in this it is important to define what we mean by calling the tune".⁶⁸

It is quite clear that the university ought to have control over the awarding of degrees and the methods of teaching and researching to be followed. This follows naturally from the fact that it is the authority in the area of the acquisition of knowledge and rational inquiry. It is the institution responsible for knowledge acquisition and testing claims to knowledge and for inducting members of society into procedures for acquiring and testing knowledge. The university's

authoritative status in matters of the acquisition of knowledge and rational inquiry also provides the main justification why the university has to exercise control over who should be employed as teacher and researcher. It is only the university that is competent to judge who among the candidate teachers and researchers is of the appropriate or highest academic standard and who is not. This does not mean that the university is not subject to limitations when it comes to this. There may well be other factors it has to consider. While for instance the university is not supposed to take the factor of race into account, it may legitimately do this in order to address the racial imbalances in its staff complement. It may also prefer to appoint a South African as opposed to a non-South African⁶⁹. The university is also in the best position to determine who should be admitted as students.

The mission of a university is committed to the responsible exercising of freedom of expression and of inquiry. In this way a university in its pursuit of truth should "place genuine academic thought in permanent opposition to received dogmas, and will seek to teach people how to think, and not dictate to them what they should think."⁷⁰ It is a right that is liable to abuse but should not be abused⁷¹.

Similar sentiments were expressed by Centlivres et al, in the following terms:

"A university is characterised by the 'spirit of free enquiry, its ideal being the ideal of

Socrates - 'to follow the argument where it leads'. This implies the right to examine, question, modify or reject traditional ideas and beliefs. Dogma and hypothesis are incompatible, and the concept of an immutable doctrine is repugnant to the spirit of a university. The concern of its scholars is not merely to add and revise facts in relation to an accepted framework, but to be ever examining and modifying the framework itself."⁷²

Some of the quotations made above seem to emphasize a different perspective of the rationale or justification for academic freedom. This perspective is to the effect that academic freedom is justified by the very nature and role of a university. According to this view academic freedom is defensible on the ground that it is unjust for persons or groups to prohibit someone from doing or to punish him for doing what they have demanded or expected of him. Universities or higher education institutions expect teachers and scholars to seek the truth in their various fields of inquiry. Universities themselves are expected to be involved in the pursuit of truth. It would therefore be unfair to prevent academics or universities to do what they are supposed to do. A university that does not pursue truth and the advancement of knowledge, is not a university in the strict sense of the word even if it may claim to be⁷³. This view is not necessarily in conflict with the utilitarian view of academic freedom; it may be regarded as the other side of the coin.

As already indicated, academic freedom is dependent on other related freedoms like freedom of thought, of conscience and of expression. This is so because academics can be effective only if they are allowed to think critically, to reason logically and to follow logic wherever it leads them. They must also be able to express their ideas freely and openly, either orally or through publications. They can only influence contemporary ideas if their views are publicised and not censored.⁷⁴ To do otherwise would be to postulate a contradiction in terms. Their views may also be subjected to critical scrutiny so that the frontiers of knowledge are in the process extended. They should also be able to follow their consciences. While academic freedom is dependable on these rights, it includes more than what these rights entail.

Searle, in discussing the rationale for academic freedom, distinguishes between what he regards as the special and the general theories of academic freedom. According to him the special theory of academic freedom is the same as what has been stated above, namely that academic freedom is indispensable for the fulfilling of the mission of a university which is the pursuit of knowledge and truth for the benefit of society. He, however, concedes that this theory does not cover all contingencies. As a result he postulates a supplementary theory of academic freedom which he regards as the general theory of academic freedom.⁷⁵

This so-called general theory of academic freedom is unnecessary if one bears in mind that academic freedom does not exist in isolation. It is one of the freedoms in a free

and democratic society. An academic is not only entitled to academic freedom, but he is also entitled to other freedoms like freedom of speech, of assembly and of association to mention but a related few.

While it has been said that academic freedom is related to and sometimes dependent on freedom of speech, it is necessary to make a distinction between the two. Academic freedom involves more than freedom of speech. It is particularly important to emphasize this because some would argue that there is no need for special protection of academic freedom as it is subsumed under freedom of speech. The distinction is also important in another respect. There has been a growing intolerance of certain views which are regarded as racist or fascist or merely conservative at South African universities and universities abroad. People espousing or representing such views have been denied platforms to speak on many campuses. This intolerance has attracted the criticism from those who advocate an "open-door" policy at universities, namely that universities should allow all views and not censor some.

Academic freedom is not just concerned with the propagation of views, which freedom of speech entails, but it also involves subjecting those views to critical scrutiny. A university has a particular ethos which is characterised by free inquiry. It can, therefore, invite any speaker who is prepared to have his views tested and subjected to critical scrutiny. But it can refuse its hospitality to a speaker who comes to spread propaganda without wanting to conform to the ethos of the university. It can do this without any qualms about its image

because academic freedom means more than freedom of speech. As Parekh puts it: "There is an important distinction between talking politics and talking about politics, speaking a racist language and speaking about racism, and the university is concerned with the latter".⁷⁶

Academic freedom is conducive not only to the creation and expansion of knowledge but also to artistic and scientific creativity. Persecution or absence of freedom impedes both creative and scientific work and "it is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation."⁷⁷ This does not mean that lack of freedom and persecution completely stifle these, but they make their realisation difficult. As it has been said: "Persecution does not preclude creation, of course, any more than it can prevent scientific speculation. After all, The Pilgrim's Progress emerged from a prison, as did Grotius's Introduction to the Jurisprudence of Holland; and Galileo's Dialogue of the Two Principal Systems of the World was published after he had been warned by the Inquisition."⁷⁸ But it is ideal that a university should operate in an atmosphere that encourages free inquiry and scientific and artistic creativity.

Support for academic freedom is not synonymous with encouraging indolence. For this reason a university teacher cannot claim to be entitled to lecture or not to lecture at the whim of the moment under the guise of academic freedom. If that were so, the university would be as much entitled to be capricious in the payment of his salary. "One should be

unsympathetic towards a university teacher who claims that to lecture when he does not feel like doing so is unfair to his students because it would mean that he was not giving them his best".⁷⁹

Although university autonomy and academic freedom are indispensable for the acquisition and dissemination of knowledge for the betterment of society, they are nonetheless often stifled. The society served by the university or scholar, often puts obstacles in the way of his or her service in the form of prejudice, fear, short-sighted interest, complacency and sheer ignorance. The scholar himself may be subject to temptation from within and from without⁸⁰.

1.7 STATEMENT OF THE PROBLEM

The perennial problem of organised society is human selfishness resulting in the hunger for and abuse of power on the part of the rulers and those who are in possession of political power. Lord Acton's famous aphorism remains true even today, namely, that power tends to corrupt and absolute power corrupts absolutely. The corrupting influence of power often leads to the violation of the rights of the individual or institution. The violation of individual rights usually leads to conflict and instability and society in the process suffers. This is a situation that must be avoided. Even in the absence of conflict and instability, society suffers if certain fundamental rights are violated through the abuse of political power. The challenge of democracy is how best to limit the abuse of power and to direct its use to good ends."⁸¹

This has been largely responsible for the evolution of rights and guarantees in society. Despite the existence and recognition of these rights, they are never completely beyond threat. For this reason they need constant appraisal and redefinition. They also need vigilance and effective protection. This is true of university autonomy and academic freedom.

It is usually governments and government officials that violate the rights of individuals and institutions. From the earliest development of universities there has been mutual rivalry between the university on the one hand, and the government and the church on the other. This is usually because universities are often critical of the practices of governments and other organisations of society. Universities emphasise rationality whereas politicians and churches often appeal to emotions and established practices and beliefs of society. As a result governments often react by limiting the autonomy of universities and academic freedom if universities are irksome by criticising what governments do. This should not be so. The government's need to govern and a university's need to enquire freely should be allowed to coexist "in a complex, delicate and trustful balance". The government and university should recognize each other's distinctive natures and their fundamental missions in order "not to maul and manipulate each other."² But this is easier said than done. It is for this reason that both the institution of university and individual academics are vested with certain rights in the form of university autonomy and academic freedom which they can assert if the government oversteps the mark.

Governments of developing countries may sometimes emphasise other ideals which have to be attained at the expense of university autonomy and academic freedom.⁸³ The results are often unfortunate. The government often intervenes in internal university matters. Too much government interference in the internal affairs of a university often results in the academic ethos of a university suffering and the university being unable to attain its goal of being a beacon of light.

In most countries governments are responsible for the subsidising of university education. Government subsidy is always given with an implicit expectation of loyalty to the government.⁸⁴ If the university does not toe the government line, the government may react negatively to this. There is no doubt that governments feel considerably comfortable if they have the support of universities in what they do. In the process university autonomy and academic freedom suffer. Society itself may unwittingly aid and abet this. The reason behind this is that both the government and society may hold ideas which are wrong. People in general tend to defend established institutions and practices even if they are wrong and unjustifiable. They then become hostile to any person who challenges those practices or institutions even if it may not be in the best interest of society in the long run to retain those practices. The reason for this is that change is for many people uncomfortable. It brings about uncertainty and anxiety whereas to follow established practices is both easy and convenient.

The problem of academic freedom, of course, is not that what happens at universities is the exclusive concern of the teachers and students who live in them. It is rather the problem how to satisfy the government's legitimate interest while the government interferes as little as possible with the traditional freedom of universities.⁸⁵

Rights when considered individually may not be problematic, but when considered in the context of others, it becomes necessary to weigh each right against others in order to come to a decision that is fair and just to the protection of each right. The new Constitution contains a chapter on fundamental rights.⁸⁶ This chapter is binding on the legislative and executive branches of government.⁸⁷ Although a university is not part of the government, there is no doubt that the provisions on fundamental rights will be applicable to it as a result of the interpretive section of the Constitution. Section 35(3) of the Constitution stipulates that in the interpretation of any law, the court should have due regard to the spirit, purport and objects of the chapter on fundamental rights. A university is also entitled to certain rights in terms of the Constitution. This is because of the provisions of section 7(3). This section stipulates that juristic persons are entitled to the rights contained in this chapter, to the extent that the nature of the rights permits.

A question that has been seriously debated is whether the Constitution, and in particular the chapter on fundamental rights, should apply vertically or horizontally. This is what in German parlance is referred to as the Drittwirkung.

Although there are instances where the Constitution can apply between citizens, the better view seems to be that it should regulate the relationship between the state and the individual.⁸⁸ For present purposes it is not necessary to be involved in this investigation. What is important is that a university is entitled in terms of the Constitution to exercise its rights against the government or individual.

Some of the provisions of the chapter on fundamental rights have a bearing on the autonomy and academic freedom of universities. Alternatively, the interpretation of these may impinge on university autonomy and academic freedom. Section 14(1) of the Constitution guarantees to every person the right to freedom of conscience, religion, thought, belief and opinion. This includes academic freedom in institutions of higher learning. Section 15 provides for the right to freedom of speech and expression, which includes freedom of the press and other media, and the freedom of artistic creativity and scientific research. These provisions guarantee both institutional autonomy and individual academic freedom without necessarily derogating from accountability. This is borne out by the provisions of section 247(2) of the Constitution which precludes the national government from altering the rights, powers and functions of the controlling bodies of universities except through bona fide negotiations. But section 247(3) stipulates that if agreement is not reached in terms of subsection (2), the national government is not precluded from altering the powers and functions of the controlling bodies of universities. A proviso to this subsection states that interested persons and bodies are entitled to challenge the

validity of any such alteration in terms of the Constitution. This no doubt refers to the provisions on fundamental rights. The alteration may, for instance, be challenged on the ground that it is a violation of university autonomy and academic freedom protected by the Constitution.

Universities will obviously be affected by the constitutional prohibition of discrimination. Section 8(2) provides that no person should be unfairly discriminated against, directly or indirectly on the grounds of race, gender, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language. Section 8(3)(a) allows for a form of affirmative action in order to achieve adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.

Section 32 creates a right to education. It provides as follows:

"Every person shall have the right -

- (a) to basic education and to equal access to educational institutions;
- (b) to instruction in the language of his or her choice where this is reasonably practicable; and
- (c) to establish, where practicable, educational institutions based on a common culture,

language or religion, provided that there shall be no discrimination on the ground of race."

This provision implies that universities should facilitate equal access of students to university education. In this way they do not have the last say when it comes to admission policies. The government may intervene in this matter. For that reason university autonomy may be affected. Section 32(b) is linked with section 31 which entitles every person to use the language and to participate in the cultural life of his or her choice. A number of problems of interpretation will arise from these provisions. This interpretation will have an effect on university autonomy and academic freedom.

1.8 AIM OF INVESTIGATION

As pointed out above, section 14(1) of the interim Constitution guarantees the right to freedom of conscience, religion, thought, belief and opinion which includes academic freedom in institutions of higher learning.⁹⁹ From this section it appears that the Constitution guarantees not only individual academic freedom but also institutional autonomy.

The aim of this investigation is to establish the content and parameters of university autonomy and academic freedom as guaranteed by the Constitution. These are not defined in the Constitution. It is assumed that it is well known and agreed what university autonomy and academic freedom entail. But the content of these may be controversial in the light of the

changed circumstances in which the South African university operates today.

The government is assuming greater powers and these may affect both university autonomy and academic freedom. The purpose of the research is to throw light on the possible scenario of how the courts in general, and the constitutional court in particular, should interpret and protect the right to university autonomy and academic freedom. This will be done by tracing the historical evolution of university autonomy and academic freedom and by making a comparative study of similar concepts in other countries. The history of university autonomy and academic freedom will be traced to the inception of universities in the Middle Ages. Having traced that history, it will be necessary to trace the concept of university autonomy and academic freedom from the establishment of universities in South Africa up to the present moment. The purpose thereof is to have an understanding of the evolution of these concepts of university autonomy and academic freedom.

It has been said that in order to understand the growth of institutions "an ounce of history is worth a pound of theory."⁹⁰ This is to be attributed to the fact that "history in illuminating the past, illuminates the present and in illuminating the present, illuminates the future."⁹¹ It will then be necessary to make a comparative study of other jurisdictions. The purpose thereof is to deepen our understanding of our situation. It has been said that by comparing our law with the laws of other countries we enhance

our understanding of our laws and of the concept of law in general.⁹² These countries include Britain, Germany and the United States of America. One or two on the African continent will complete the picture. Even the Constitution provides that in the interpretation of the provisions on fundamental rights the courts are entitled to refer to international and comparative jurisprudence on these issues.⁹³

Admittedly the concepts of university autonomy and academic freedom are not new. They are as old as the university itself. But when circumstances change, it is necessary to revisit old and established institutions in order to ascertain their relevance and effectiveness or even their alteration in the light of changed circumstances and needs. Although university autonomy and academic freedom developed with universities, universities themselves have been constantly changing and adapting to new changes. New demands have been imposed on them and they have been asked to meet new challenges. In the process of these changes and adaptations, university autonomy and academic freedom have of necessity altered accordingly.

During this era of transition, universities in South Africa are called upon to fulfil certain new roles. They are expected to contribute to the Reconstruction and Development Programme (RDP) and to transform in the light of the new political and constitutional dispensation. In the course of this, university autonomy and academic freedom have to be affected. Apart from the need to give guidance to the constitutional court on how to interpret the constitutional provisions relating to academic freedom, it is essential that

universities themselves, and in particular their officials, should know what university autonomy and academic freedom entail in order to defend these rights. This is based on the assumption that universities can remain effective only if these rights are protected.

1.9 CONCLUSION

Although academic freedom is distinguishable from university autonomy, the two are interdependent and mutually reinforcing although the one can exist without the other. Academic freedom can only flourish within an autonomous university although even an autonomous university can restrict academic freedom. These concepts are undoubtedly of fundamental importance to the role and function of a university of generating knowledge. Knowledge can only be generated in an atmosphere of free enquiry. For this reason it has been said:

"A university is fundamentally about inquiry - that is what a free society is about, that is what the growth of knowledge is about, and ultimately that is what being human is about. A university is the guardian of the imagination that both describes and asserts the essential nature of humankind. A university thrives on debate because inquiry thrives on debate. Criticism is not suppressed nor should it be merely tolerated. Rather, a university should encourage critical exchange in pursuing its mission. Yet the phenomena of political, economic and technological power everywhere threaten the

university survival as a distinctive institution which stands in the service of humankind and which is characterised by a self-determining, self-regulatory inquiry after truth."⁹⁴

Academic freedom is also dependent on or related to other democratic freedoms. These include freedom of thought, freedom of expression and freedom of conscience. This is to be ascribed to the fact that academic freedom entails the freedom to think critically and creatively on one's discipline. It also entails the freedom to express and publish one's views even if they are contrary to conventional wisdom. Moreover, it involves following not only one's mind, but also one's conscience when it comes to one's discipline. Academic freedom may therefore in a way be regarded as the sum total of these rights and freedoms exercised in an academic environment, although it is an independent and substantive right. In addition to this, any academic is entitled to exercise the other freedoms like freedom of speech, of conscience and of association and any other political right. That is why it was pointed out above that academic freedom can only thrive within a free and democratic society. Academic freedom is aimed at facilitating the generation of knowledge which is ultimately for the good of society. In this context the words of Higgs are once again apposite:

"The interest of a university is none other than civilisation itself - the quality of humankind's existence. In other words, it subsumes the concern of the body politic and the market in the interests

of humankind's need for enlightenment in order to ensure a quality of existence that is becoming of civilisation. As a custodian of civilised values a university seeks to serve the cause of civilisation in pursuing truth by way of learning, research and scholarship. This value-laden activity represents a university's education mandate, wherein the individual often alone, often with others, seeks constantly, with imagination and creativity, to clarify limits in order to surpass them, to order the mind so as to set it free. This seeking is a university's essence."⁸⁵

Academic freedom can only flourish in a democratic society if democracy is understood in the liberal sense. Liberal democracy entails not simply majoritarianism which implies the rule by the majority, but it also means that certain rights could be enforced even against the majority. That is why rights are protected in a bill of rights.⁸⁶ In this way academic freedom implies that a person should be allowed to hold and express his views even against the views of the majority. Part of this is due to the fact that the majority may often be wrong because truth is not a monopoly of the majority. Yet truth is indispensable for freedom⁸⁷ and for people to attain the good life. Academic freedom therefore is of the very essence of a university as an institution of higher learning and deserves not only careful scrutiny but also effective protection if the university is not to be a contradiction in terms, a fire that burns not.

Although provision is made in the Constitution for the protection of academic freedom and university autonomy, it does not mean that this is the end of the story; it merely signifies the new beginning where individual and institutional rights are respected. It is well known that to provide a bill of rights is one thing, but to make it work is entirely another. Generally, the effective working of a bill of rights depends on a culture of democracy.⁹⁸ A culture of democracy is what we lack in this country. Universities in the past were influenced by societal views and government policy which led to academic freedom being inhibited. This may be so in future. Despite the constitutional guarantee of academic freedom, it does not mean that academic freedom will automatically be respected by all. It is the universities themselves that must continually strive to preserve and assert it.

FOOTNOTES

1. J Kriel "A university on African soil - Towards a definition of goals" in A J Thembela (ed) Proceedings of a symposium held on 7-9 September 1981 at the University of Zululand Kwa-Dlangezwa (1982) 18; see also O D Dhlomo "University goals in relation to staffing and administration" in A J Thembela (ed) op cit 57; Van Wyk de Vries Main Report of Commission of Inquiry into Universities (1974) 20; O M Bergh Ontwikkeling van Universiteite met Besondere Verwysing na die Organisatoriese Reëlings van Swart Universiteite in Suid-Afrika unpublished D.Phil thesis University of Port Elizabeth (1987) 56-58; L M du Plessis and A G du Plessis Introduction to Law (1992) 9-10; S J P du Plessis Voorgraadse Akademiese Produktiwiteit van die PU vir CHO vir die Tydperk 1962 tot 1976 unpublished D Ed thesis Potchefstroom University for CHE (1978) 16; J R Pauw Die Westerse Universiteit - Sy Ontstaan, Aard en Toekoms (1975) 85; B M Khutsong "Universities in Post-apartheid South Africa" 1992 SAJHE 88 ff; P Higgs "The Nature and Mission of a University: A Fundamental Response" 1991 SAJHE vol 5 no 2 164 ff; A H Strydom "The University on its Way to the Year 2000" RSA 2000 (1980) 32; I Wallerstein and P Starr (eds) The University Crisis Reader: The Liberal University Under Attack (1971) 78; E Shils "The Academic Ethos Under Strain" in P Seabury (ed) Universities in the Western World (1975) 21; R Lowenthal "The University's Autonomy versus Social Priorities" in P Seabury (ed) Universities in the

- Western World (1975) 75-76; A van de Sandt Centlivres (ed) The Open Universities in South Africa (1975) 10; H J Mosha "The Role of African Universities in National Development: A Critical Analysis" 1986 Comparative Education 94; S J Shand "The Making of a University". Lecture delivered at Stellenbosch on the occasion of the passing of the University of Stellenbosch Act, 1916 3; National Commission on Higher Education (NCHE) A Framework for Transformation (1996) 68-69.
2. Higgs 164; see also Strydom 31 ff; J H Keenan "Open Minds and Closed Systems: Comments on the Functions and Future of the 'Urban' 'English-speaking' University in South Africa" 1981 Social Dynamics 36 ff; E A Lynton "Re-examining the role of the University" 1983 Change Year 19 ff; A H Halsey "The Idea of a University: the Charles Carter Lecture, 1984" 1985 Oxford Review of Education 115 ff; T A Markus "Universities and the Market" 1985 Culture, Education and Society 5 ff; B F Nel "The South African University in the 1980's: An Identity Crisis" 1983 Journal of the University of Durban-Westville 212 ff; C Kerr "A Critical Age in the University World: Accumulated Heritage versus Modern Imperatives" 1987 European Journal of Education 183 ff; H Röhrs "The Idea of the University in the Contemporary World" 1989 Education (Germany) 52 ff; P Smit "Die KUH-Ondersoek na die Universiteitswese: Implikasies vir die Universiteit" 1989 Aambeeld 6 ff; P Scott "Knowledge, Culture and the Modern University: Past Speaks and Future Prospects" 1989 The Times Higher Education Supplement 873 ff; P Scott "Knowledge, Culture

- and the Modern University III: Redefined roles for a Mass Age" 1989 The Times Higher Education Supplement 24 ff; D Holbrook "Is the Idea of a University now Totally Jettisoned?" 1984 Culture, Education and Society 191 ff.
3. Du Plessis Introduction 10; R M MacIver Academic Freedom in our time (1967) 4; D Bok Beyond the Ivory Tower : Social Responsibilities of the Modern University (1982) 19; N Lobkowitz "Man, Pursuit of Truth and the University" in J W Chapman (ed) The Western University on Trial (1983) 32.
 4. A van de Sandt Centlivres et al (ed) The Open Universities in South Africa (1957) 33; G L Brook The Modern University (1965) 10-11; Shand 10.
 5. Bok 20; see also R Polin "Freedom of Mind and University Autonomy" in J W Chapman (ed) The Western University on Trial (1983) 39.
 6. Brook 16; Shand 10-12.
 7. Main Report of the Commission of Inquiry into Universities (1974) 31-32; Brook 11.
 8. Main Report 32 ff, Brook 14-15; NCHE 83ff.
 9. Brook 15; Polin 41; A Loizou Ethos Community and Academic Freedom (1989) 8 ff.
 10. Higgs 167.
 11. Main Report 77 ff; cf NCHE 83ff.
 12. J Moulder "University Neutrality: Some Puzzling Reflections in a South African Mirror" in H W van der Merwe and D Welsh (eds) The Future of the University in Southern Africa (1975) 245 ff, Bok 34.
 13. G Budlender "The Conservative Bias of South African Universities" in Van der Merwe and Welsh op cit 260 ff.

14. M Hawkesworth "The Politics of Knowledge : Sexual Harassment and Academic Freedom Reconsidered" in M Tight (ed) Academic Freedom and Responsibility (1988) 21 ff; A Nolan Academic Freedom : A Service to the People (1986) 5.
15. Wallerstein and Starr 59 ff.
16. Moulder 248-251; R Barnett "Limits to Academic Freedom: Imposed upon or Self-imposed?" in M Tight (ed) Academic Freedom and Responsibility (1988) 101.
17. J Searle The Campus War: A Sympathetic Look at the University in Agony (1972) 183; see also Lowenthal 80.
18. Searle 184; Lowenthal 80; J W Chapman "Introduction : The Western University on Trial" in J W Chapman (ed) The Western University on Trial (1983) 7.
19. Moulder 251-253; J C Alexander "The University and Morality: A Revised Approach to University Autonomy and its Limits" 1986 Journal of Higher Education 465.
20. Alexander 468.
21. Lowenthal 80.
22. Alexander 469.
23. Searle 185-186; Alexander 469.
24. A van de Sandt Centlivres (ed) The Open Universities in South Africa (1957) 3 ff.
25. Searle 188; Lowenthal 80.
26. Higgs 167; G Caston "Academic Freedom : the Third World Context" 1989 Oxford Review of Education Vol. 15 no. 3 305.
27. B Beinart et al The Open Universities in South Africa and Academic Freedom 1957-1974 (1974) viii.

28. Van Wyk de Vries Commission Main Report 35 ff; Pauw 174; see also G Caston "Academic Freedom" 1992 The Encyclopaedia of Higher Education vol 2 1295 ff; E F J Malherbe "Die Regsbeskerming van Akademiese Vryheid en 'Universiteits- outonomie' in 'n Nuwe Suid-Afrika" 1993 TSAR 366; Beinart et al 2; R M McIver Academic Freedom in Our Time (1967) 36; M Rendel "Human Rights and Academic Freedom" in M Tight (ed) Academic Freedom and Responsibility (1988) 74-75; S M Jasper "Britain's Education Reform Act: A Lesson in Academic Freedom and Tenure" 1990 Journal of College and University Law 453-4; Polin 28; Loizou 20 ff; NCHE 73.
29. Rendel 80; M Tight "So What is Academic Freedom?" in M Tight (ed) Academic Freedom and Responsibility (1988) 123; Jasper 453; Caston 307.
30. Centlivres et al 11-12, 14; this definition was adopted from an address to new students at the University of Cape Town by the Principal and Vice-Chancellor, Dr T B Davie (Cape Times 28 February 1953); it was approved by Mr Justice Frankfurter in Sweezy v New Hampshire 354 US 234 at 263 (1957); Bok 38; See also J N Kaul The Governance of Universities : Autonomy of the University Community (1988) 62-63.
31. Beinart et al 1.
32. Polin 40.
33. Van Wyk De Vries Commission Main Report 74 ff; NCHE 73; see also Bergh 113 ff; Caston 307; Bok 38-40.
34. S Miller "Academic freedom in South Africa" 1991 The Australian Universities' Review 34.

35. MacIver 9; A Loizou Ethos Community and Academic Freedom (1989) 1 ff.
36. Van Wyk De Vries Commission Main Report 75-76; NCHE 73; Pauw 174; Searle 170; Beinart et al 2-4; MacIver 6-8; Jasper 455.
37. M Tight "So What is Academic Freedom?" in M Tight (ed) Academic Freedom and Responsibility (1988) 132.
38. Brook 153.
39. Beinart 4.
40. Miller 33.
41. Miller *ibid.*
42. Miller *idem ibid*; this view has also been prevalent in countries which have not necessarily espoused the concept of a people's university - see M Fisk "Academic Freedom in Class Society" in E L Pincoffs (ed) The Concept of Academic Freedom (1975) 5 ff; contra see B H Davis "Academic Freedom, Academic Neutrality and the Social System" in E L Pincoffs (ed) The Concept of Academic Freedom (1975) 27 ff.
43. Miller *idem ibid*
44. Miller *idem ibid.*
45. Rendel 80
46. Malherbe 366; Beinart et al 4; Caston 308-9.
47. Beinart et al 4-5; for a further discussion of this see E N Griswold Academic Freedom and Human Freedom (1967); G Spivak Thinking Academic Freedom in Gendered Post-coloniality (1992).
48. Rendel 74 ff.
49. E Shils "The Modern University and Liberal Democracy" 1989 Minerva 425 ff.

50. Malherbe 363; Tight 117 ff; Rendel 83-84; MacIver 7; Jasper 449, 455.
51. Centlivres et al 10; contra Searle 170; see also S Goodlad "Four Forms of Heresy in Higher Education : Aspects of Academic Freedom in Education for the Professions" in M Tight (ed) Academic Freedom and Responsibility (1988) 57; MacIver 4; Loizou 1.
52. Shils 441; MacIver 9; Chapman 8.
53. L Henkin The Rights of Man Today (1978) 3; R Dworkin Taking Rights Seriously (1977) 185 ff; see also Rendel 74 ff.
54. Henkin 3 *ibid.*
55. On some of these conflicts see CRM Dlamini "A court-enforced bill of rights for South Africa?" 1988 Journal of Contemporary African Studies 81.
56. Henkin 2-3.
57. MacIver 11; Chapman 8.
58. Tight 117 ff; Jasper 455; MacIver 10; Nolan 5 ff; D M Rabban "A Functional Analysis of 'Individual' and 'Institutional' Academic Freedom Under the First Amendment" 1990 Law and Contemporary Problems vol. 53 no. 3 232; Loizou 27 ff.
59. J R G Turner "The Price of Freedom" in M Tight (ed) Academic Freedom and Responsibility (1988) 106; MacIver 8-15.
60. Turner 107; see also Rabban 233.
61. Bok 18.
62. Bok *ibid.*

63. Higgs 165; Shils 441; D Mahony "Autonomy and the Demands of the Modern State: A Systemic Study" 1992 Higher Education Review 8-10.
64. J C Alexander "The University and Morality: A Revised Approach to University Autonomy and its Limits" 1986 Journal of Higher Education 437; Centlivres et al 10 was saying more or less the same thing when he said that "A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest"; see also MacIver 11.
65. Higgs 165.
66. J Rawls A Theory of Justice (1972) 2-3.
67. Higgs 167; see also Centlivres et al 10; Shils 441.
68. Brook 145.
69. Miller 34.
70. Higgs *ibid.*
71. MacIver 8
72. 10.
73. H E Jones "Academic Freedom as a Moral Right" in E L Pincoffs (ed) The Concept of Academic Freedom (1975) 44ff.
74. For a discussion of the value of freedom of speech see B van Niekerk "The Uncloistering of the Virtue: Freedom of Speech and the Administration of Justice - A Comparative Overview" 1978 SALJ 362 ff.
75. 170 ff; see also J R Searle "Two Concepts of Academic Freedom" in E L Pincoffs (ed), The Concept of Academic Freedom (1975) 86 ff; W van Alstyne "The Specific Theory of Academic Freedom and the General Issue of Civil

- Liberty" in E L Pincoffs (ed) The Concept of Academic Freedom (1975) 60 ff; cf MacIver 11.
76. B Parekh "Free Speech and the Universities" in M Tight (ed) Academic Freedom and Responsibility (1988) 69 ff; Loizou 22.
77. Centlivres et al 10-11; see also Beinart et al 2.
78. Centlivres et al 11.
79. Brook 155.
80. MacIver 10.
81. D V Cowen The Foundations of Freedom (1961) 83.
82. Higgs 167.
83. L Thompson "Some Problems of Southern African Universities" in Van der Merwe and Welsh (eds) op cit 280 ff.
84. A M Bickel "The Aims of Education and the Proper Standards of the University" in P Seabury (ed) Universities in the Western World (1975) 6.
85. Brook 155.
86. Chapter 3 of the Republic of South Africa Constitution Act 200 of 1993.
87. Section 7 of the interim constitution.
88. A Cachalia, H Cheadle, D Davis, N Haysom, P Maduna and G Marcus Fundamental Rights in the New Constitution (1994) 20; South African Law Commission Interim Report on Group and Human Rights (1991) 489-94.
89. Section 14(1) of the interim constitution.
90. W Seagle The Quest for Law (1941) 27.
91. B N Cardozo The Nature of the Judicial Process (1921) 53.

92. A J G M Sanders "The Characteristic Features of Southern African Law" 1981 CILSA 199.
93. Section 35(1) of the interim constitution; for a discussion of this see J Dugard "The Role of International Law in Interpreting the Bill of Rights" 1994 SAJHR 208.
94. Higgs 166.
95. Higgs *ibid.*
96. J D van der Vyver "Parliamentary Sovereignty, Fundamental Freedoms and a Bill of Rights" 1982 SALJ 557 ff; see also C R M Dlamini "A Court-enforced Bill of Rights for South Africa?" 1988 Journal of Contemporary African Studies 81 ff; on liberal democracy see J Dugard "The Quest for a Liberal Democracy in South Africa" 1987 Acta Juridica 237 ff.
97. John 8:32; MacIver 4.
98. Dugard 240.

CHAPTER 2

THE HISTORICAL EVOLUTION OF UNIVERSITY AUTONOMY AND ACADEMIC FREEDOM FROM THE MIDDLE AGES

2.1 INTRODUCTION

As stated earlier, it may be necessary to examine the historical evolution of institutions in order to obtain a proper understanding of their true nature.¹ Universities are no exception to this rule. In the words of Versveld: "In die oorsprong van dinge kan ons dikwels die elemente bespeur waarsonder hulle nie sou kon voortbestaan nie."² Allott expressed the same sentiments when he said that history is of interest to an historical jurist interested in the processes by which legal systems, and legal institutions and ideas, evolve over time, and change from one form to another in response to new demands or new influences.³ This is so because human institutions are sometimes influenced by the course of political, sociological and cultural history of a people, country or sub-continent. Universities in South Africa regard themselves as modelled on their medieval counterparts in Europe. It is for this reason that we have to trace the history of universities to the Middle Ages. The purpose of this is not to promote idle curiosity, but to go to the roots of universities in order to establish why they developed certain practices and principles. It is also to seek justification for the existence of certain practices and principles which universities continue to follow.

Although there are precursors to the university as it developed during the Middle Ages,⁴ there is general agreement that the university as we have it today is a product of the Middle Ages.⁵ The word "universitas" had hitherto not been used exclusively to mean a university as we understand it today; it was a term used to denote merely a plurality or aggregate of persons. There was even a "Universitas Carceratorum", an association of prisoners. "Universitas vestra" in a letter addressed to a body of persons merely meant "the whole of you". In a technical sense "universitas" meant a legal corporation or juristic person. The term that was mostly used to describe a university was "studium generale" which meant a place where students from all parts of the world were received.⁶

It was during the Middle Ages that great studia generalia like Bologna, Salerno and Padua in Italy, Paris and Montpellier in France, and Oxford and Cambridge in England came into being. The coming together of masters and students was the result of a spontaneous movement and not that of planning.⁷ There were intellectual, social and economic reasons for that development. It will not be possible to deal extensively with all of them here. Only a few cursory remarks will suffice in order to put the matter in proper perspective. Although there may be entirely rational reasons for the existence of university autonomy and academic freedom today, there is no doubt that the circumstances surrounding the inception and development of universities give one a better grasp of the need for and the evolution of these concepts.

2.2 DEVELOPMENT OF UNIVERSITIES AND UNIVERSITY AUTONOMY

2.2.1 Reasons behind the establishment of universities

In order to understand the evolution of university autonomy and academic freedom, it will be illuminating to consider the circumstances under which universities developed. As already stated, there are various reasons for the origin of universities in the Middle Ages.

One of the reasons for this development was that the eleventh century was the turning point in the intellectual history of Europe. There was both ecclesiastical and cultural renewal. This culminated in what has been called the Renaissance of the twelfth century which, although not as profound as and as conspicuous as that of the fifteenth century, resulted in the intellectual revival which was spearheaded by people like Petrus Abelardus and others who popularised theology and philosophy through their dialectical method. This caused a resurgence of interest not only in theology and philosophy but also in law,⁸ and hence in the growth of universities.

A second reason for the origin of universities in the Middle Ages is to be ascribed to certain political, social and economic considerations. This was the era that marked a change from an agrarian society, based on the feudal system, to an industrialized one. The increase in trade with the east led to the creation of industries and financial institutions which led to bigger groups of people coming together. This resulted in the establishment of cities. The population increase that

ensued required a sophisticated management system and the services of administrators, lawyers and medical doctors. Training for the occupation of posts outside the church, became more necessary than before. This further resulted in the need for better training and better utilisation of the work force. These needs could no longer be adequately satisfied by the cathedral and monastic schools of the time. Consequently, the creation of new and more differentiated, and later more advanced, institutions was a natural parallel to the development of the city as a political, social and geographical unit.⁹

A third aspect of the Middle Ages university, which does not necessarily explain its origin as the form it took, was that this time coincided with the origin and development of the guilds owing to the growth and freedom of cities. Traders and craftsmen formed themselves into brotherhoods or guilds to protect and promote their specific interests. These guilds were self-managing and formed close-knit units where outsiders were excluded unless they were masters of their craft. Members of the guilds took care of each other's interests. In order to be admitted to a guild, a person had to have undergone years of training as an apprentice under a master of a particular trade. The master craftsman would then recommend him to the guild of which he would also become a member and master craftsman. The guilds were therefore autonomous and only admitted masters of the particular trade as members.¹⁰

2.2.2 Autonomy and the role of the guilds

The model of the guild contributed in no small measure to the development of university autonomy and academic freedom. The spirit of independence and coherence which pervaded the guilds was attractive to the brotherhood of the learned, as they strove for a greater say over their affairs and wanted to free themselves all the more from domination by the local church and secular authorities. At Bologna, for instance, foreign students formed themselves into guilds to protect their interests. At Oxford and Paris it was the masters who formed themselves into guilds. Although the masters controlled the guilds, the students were also part of the guilds because they would themselves ultimately be members thereof. This gave rise to universities being regarded as corporations of masters and scholars (universitates magistrorum et scholarium). It was this organizational pattern of the guilds which gave rise to the principle of autonomy which is important even today and which is the subject matter of this investigation. The corporate identity gave rise to the independence of the guilds. The spirit of independence on the one hand and communal protection, on the other, which guilds had, had a profound influence on education and contributed to the evolution of universities in that form."

2.2.3 Autonomy and the role of the chancellor

The situation at Bologna and Paris led to a great variety of studies being offered in the schools. This also led to the coming together of a great number of pupils and teachers. At

Paris they were under the control of the bishop who mostly delegated his responsibility to another member of the church hierarchy. Although this person sometimes had other titles, it was usually the chancellor of the cathedral who was the master of the schools. As he had other obligations, he was seldom involved in teaching himself. For this reason, he appointed people under him to do the teaching. He wielded considerable power over those teachers directly under his control. As the numbers of those students who came to study grew, a group of masters developed who wanted to be more independent and to be able to give lectures to those students who could pay without the control of the chancellor. As a result a struggle ensued between the chancellor and the masters. This struggle was not only between the chancellor and the masters, but it was also between the masters and the church as represented by the chancellor. It was a struggle of the masters to free themselves from the control of the church and the chancellor. A practice then evolved for the chancellor to give permission to such masters to establish their own schools in the vicinity of the cathedral. This licence to teach became known as the licentia docendi. Although initially the chancellor had great power, even over teachers who were not directly under his authority, these masters gradually obtained more powers and began to stand together to protect their interests.¹² In this way the fledgeling universities gained more autonomy.

During the twelfth century, this group action began to take shape. The masters were, among other things, dissatisfied that the licentia docendi was frequently issued to people who did not really qualify and were consequently not masters of their

subjects. Here the influence of the guilds was exercised. The masters insisted that no new member would be allowed to the guild without having the necessary schooling and training under a trained craftsman. The masters also wanted to ensure the proper training of new masters. To attain this they introduced an initiation ceremony which became known as the inceptio. After having been examined and licensed by the chancellor, the novice had to deliver an inaugural lecture or engage in a public disputation in the presence of his former master and some fellow masters. In this way, he proved his ability to teach in the area of expertise he had chosen. This gave him admission to the fellowship of the "elect masters". It was during this time that the practice of conferring doctorates commenced. Initially "doctor" simply meant a licence to teach. It started in the middle of the twelfth century. The terms "doctor", "master" (magister) and "professor" were used synonymously throughout the Middle Ages, and meant one licensed to teach. The masters co-operated closely in matters of common interest. The corporate action of the masters gave rise to the form in which the university would develop."

The introduction of the inceptio did not mean the end of the struggle between the chancellor and the masters. The chancellor still had the power to examine and license candidates. The masters also wanted to possess this power. Once they had gained this, it would mean the eventual freedom from the chancellor and the cathedral. Students also wanted greater autonomy and certain guarantees as they were in constant conflict with the city population which sometimes led

to violent clashes. Students felt they were unreasonably punished by the city authorities whereas they fell under the jurisdiction of the church. After such a clash, and in the year 1200 where a number of students were killed, the masters approached King Philip Augustus. As he feared that they would leave the city, he issued a charter to both masters and students. In this charter he acknowledged their privileges and provided that they be treated with respect, and in the event of misconduct that they be handed to the church authorities.¹⁴

During this period the idea of a community of scholars and masters had crystallised. Thus the university had come into being not necessarily as a consequence of a deliberate act of foundation but as a result of a gradual process of development. The victory of 1200 led the masters to realise that their power lay in unity. Consequently, certain practices were established whereby their mutual responsibility for their interests was accepted. Various rules were also accepted on matters like academic dress, the holding of lectures, the attendance of funerals of deceased masters and many other issues. The local church authorities did not take kindly to these developments and attempts were made to suppress them, but the masters apparently had the support of the pope. This ultimately led to the masters not taking an oath of allegiance to the chancellor as had been the case before. It was also provided that they should be consulted on the competence of a candidate to whom a licentia docendi was granted. In this way the masters received greater powers. They could choose certain officers. They also received a seal and recognition for their rectors and other officials.¹⁵

Although Oxford University had a close affinity to Paris in its academic and intellectual life, there were striking differences which arose from the different milieux of the two institutions. Whereas Paris had been characterised by the struggle for autonomy against the chancellor and the cathedral chapter, this was not so with Oxford. At Oxford there was no struggle for independence, either against the chancellor or the mendicants and there was little intervention from the pope. Oxford did not form part of a capital, never had a cathedral school and was in a more remote kingdom where there was not frequent contact with the pope. Moreover, the position of chancellor at Oxford was radically different from that at Paris. At Oxford the chancellor was far more an intermediary between the bishop and the university than at Paris where he stood outside the society of masters as a representative of the bishop. While at Paris the chancellor was a symbol of alien rule, at Oxford he was a symbol of self-rule. He was the direct successor to the master of the schools and did not originate in the cathedral chapter.¹⁶

The main reason for this development was that there was no cathedral school at Oxford and the bishop was distant from Oxford. The fact that there was no immediate control from the bishop or that there was no subjection to the chapter, gave the masters greater freedom. This also accounted for the absence of an intense struggle between the university and the church. The chancellor wielded a lot of influence and while at Paris his powers were gradually reduced, at Oxford the opposite took place. This was also facilitated by the fact that at Oxford the chancellor was nominated by the masters and

his name submitted to the bishop who confirmed the appointment on the fiction that he had nominated him. Whereas after 1231 the chancellor at Paris had been divested of most of his original powers, and retained only the power to confer the licence to teach, at Oxford he not only retained his original powers, but he also combined them with those of the Paris rector and the chief magistrate of the city. His position, however, was made easier by the fact that he was elected by the masters and not imposed by the bishop. He held office for two years. If he proved to be intolerable, he could be deposed by a direct decree of the congregation of the whole university following representations to it by the congregation of regents. The proctors, who initiated the process, could then call upon the chancellor to resign. If the chancellor expelled a master, he did that in the congregation. On the whole when the chancellor became the presiding officer of the university, he became identified with the university and was separate from the bishop. Yet educationally the university was genuinely autonomous although there were always struggles with the society.¹⁷

2.2.4 The great dispersion

In 1229 at the University of Paris an event took place which had a great influence on the university. A group of students entered a tavern during a carnival. In this tavern they found good wine. A quarrel with the owner of the tavern over the account ensued and fighting broke out. The neighbours were summoned to help and the students were driven out, but the students returned the following day with reinforcements and

armed with swords and sticks to take revenge. Mercenaries were called in and killed a few innocent students. The masters protested against this and decided to suspend lectures. This, however, did not succeed in swaying the authorities to their side. For this reason the masters decided that, if within a month justice was not done, they would dissolve the university for a period of six years and that even after the expiry of this period they would not return unless their grievances had been addressed. They carried out this threat and the great dispersion of 1229 took place. Many of the university teachers went to Oxford and Cambridge in England and others went to smaller universities in France where they continued their activities in peace.¹⁸

The pope did not agree with his representative in Paris on how this matter had been handled and recalled him. In this way he demonstrated his support for the masters. The removal of the university caused a great loss, not only of prestige but also of income, to the city. This forced the king to reconsider the matter. It is not clear what concessions were granted, but in 1231 students and masters were back in Paris. During the period of dispersion, they managed through their representatives to extract further rights and privileges from the pope. The grievances were redressed by papal bulls, and especially by the Charter of 1231, the Parens scientiarum, often referred to as the Magna Carta of the University of Paris. It laid down rules that were to promote the welfare and growth of the University of Paris. Through this the powers of the chancellors were restricted. This gave the masters a position of power.¹⁹

This victory is regarded as an indication of a final triumph of the university which led to its entrenchment and recognition as a third power which exercised great influence in the Middle Ages. This was a power in addition to the state and the church. For this reason one writer during the Middle Ages referred to the triad as the Sacerdotium, Imperium and Studium to emphasise the powerful position of the university.²⁰

2.2.5 The struggle continues

Although the above describes the situation at Paris, the same type of struggle took place at Bologna, although here it was not against the church, or the archdeacon (later chancellor) who had been recognized and willingly given a say in university matters, such as the examination of students. Here the students were opposed to the city authorities as represented by the podesta or chief magistrate. This ultimately led to the greater recognition by the city for the independence or autonomy and right of the university to regulate its affairs.²¹

In the matter of governance, two models emerged. At Bologna the government of the university was in the hands of the students, who had full authority over their teachers. At Paris on the other hand, the government of the university was in the hands of the teachers and the students had no say in it. The Bologna model was followed throughout Italy and Spain and by all the French universities other than Paris. The Paris model was adopted in England and Germany.²²

The reason behind this difference is that the students at Bologna were adults who were already working and were even financially independent. Some of them occupied important positions in society. They were therefore more mature and responsible than the students from the north. It is quite understandable that they wanted to manage the university and why the idea of guilds was strongly under the influence of students at Bologna. In Paris, on the other hand, the students were still young and inexperienced.²³

2.2.6 Autonomy in internal matters

In matters of admission, internal management and administration, curriculum content, method of teaching and examinations, the university was entirely autonomous and regulated its own affairs without any external interference. As regards admission requirements, what was only necessary was that a prospective student should possess a knowledge of Latin. At Bologna, a student had to register by having his name on the matricula. This was a list of the names of the members of the university. At Paris and Oxford, where only the masters constituted the university as a corporate body, there was no matricula. When a student matriculated at Bologna, in other words when he put his name on the matricula, he had to take an oath of allegiance to the university and had to pay a prescribed fee.²⁴

2.2.7 The role of the students

The students came from practically the whole world of that time. Students had freedom of movement and as a result the university of this era was international. This was facilitated by the fact that Latin was the medium of instruction of all universities and all belonged to the Roman Catholic Church.²⁵ A problem that arose from this internationalism was that foreign students felt that they were sometimes overreached. They also experienced considerable problems on many issues. One of these problems was that of accommodation. As strangers, they did not enjoy any diplomatic immunity and were subjected to stricter laws than the indigenous population. Consequently they often landed in gaol and faced many other problems. The result was that the students from many countries formed themselves into groups. At Bologna there were initially many such groups. They were, however, later reduced to four and ultimately, to two. These were known as the Cismontani and the Ultramontani. The Cismontani meant those who come from this side of the mountains (the Alps) and the Ultramontani meant those who come from the other side of the mountains. These groups were called nationes or nations. These nations acted as groups on behalf of their members and at Bologna they took the management form of the guilds. A similar practice obtained at Paris. But otherwise than at Bologna there were four nationes and the masters were also in control of the nationes.²⁶

At Paris the nationes were largely confined to the faculty of arts. Because the faculty of arts was the biggest in the university, the nationes had a considerable influence on the

management of the whole university. Each nation had its own representative or procurator and they in turn chose a rector who was in charge of the four nations and was ultimately in charge of the whole university. Nations were largely educational institutions. They were involved in teaching and the passing of examinations. They contributed in asserting the autonomy of the university against the chancellor and in the process increased the power and authority of the rector who, as has been said, was initially the head of the arts faculty. The reason for this was that the rector was elected by the representatives of the nations and was therefore drawn from the masters and was one of them, unlike the chancellor who stood over the university and was initially appointed by the bishop. His tenure was unlimited and his powers were spiritual, judicial and educational whereas the rector's tenure was limited - initially a month or six weeks, although later extended to three months."

The nations gradually obtained official recognition from the pope. This also entailed the right to appoint officials, to issue statutes and perform other functions. This led to the whole corporation being known as the universitas magistrorum et scholarium studii Parisienis²⁸ At Oxford, the nations were not the independent bodies they were at Paris. There were only two nations in the arts faculty; they did not have the importance of the four Paris nations. They were divided into those north and south of the river Nene - the Boreales and Australes. The Scots belonged to the Boreales and the Irish and Welsh to the Australes together with anyone from France or elsewhere. Although the nations at Oxford were also bellicose,

they did not receive formal recognition in the functioning of the university and their autonomy was not fostered. They were characterised by fighting with each other which led to the making of treaties between them. Because of these disturbances they were forced to merge into one. But the two proctors who were elected by them remained. It was these two who had an influence on the university as they were regarded as executive officers in the absence of the rector. As at Paris they were initially called rectors, but this name fell into disuse. They exercised a number of functions and assisted the chancellor. The constitutional difference between Oxford and Paris is that at Oxford the university performed many of the functions of the faculty and nations.²⁹

The statutes of the universities frequently dealt with the daily life of the students. Even at Bologna with its typically mature students, these people were exuberant and sometimes made themselves guilty of all sorts of misconduct. The Italian students apparently frequently made themselves guilty of brawls and gambling. This explains the strict regulations on the carrying of weapons and the prohibition of gambling. A student could not even be a spectator where gambling took place in public. At the University of Lerida in Spain, students were prohibited from entertaining actors and professional jesters, except at specified times and even then the jesters were not allowed to pay the students. They could also not ride on horseback to classes and they could not keep horses, although mules were allowed.³⁰ There were also rules to regulate initiation and to protect new students from harsh treatment.³¹ Rules and regulations against the keeping of dogs

and falcons, against gambling and chess, against visits to taverns, against commercial traffic, the throwing of stones, the carrying of weapons, the use of improper language, disobedience and serious misdemeanours of an indecent nature, to mention but a few.³² There was also constant friction between the students and the townspeople³³ which sometimes erupted into violent conflict as pointed out above. What is important, however, is that in making these rules, universities were entirely autonomous of outside bodies. The rules were meant to ensure discipline and order within the university as no education can take place in the absence of order and discipline.

2.2.8 The role of the faculties

The masters during the medieval period grouped themselves according to the three areas of specialisation, namely, law, medicine and theology. In order to gain admission to any of these faculties, students had first of all to be admitted to the arts faculty which was also regarded as the lower faculty.³⁴ Each faculty had a great measure of autonomy. But gradually the masters realised that their salvation lay in co-operation especially in times of struggle against the chancellor. As a result they were gradually recognized as organs of the university where each one worked within its confines for the benefit of the whole.³⁵ Each of the higher faculties was headed by a dean whereas the arts faculty was headed by a rector. Owing to the great numbers of the students and masters in the arts faculty, at Paris the rector later became the head of the university as a whole. By virtue of his

position, he was empowered to convene a congregation to discuss a matter referred by one of the faculties to the joint meeting.³⁶

As already mentioned, before a student could be admitted to one of the higher faculties, he had to join the arts faculty. The influence of the guilds played a significant role here. When he was studying in the arts faculty, the student was a pure student. On completion of the course, he would be examined according to the practice of the time, and if he was successful he would receive the title of bacalarius (later baccalareus). He would then proceed with his studies in the higher faculty. During this time he was entitled to give lectures in the arts faculty. After completing about five or six years, he could submit himself for examination for the licentia docendi which examination was conducted by the chancellor, although the role of chancellor later became purely ceremonial. He would then have his inceptio. There were no written examinations, but the examination consisted of disputations or argumentation with the masters and fellow students on the prescribed books.³⁷

As already stated, the chancellor was initially involved in the granting of the licentia in the higher faculties, but later his involvement was merely ceremonial. The examinations and the granting of the licentiates were accompanied by a lot of ceremony and celebration. The licentia docendi gave the holder the right to give lectures even independently. With the increase in the number of universities, the recognition of university qualifications became a problem. The right to

lecture in one university did not imply the right to lecture at other universities. During the thirteenth century a practice developed whereby those who held qualifications from recognized studia generalia were entitled to lecture at other universities. This right became known as the ius ubique docendi.³⁸ This is evidence of the autonomy of each university. But it is also evidence that university autonomy is not absolute.

Obtaining a licence to teach did not entitle a candidate to admission to a guild. After the student had undergone a private examination, a public examination or conventus had to take place. This was the ceremony in terms of which the candidate was admitted to the membership of the masters by holding a practical lecture. This was derived from the Roman law practice whereby a person was invested with the de facto possession of his office by an actual and solemn performance of its functions.³⁹ At Paris there was a similar ceremony, the inceptio, where the licensed candidate delivered his inaugural lecture, whereupon he was given his biretta and book. Then he received a kiss of brotherhood from the presiding master and took his place on the chair, cathedra, of the masters.⁴⁰

At Oxford the higher faculties had no independent organization with their own deans and statutes. Their regulations dealt with academic requirements and especially with the way in which they sought dispensations from higher authority, generally the congregations. This was largely due to the dominance of the arts faculty.⁴¹

2.2.9 Course content

As already indicated, at Paris and other northern universities students had first to be admitted to the arts faculty. Here the universities followed the tradition of the earlier schools and offered the seven liberal arts, the septem artes liberales. They were regarded as the liberal arts because they were inherited from the Romans. According to Roman culture these were skills or abilities which a free and civilised person had to have in contradistinction with the labourers and slaves. During the Middle Ages, these were regarded as forming the foundation for higher learning. The septem artes liberales were further divided into two groups of subjects, namely the trivium and the quadrivium. The trivium consisted of grammatica, rhetorica and dialectica. The quadrivium entailed arithmetica, geometrica, astronomica and musica. This was the state of affairs at the universities at the end of the twelfth century when the universities came into being. They retained the name septem artes liberales although there was a shift of emphasis. After a person had become a master in the arts faculty at Paris, he had to undertake to teach for at least two years. He could then be admitted into one of the higher faculties where he could specialize.⁴² The universities were entirely free in determining their course content.

2.2.10 Teaching method

The method of teaching took the form of the lectio and disputatio. Initially the lectio entailed that the prescribed work had to be read with the students. This was accompanied by

annotations and exegesis. This method was based on the interpretation and re-interpretation of the text. The written word was therefore of great importance. There was even an attempt to regulate the teacher and his style of teaching in class. In the thirteenth century at Paris a number of regulations were issued which even provided that the teacher had to read ex tempore and not to dictate and even prescribed the tempo of reading, that it should not be tractim or leisurely but raptim or rapid as if nobody was sitting and writing. Students who complained about the pace in various ways were subjected to a penalty.⁴⁴

The other method of teaching was the disputation which was a debate that followed a prescribed procedure. The master who acted as leader or chairman, presented a problem to the student. The student had to attempt to answer the question through a process of argumentation. He was then criticised by the presiding master and other students. At the end of the proceedings the master would summarize the arguments for and against and come to the conclusion. From this brief account it is clear that the lectio and disputatio were complementary to each other.⁴⁵ They were designed by the universities as methods that effectively transmitted knowledge from the masters to the students.

2.2.11 Physical facilities

At the beginning, in the Middle Ages, universities had no fixed property. Great ceremonial occasions, lectures, disputations, meetings of the congregation and other

activities took place in cathedrals, churches, halls and houses of the masters, or in other places hired from the city dwellers. The fact that the universities had no capital assets and were therefore poor, was also a strength they could use and in fact used effectively. They were consequently not dependent for their income from anybody except the students. For this reason nobody could prescribe to them what to do or not to do, on the basis of financial support. They were therefore independent. They were also not tied down to a particular place by buildings and other facilities. As a result they were mobile and could move away from a particular place if they experienced problems from the local residents and other bodies. Such a movement was not a trivial matter for the city where the university was located. A sudden departure of a number of students meant a loss of income to the city and also a loss of prestige when a city or town lost its studium. Thus a threat of migration from the university was generally sufficient to let the authorities, whether church or secular, rethink. In this way both students and masters were able to extract a number of rights, concessions and privileges from the authorities. This autonomy could be used effectively and weighed heavily not only with kings but also with the popes.⁴

2.2.12 Colleges

Initially universities did not provide accommodation for their students as they had no physical facilities. At Bologna where students were generally people of means, the corporations took care of their members so that they would not be overreached. At Paris and Oxford, young boys of about fourteen years came

as strangers and had to hire poor accommodation. The universities of Bologna and Paris and other universities of the Middle Ages tried to protect students from exploitation by accommodating them in hospicia or hospitia, the rent of which was jointly determined by the university and the town authorities. At Paris a practice developed that a master had to be head of such accommodation. All except the richest and poorest stayed in the hospitia. It was the plight of the poor students which evoked the sympathy of certain philanthropists who established certain hospitia through donations from rich people. The purpose was to assist students who could not pay for their accommodation.⁴⁷

A lot of influence was exercised on these hospitia by the monastic colleges. As a result of this influence many of these hospitia developed into colleges. Each of these had its own rules and practices and each had a measure of autonomy. At Paris they were largely under the control of a master who was in turn under the authority of the university. The most famous college in Paris was the one founded by Robert de Sorbon around 1251, mainly for students of theology. Although colleges originated largely at Paris, they quickly spread to other medieval universities. It was especially at Oxford and Cambridge where they reached their fullest development and continue to exist even today.⁴⁸

Initially the colleges were no more than ordinary hospitia or residences. But they were soon transformed into educational institutions.⁴⁹ Although the philanthropists who founded them initially did not erect buildings for this purpose but hired

them, later they erected such buildings. In England the colleges followed the example of Merton College, Oxford by having land from their benefactors not necessarily situated near the college but away from it. From this the college derived a fixed income. Just like colleges, the universities of the Middle Ages gradually had their own buildings and property. This in turn deprived them of their mobility and the power this gave them to bargain for better deals with the city authorities. It must, however, be conceded that during the latter part of the Middle Ages the practice of migration had fallen into disuse.

From this account it is clear that the medieval university moved from a situation where it had no capital assets to a position where it had buildings, classrooms and other facilities so that the university was not simply characterised by its corporate nature, but could also be identified by its buildings.⁵⁰ This development affected the autonomy of universities although there were other ways whereby they could protect such autonomy.

2.3 ACADEMIC FREEDOM

From the above discussion it has become clear that the corporate nature of the university of the Middle Ages gave it its autonomy and that this autonomy gave it bargaining power and a greater say in its internal affairs. This has been regarded as a feature which ensured its continued existence and also enabled it to serve as a model for future development. This autonomy did not make universities

completely free from the secular and ecclesiastical authorities. On the contrary, they continued to subject themselves to the pope and to the emperor. They sometimes relied on the pope or the king for the protection of their privileges against the local authorities.⁵¹

There is, however, no doubt that autonomy gave universities great power to influence the cultural and spiritual life of the time. The great measure of autonomy in relation to their management, which their corporate nature facilitated, ensured greater freedom of thought and action on the part of the university and its members. It gave them the power to decide what to teach and how it should be taught. This meant the origin of the concept of academic freedom which has become the corner-stone of the university system even today. This academic freedom was further influenced by the emphasis on rational thought which was fostered by the later period of Enlightenment.⁵²

Although academic freedom was recognized during the medieval period, it does not imply that the situation was perfect. During the eight centuries since universities started, there were many attempts to limit the search for truth. Limitations were placed by outside bodies. In the medieval period, the church through the Holy Inquisition, tried to limit speculative thought within rigid limits. University teachers were not immune from its awful examinations and condemnation. A few examples can illustrate this point. For eight years Giordano Bruno was a prisoner of the Inquisition because he taught that the universe is infinite and that there are

endless particular worlds similar to this of the earth, that the earth is "a star and similar to it are the moon, the planets and other stars". When he refused to recant, he was eventually burnt. Later Galileo was subjected to denunciation by the Inquisition in 1612 and was ultimately forced to publicly renounce his teaching that the sun and not the earth is the centre of the universe.⁵³

From the earliest times universities have had the right to choose for themselves who may teach within themselves. Conflicts, however, arose when teachers were condemned by the church or government for heretical teachings. Sometimes the church or government imposed undesired lecturers on a university. There were also limitations on who might attend universities as students. During the first seven centuries of university history, women were excluded from admission to university. It was only during the last century that this obstacle was removed. From the medieval period students were debarred on religious grounds. Non-Christians, for instance, were excluded. In England the Non-Conformists, who refused to sign the Thirty-nine Articles of the Church of England, were excluded from the Universities of Oxford and Cambridge from the seventeenth to the middle of the nineteenth century. There were other limitations on admission to the university, although the above were the most common.⁵⁴ This demonstrates that although universities have, from their earliest period of inception, been autonomous institutions and espoused academic freedom, they could not escape some of the societal influences which impinged on them.

2.4 FROM THE RENAISSANCE TO THE NINETEENTH CENTURY

2.4.1 The fourteenth and fifteenth centuries

The rise of humanism in the 14th and 15th centuries undermined the medieval style of life and affected the existing universities that were based on the scholastic method. It also led to the establishment of new universities, especially in Germany, which were known as universitates litterarum. As a result of the universalism of humanism, the medieval universitas magistrorum et studentium came to an end, and universities became territorial and national. Humanism was soon superseded by the Reformation and the universitates litterarum also came to an end. The 16th century saw research being driven out of universities and universities concentrated on "learning" and "scholarship".⁵⁵

Humanism was on the main not a university movement.⁵⁶ It rather influenced the development of academies which were different from universities. They were closed corporations of the learned which met from time to time to hold lectures or discussions. These academies, however, had no teaching function. Teaching on a high level still remained the function of the university. Yet there were no major changes among universities.⁵⁷ There is also no evidence that during this period there was any meaningful change to the ideas of university autonomy and academic freedom. Although there was a change in the content of the subjects offered, the method of teaching largely remained unaltered.

2.4.2 The Reformation

Although the Reformation had a pervasive influence on European society in general and on the church in particular, it did not contribute to the development of university autonomy and academic freedom. Although a person such as Martin Luther recognized the role of universities in providing qualified ministers and church officials, he was not well disposed to certain aspects of the university. Melancton, on the other hand, had served the university practically during the Reformation. Not only was he a teacher of no mean substance, but he also played a leading role in the organisation of universities. He also played a significant role in the training of teachers for the protestant universities and schools and wrote prescribed books. The protestant universities quickly became, on the main, centres of service to the Reformation. They served as custodians of the church doctrine. There was therefore strict control over universities and no deviation from the teachings of the church was permitted. As a result there was no freedom for the development of new ideas.⁸

During this era the state came to play a greater role. The landlords of the various regions, like the reformers, had seen the universities as a potential source for trained officials. This led to each region striving to establish its own university. Consequently a number of new universities came into being. These universities were territorial and lost much of the internationalism of previous centuries especially in the Middle Ages. These universities were parochial and had no

long tradition of autonomy and academic freedom. There was also strict control over what was taught and heresy was strictly monitored. All this inhibited intellectual creativity. It is for this reason that the Reformation has been regarded as having adversely affected universities especially in Germany and the Scandinavian countries. Enrolments declined and science suffered a severe blow owing to the academics paying unquestioning loyalty to and respect for the reformers. Although the period of the Reformation brought about welcome changes in ecclesiastical circles, it did not contribute to the growth and development of university autonomy and academic freedom. On the contrary, universities in general in Europe reached a low water mark, especially towards the end of the seventeenth century.⁵⁹

2.4.3 The age of Enlightenment

During the era of Enlightenment two universities in Germany came into being. These were destined to play an important role in breaking away from the stagnation into which universities had fallen towards the end of the seventeenth century. The first was Halle, which had already been established in 1694, and the other was Göttingen which came into existence in 1737. At Halle it was in particular Christian Wolff who played a pivotal role. Wolff took the view that philosophy should be based on its own reason. This meant that reliance in philosophy was not simply had on immutable concepts, but rather that with the help of, inter alia, mathematics or the natural sciences, one could without any pre-conditions seek for truth. This emphasised rational thought which led to

original research by means of the individual's own reason. In terms of this, the search for truth was a search for new answers to problems posed by life. In this way at Halle it was possible for a lecturer not only to research what he wished to, but also to teach what he wanted to.⁶⁰

Although Göttingen came into existence later than Halle, it soon overtook Halle, and by the end of the eighteenth century, it was the leading university in Germany. It introduced new subjects which contributed to the freedom of reason. On the whole, the two universities spearheaded changes which influenced other universities. These changes emphasised the autonomy of reason and rational thought. They also led to freedom of research and freedom of teaching.⁶¹ Rational thought is fundamental to university autonomy and academic freedom.

2.4.4 The nineteenth century

A significant impetus to the ideas of university autonomy and academic freedom in Germany came from the establishment of the University of Berlin. The defeat of the Prussians by Napoleon Bonaparte in 1806 led to the closure of the University of Halle. It was in 1809 that Wilhelm von Humboldt was appointed as Minister of Education. He undertook to establish the University of Berlin which came into existence in 1810.⁶²

In his memorandum on "the state of our learned institutions", from which emerged the University of Berlin, Von Humboldt expressed the idealistic liberalism that looked to the universities as institutions aimed at the formation of the

character of the autonomous cultivated individual. He built on the ideas developed in the eighteenth century and perfected them. The ideals of the unity of teaching and research (Einheit der Forschung und Lehre), the freedom of teaching and learning (Freiheit der Lehre und des Lernens) and of academic self-government (Akademische Selbstverwaltung) were the corner-stones of what he thought the university should do. In his view, the highest good to which universities could contribute was the formation of individuality of character. This could be attained through the disciplined, methodical search for truth, unhampered by any restrictions. Owing to this, the ideal of academic freedom became an integral feature of universities of many countries in the nineteenth century.⁶⁴

Von Humboldt reverted to the medieval idea of the university as a corporate entity with its different faculties and with the arts faculty occupying a central position. The freedom to teach what he willed, on the part of the lecturer, and the freedom to learn what he willed, on the part of the student, (Lehr- und Lernfreiheit) were adopted as a firm principle to the utter disregard of the idea of preparation for a profession.⁶⁴

The University of Berlin was distinguished by its emphasis on research. The role of the university was seen as not simply that of transmission of knowledge, but also to search for knowledge. This was the duty of both lecturer and student. It did not mean that teaching was jettisoned, but it emphasised the unity of teaching and research. The role of a professor was perceived as being not that of giving, while that of a

student as being that of receiving, but both were regarded as having a seeking and creative role. Both lecturer and student had the task of developing scientific thought. They were, as it were, both fellow labourers on the same task, and although the lecturer had more knowledge and experience than the student, the student had more energy and less bias and prejudice than the lecturer. This meant that there was freedom from censure on the part of the professor and freedom from coercion on the part of the student.⁶⁵

The emphasis on the unity of teaching and research led to the use of the seminar as a regular feature in the university set-up. This enabled both student and lecturer to quietly continue with their research and occasionally discuss it with each other. In this way both students and lecturers constituted a research community. By this Von Humboldt wanted to propagate a cultivated form of communal life which through its constant exchanges would be devoted to academic scholarship. Initially this did not mean empirical research on a large scale which would have required a complex system of administration. It was rather a direct participation of students in the speculative ideas of their lecturers.⁶⁶

These ideas permeated the whole German university system although they were sometimes difficult to attain. Because the University of Berlin admitted students from all over, its influence spread to other parts of the world. These ideas are still influential in various forms and in various parts of the world.⁶⁷

Von Humboldt had specific views on the role of the government in the life of a university. Although he undoubtedly regarded the university as a state institution and as constituting a part of the government's whole education system, he nonetheless held the view that the university should have a great measure of autonomy without prejudicing the interests of the state. In his view the government had the authority to appoint lecturers. But the university had to be allowed to attain its own objectives. This required a high degree of autonomy. The only role of the government was to provide the necessary facilities and to look for the right people. The government, however, was not supposed to interfere in the internal affairs of the university. If it did that, it would constitute a hindrance to the university.⁶⁸

As long as there was inner harmony between the government and the university, the ideas of Von Humboldt could work. But if there was disharmony, the government and university would move apart. (This actually happened later in Germany). In that event, the harmony between the government and the university would disappear and the autonomy of the university would not be guaranteed. Although some of Von Humboldt's ideas were superseded by the later influence of industry and the greater role played by the natural sciences and technology, he brought about considerable changes and held views which had a pervasive impact on universities in general, especially his emphasis on the unity of teaching and research which has become the characteristic feature of the university system even today.⁶⁹

2.4.5 Models of autonomy

Although it has been said that university autonomy started in the era of the foundation of universities in the twelfth and thirteenth centuries, there was no uniform model of autonomy. Initially there were two models, as already mentioned, the Bologna and the Paris models - both of which differed. According to the Bologna model, the idea of autonomy applied to the student constituency. It entailed the individual's freedom to learn. The Paris model on the other hand, viewed autonomy as the freedom to teach and applied primarily to the scholars of which the students were a subset rather than the teachers as the employees of students. The medieval concept of autonomy was part of a rather broader underpinning of contemporary social organization, grouped around guilds or corporations. Each of these enjoyed certain privileges or exemptions in the practice of their activities. They owned property and, like other guilds, exercised control over those admitted after due apprenticeship to their ranks. They also enjoyed a high degree of self-government. Their independence, however, considerably depended on the protection from the local ruler. In this way university autonomy depended largely on the conflict between princes and prelates, or in certain instances, on the determination of the city fathers to demonstrate their independence from the prince by founding their own establishment.⁷⁰ There were other models of autonomy that evolved to replace the two original models which had gradually become obsolete. These are the Kantian model, the Humboldtian model, the Napoleonic model and the British model. These models were influenced by the growing state involvement

into universities. The critical question was, how far the state had to intervene into university matters or alternatively how to strike a balance between the independence that scholarship requires against the rights of the state to have some measure of control over law, theology and medicine.

In 1878, Emmanuel Kant set out a model of autonomy which recognized the right of the state to intervene in those areas which directly influenced the well-being and thinking of its citizens. He contended that such intervention did not apply to philosophy for a variety of reasons. First, owing to the fact that philosophy was concerned with scholarship and truth rather than with the administration of public order; second, because it had to be free from external constraints if it were to judge the teaching of other faculties; and third, because human beings are by nature free and under no constraints save that involved in the pursuit of truth. On all these grounds, therefore, state regulation in the sphere of philosophy was regarded as inappropriate. The Kantian model of academic autonomy therefore rested on a fundamental dualism between those activities where the state might intervene and those where it might not.⁷¹

While Kant acknowledged the legitimacy of state authority in certain specific fields, von Humboldt interpreted the role of the state in a minimalist fashion. Its task was viewed as that of ensuring that the external conditions were appropriate for the maintenance of freedom to teach and to learn (Lern-und-Lehrefreiheit). Von Humboldt's concept of academic autonomy differed in many respects from that of Kant. He did

not regard the existence of the state as in conflict with the "inner life" of the academia. On the contrary, one of the essential expressions of statehood was a common cultural identity. One of its primary functions was to advance culture, learning and teaching for the well-being of society in general. As a patron of culture and science, a central element in the state's mission vis-a-vis the university was the protection of disinterested science against sectarian pressures from within and from without the academia. In von Humboldt's idea of academic freedom, the state itself served as a "buffer organ" against outside pressures, one of which was the utilitarianism associated with the "rising industrial classes". The fact that the state underwrote the university's commitment only to the interests of science and learning, "involved it in a species of self-denying ordinance in those matters associated with research and teaching". This did not mean that the university was not accountable to public authority."

Unlike the Kantian model, where intervention was legitimate in "vocational areas" while preserving an "autonomous domain" for philosophy, the Humboldtian model redefined this duality in the form of a descending administrative hierarchy and an ascending academic hierarchy which vested in an individual interpretation of the freedom to teach and to learn. Although von Humboldt sought to bring together both student and teacher as part of an organic community of scholarship, this community was not a community of equals. On the contrary, it comprised various degrees of individual autonomy with the highest and freest expression being found in the individual full

chairholder, around whom were grouped co-workers, assistants, students and aspirants who formed part of a "school of thought". The concept of academic autonomy therefore did not assume a collegial form across all grades. Autonomy was individual and not institutional.⁷³

A third model of the relationship between government and the university is found in the Napoleonic university. Unlike the Humboldtian view of academic autonomy which rested on a form of partnership in which the state provided the legislative framework within which the university advanced culture and learning, and consequently afforded a higher expression of the state as a cultural entity, the Napoleonic model involved a clear subordination of the university to the state. The university's function was to ensure the political stability and unity of the nation in a physical sense. This was in contrast to the Humboldtian view in which culture, science or learning existed over and above the state. Teaching and learning were not conceived as independent of the state, but rather as expressions of a unity that had already been achieved⁷⁴.

Teaching and learning were therefore subject to legislative oversight by central government acting as the incarnation of the nation, its culture, ambition and genius. The bureaucratic control by central administration over matters such as selection and appointment of staff to tenured positions was a means of upholding universalistic criteria for judging merit and advancement. The state had to act as the ultimate guarantor against corporate reproduction. It also served to

maintain the quality and institutional homogeneity in the universal sector, and, it was regarded as a means of upholding national unity by ensuring the formal equality of provisions of services, programmes and courses among universities.⁵⁵

The designation of university teachers as one of a series of technical aims of central government seriously affected hitherto held notions of corporate autonomy. The incorporation had an effect on the way in which autonomy was conceived and, until the late 1960's, continued to be conceived. Autonomy was not regarded as being coterminous with the pursuit of scholarship and the maintenance of particular privilege, of serving vested, sectoral and self-interest, rather than of service to the nation. The Napoleonic model did not allow the inclusion of academic autonomy as part of the legitimate relationship between government and university, because to have done so would have been to deny the universal nature of the unit of government. Instead of being a species of reserved area "contained within a general legislative frame, which distinguished the Humboldtian theory, institutional autonomy in France was less a matter of formal theory than an series of marginal activities over which the state had not seen fit explicitly to extend its purlieu". An alternative view as revealed in the Napoleonic model would be to see it as residing in the initiation of procedures which ultimately required official sanction.⁵⁶

A fourth model of autonomy is that found in Britain. The British theory of academic autonomy was based on the Whig

constitutional theory of the eighteenth century, reinforced by the nineteenth century liberal theories of the state. As opposed to either France or Germany, Britain saw no general attack on the corporate stance of the academia.

The political revolution which took place in Continental Europe in the latter part of the eighteenth and the early part of the nineteenth centuries had no counterpart in Britain. As a result a university was neither incorporated as part of the national bureaucracy, nor was it subject to any one coherent constitutional or administrative theory of the relationship between the state and the university.

The status of academia as a property-owning corporation of scholars, the purest expression of which was in the two ancient English universities, was preserved. Although other models grew up with provincial universities, these have assumed extensive self-governance and internal self-validation. The reasons why the corporation of scholars retained its importance in Britain is because until the First World War, British political life had no concept of "the state" as a distributive or regulative entity, and there existed a broadly held view which regarded education, and cultural responsibilities by extension, as ill-served by state intervention. "The British model of academic autonomy therefore derived not from the action of the state defining a 'reserve area' of non-intervention, but rather from the absence of a concept of the role of the state which itself could serve to legitimize such a definition".

Although the above discussion has largely been confined to European universities, it is necessary to consider developments from another part of the world which had a lot of influence on the university system as well. This is the development as regards the universities in the United States of America.

As the United States was a relatively new nation, it did not have well-established universities with a tradition of autonomy and academic freedom at the beginning of the nineteenth century. Many American scholars went to German universities where they came into contact with Humboldtian ideas which they in turn imported back into the United States of America where these ideas influenced American universities. These ideas led to the establishment of American universities based on the German model.⁷⁸

2.4.6 The land-grant institutions of the United States of America

Owing to industrialisation and the agriculture in the United States of America which increased during the middle of the nineteenth century, there arose a strong need for institutions of higher education which would be accessible to the ordinary person and which were not based on pure theoretical speculation but were more practical. This need was met by the land-grant colleges which were established in 1862 by means of the Morrill Act. This legislation provided that 30 000 acres of land of the federal government be made available to each member of the Senate and the House of Representatives and that

this land would be sold to serve as a permanent donation for the establishment in each state of at least one college where the leading object would be, without excluding other scientific and classical studies and including military tactics, to teach such branches of learning as related to agriculture and the mechanical arts. The purpose of this was to promote the liberal and practical education of the industrial classes in various pursuits and professions in life.⁷⁹ As time went by, further legislation provided for the addition of further functions to these colleges and universities and provided for additional funds. Besides providing courses for women and providing for courses in business administration, these colleges started doing research in various fields.⁸⁰

2.4.7 Academic freedom among American universities

2.4.7.1 The early period

The evolution of academic freedom in American universities started in the second half of the nineteenth century. Prior to this period, the role of the university had been cultural conservation. In the first half of the nineteenth century the American university was centred on tradition. This effectively stifled academic freedom in the ante-bellum colleges. Students were not allowed to freely express their views on the issues of the day.⁸¹ "The college in America could not be a market place of ideas so long as it regarded its students as both gullible and perverse".⁸² Religious conservatism stifled not only freedom to express ideas on various issues of the day,

but also had an adverse effect on science and scientific research.⁸³ This period was characterised by "traditionalism, authoritarianism, paternalism, doctrinal moralism and sectarianism" which depressed academic freedom.⁸⁴

2.4.7.2 The influence of Darwinism

The idea of academic freedom among American universities was greatly influenced by Darwinism. Darwinism propagated the theory of the evolution of the human species. This doctrine was contrary to the accepted church doctrine of the creation of human beings. It therefore caused a revolution among universities that were closely associated with churches. Darwinism was regarded by the church as a heresy. This led to those who propagated this theory being dismissed or threatened with dismissal from universities.⁸⁵ The reaction to this was not uniform and penalties were not consistent. Whether or not evolutionists would be dismissed, depended on a number of factors, inter alia, the strength of the college's tie to a church or sectarian sponsor, the rigidity of the religious creed binding trustees and staff, the importance of science and scientists in the college's scheme of education and the determination of the college to defend its reputation. A number of academics were tried for their belief in Darwinism. These cases in turn led to the attack on sectarian control of universities as being rigid and intolerant.⁸⁶ This attack on religious authority and moralism led to academic reform.⁸⁷

A new rationale of academic freedom grew out of the Darwinian debate. Science invested the theory of academic freedom with a

special conception of truth and a formula for tolerating error. Although this idea was not new, science reinforced it. The concept of scientific competence enabled faculties to control the misuse of administrative power. The infusion of the values of science made academic freedom an ethic "an affirmative moral position and not merely a negative condition, the absence of overt restraint".⁸⁸ The main justification for intellectual freedom is that nobody has the monopoly of truth. It is therefore necessary to tolerate error. Contrary to earlier views about the truth as being, *inter alia*, revealed in the dogmas of faith and needing no further argument or verification, the evolutionists argued that all beliefs are tentatively true and tentatively false and can only be verified through a continuous process of inquiry. Academic freedom was therefore imperative and all seeming errors must be tolerated "for what is truth is never fully known and never finally knowable".⁸⁹

Disciplined inquiry was emphasized and set important limits to the permissible tolerance of error. This implied that not every opinion was of equal value. For this reason every claim to a discovery of truth must be subjected to open verification. The process of verification must follow certain rules, and this process can only be understood by those who qualify as experts. As Metzger puts it; "Academic freedom does not theoretically justify all kinds of intellectual nonconformity, but only that kind of nonconformity that proceeds according to the rules; not any private belief but that kind of private belief that allows itself publicly to be tested; not a perfect competition of ideas, but rather an

imperfect competition, to which certain opinions come enhanced with a special professional warranty. In this respect, it makes fewer allowances for vagaries of opinion than do, say, the doctrines of Milton and Mill. In the modern theory, though no conclusion is unchallengeable, the method for arriving at conclusions is prescribed."⁹⁰

The institutional aspect of the struggle for academic freedom revolved around whether and to what extent trustees should exercise their prerogative. Since the Darwinian era, the limitation of administrative power has been based on scientific competence which entailed that the professional standing of a professor could only be established by experts, chosen from among his professional peers and the general consensus of the peers should be decisive. It was essential that trustees should not dismiss professors on inadequate knowledge of the facts and that they should not admit prejudice to evidence or be influenced by irrelevant considerations. All of these were not new and reflected the "due process" philosophy or the principles of natural justice based on the common law,"⁹¹ but the Darwinian debate revitalized them.

The rationale for academic freedom was also endowed with certain fundamental values which, although not original to science, were implicit in scientific assumptions and inherent in scientific activity. These values included tolerance and honesty, publicity and testability, individuality and co-operativeness. It also entailed reliability - the dissociation of a scientific work from the beliefs and

associations of its author. It bestowed on academic freedom the value of universalism which means "the elimination of particularistic criteria - creedal, racial or national - in judging the merits of a work, and the elimination of unearned advantages - connections, rank and caste - in considering the merits of a man." The other value is that of neutrality "an interest in disinterestedness that is deeply ingrained in science". By assimilating the values of universalism, academic freedom has come "to signify the brotherhood of man in science, that is akin in aspiration to the brotherhood of man in God". For this reason, to foist on the academic community a person on the basis of considerations other than merit would be an infringement of academic freedom. By acquiring the value of neutrality, academic freedom came to signify that science must transcend ideology, and that professors might abjure all commitments that corrupt the passion for truth. For this reason, attempts to suborn professor by pay or other preferences and attempts by professors themselves to force departments to toe a particular line, are infringements of academic freedom. As a symbol and guardian of these two values, academic freedom came to be equated not only with free intellectual activity, but also with "an ethic of human relations and an ideal of personal fulfilment."⁹²

2.4.7.3 The German influence

As pointed out above, the American university was modelled on the German one. In the centennial year of the United States of America's independence, Johns Hopkins University, the first University in America based on the German model opened its

doors. The aim of this university was said to be the encouragement of research; the promotion of young men; and the advancement of individual scholars who by their excellence would advance the sciences they pursued and the society where they dwelt. This university was aptly referred to as Göttingen at Baltimore."

As has also been said, the German concept of academic freedom had a great influence on American universities. This concept which, as we have seen, entailed Lehrfreiheit und Lernfreiheit, meant in the words of Metzger, "the absence of administrative coercions in the learning situation", which implied that the German students were "free to roam from place to place, sampling academic wares; that wherever they lighted, they were free to determine the choice and sequence of courses, and were responsible to no one for regular attendance; that they were exempted from all tests save the final examination; that they lived in private quarters and controlled their private lives". This freedom also meant that "the university professor was free to examine bodies of evidence and to report his findings in lecture or published form - that he enjoyed freedom of teaching and freedom of inquiry". This freedom was not, as the Germans perceived it, an inalienable endowment of all men, nor was it a superadded attraction of certain universities and not of others. On the contrary, it was regarded as a distinctive prerogative of the academic profession, and the essential condition of all universities. "Without it, no institution had the right to call itself a 'university'"."

The German's immense pride in the concept of academic freedom has been attributed, to some extent, to the status it conferred and to its significance as a patriotic symbol. As Metzger aptly puts it:

"To the university student, coming from the strict and formal Gymnasium, Lernfreiheit was a precious privilege, a recognition of his arrival at man's state. To the university professor, extremely sensitive to considerations of social esteem, Lehrfreiheit was a dispensation that set him apart from the ordinary civil servant. In a nation still aristocratic and feudalistic in its moves, caste considerations thus underlay the loyalty to academic freedom. In addition, Lern- and Lehrfreiheit had patriotic associations. They were identified with the national revival. The renewal of student preregrinations in the eighteenth century symbolized the breakdown of territorial exclusiveness and the growth of national consciousness. The University of Berlin, dedicated to academic freedom, was a phoenix that had arisen from the ashes of military defeat. The denial of academic freedom in the Metternich era had been the work of Catholic dogmatism, Protestant particularism, petty absolutism - all enemies of the Reich. Moreover, after unification, academic freedom was thought to atone for the lack of political freedoms and to prove the special virtue of the Fatherland."⁵

American universities did not adopt the German notion of academic freedom without any modification. Although they evidenced dependence on the German concept, they were also selective. Many Americans who went to German universities were lavish in their praise of academic freedom. This is to be attributed to the fact that most of them attended the freest of the German universities, Göttingen and Berlin. At these universities they did not have to take the religious oaths that would have violated their consciences at the South German Catholic universities. Moreover, most of the Americans who went to Germany were young men who were impressionable and were consequently greatly influenced by the free atmosphere of German universities as opposed to the rigid puritanism at home. Many of those were greatly impressed by the idea of academic freedom which was regarded as the chief German contribution to the American conception of academic freedom. As a result academic freedom, like academic research, defined the true university. This idea was reflected in the rhetoric of academic ceremonials. Despite the rhetoric, there was sometimes a discrepancy between the words and their implementation as when presidents told academics to omit from their publications doctrines that were offensive to powerful interests.*

As has been said, the German concept of academic freedom was not adopted without selection and modification. This can be evidenced from the 1915 "Report on Academic Freedom" of the American Association of University Professors which, although in its opening statement it acknowledged that academic freedom had traditionally had two applications, namely to the freedom

of the teacher and to that of the student, to Lehrfreiheit and Lernfreiheit, it later stressed that the freedom that was the subject of the report was that of the teacher. This was the trend that was later followed.⁹⁷

There are entirely plausible reasons why the freedoms of the student were either subordinated to or excluded from the American definition of academic freedom. The American professor was in a different position from that of the German professor. He was an employee of a lay board of control, and was not, as in Germany, a civil servant. Moreover, he was governed by an administrative hierarchy which had power to take important decisions and which did not consist of officials elected from the professor's ranks, as in Germany. The problems that beset an American professor led to a change of focus. Another distinction between the American theories of academic freedom lay in their arguments for the defence of the autonomy of the university. German theorists relied on the protective power of the government and on traditional guild prerogatives both of which were meaningless and irrelevant to the American situation. Here the government by trustees not only inhibited professorial independence, but it also facilitated the notion that professors were incapable of self-government. The local sponsorship of American education forestalled federal intervention. The courts were reluctant to interfere with decisions of the administrative authorities except when these were in conflict with the university's charter. It would be futile to appeal to state legislatures because their members were often, like the trustees, not favourably disposed towards intellectual freedom. For this

reason, American theorists appealed to the will of the whole community. This will was not regarded as synonymous with public opinion, but as being something more elusive, a general will analogous to that of Jean Jacques Rousseau. They asserted that all universities belonged to the community as a whole and trustees were merely public servants, while professors were public functionaries. The universities were public properties. Consequently, they should not be treated as private possessions or be tied to a particular faith or ideology or be bent to the interest of a class or sect or party. If that was done it was a violation of a public trust. This theory ran into difficulties if the public consented to the violation of the trust. That is why proponents of this theory had to interpret public interest as meaning something other than public opinion. The problem was that in America at the time, academic freedom was too new an idea to arouse patriotic feelings and too exclusive to prompt mass support.⁹⁸

A further difference between the American and German concepts of academic freedom relates to inner and outer freedom. The German idea of "convincing" one's students and of persuading them over to the personal system and philosophical views of the professor were not appealing to American academic opinion. American professors took the view that in the classroom the proper stance for an American professor was that of neutrality on controversial issues, and silence on substantive issues which fell beyond the purview of their competence. There was a strong belief that college students were always in danger of mental seduction by their teachers. The old fear that students could fall easy prey of heretical doctrine "became the new

fear that students had but fragile defences against subtle insinuation of 'propaganda'".⁹⁹

Although American ideas on academic freedom were influenced by German ones, there were different underpinnings. The Americans did not follow the idealism of Kant and Hegel but were much more influenced by evolutionary pragmatism and positivism. Darwinism also had a strong influence on American academic thought. In Germany, philosophy was used to attack religious authority whereas in America, science was used to break the hold of religious authority. The empiricist heritage promoted the view that the facts must be the arbiter between competing notions of truth. This strengthened the standard of neutrality. A corollary of this was that universal and synthetic speculation must give way to specialized knowledge, which promoted the standard of competence. Moreover, the Darwinian influence, promoted the belief that certainty was as foreign to inquiry as immutability was to the processes of life. The right to pass judgment on scientific questions was the prerogative of those who possessed special credentials.¹⁰⁰

These theories related to the norms for intramural utterance, that of the utterances of professors in their role as teachers. Outside the university, professors in America had greater freedom than the German ones because of the stronger social and constitutional commitment to freedom of speech. Although academic freedom and freedom of speech have many connections, history has demonstrated that the advance of the one has not automatically produced a comparable advance of the other. The two freedoms developed independently for different

reasons, although they are causally connected to a common long-term factor, which is generally the diffusion of political power or the fostering of the habit of tolerance. Nevertheless under certain conditions these two freedoms do affect each other directly. Consequently, the secure position of the one may improve the position of the other and deepen its meaning and effect. American universities provided an opportunity to engage in outside activities and professors also showed a lot of interest in outside affairs. There was also a move, on the part of professors, away from the quiet life of moral philosophy in favour of the more worldly concern of social science. This was influenced by the rise of pragmatism which emphasised the application of the trained intelligence to the practical problems of life. Owing to the fact that the American professor, as opposed to his German counterpart, operated in the arena of social and political action, he relied more on freedom of speech. For this reason he felt that he had the right to express his opinion on controversial subjects, even on matters that fell outside his field of competence.¹⁰¹

The attempt to assimilate the right to free speech into the doctrine of academic freedom created problems. It created the perception that professors were given special protection when they were involved in the "rough give-and-take" of politics. In the words of Metzger:

"To argue that the institutional position of professors should not be affected by what they said as citizens, was to urge immunity for them

from the economic penalties that may repay unpopular utterances - the dwindling of clients, the boycott of subscribers, the loss of a job. Such a demand for immunity, exceeding anything provided by the constitutional safeguard of free speech, going even further than the 'free market' conceptions of the great philosophers of intellectual liberty, was bound to strain the less tensile tolerance of American trustees and administrators."¹⁰²

Professors reacted by defending and justifying the social and political activism. These justifications sometimes did not hold water. A number of questions arose on the role of academics in public life. Was it proper for a professor to run for political office or to work actively for a political party? Moreover, was it proper for a professor to publicly criticize the actions of a colleague or a superior? In most cases it was not easy to decide where free speech ended and insubordination began. A further question was whether the professor's relations to his trustees was similar to the relation of the judiciary to the executive power? If that be the case, it meant that the trustees could not remove their appointee at will, although this also meant that professors were bound by the "staid public ethics of judges".¹⁰³ All these issues were reflected in the 1915 Report of the Committee on Academic Freedom and Tenure of the American Association of University Professors.¹⁰⁴

2.4.7.4 Academic freedom and big business

It is sometimes thought that private universities and colleges enjoy greater autonomy and academic freedom than universities which are supported by government and which are legally under the control of the state. Although this may appear to be so in principle, there are a number of exceptions where in American private universities the academic freedom of academics was stifled by or the academics were dismissed from universities for expressing views that were contrary to the interests of the benefactor.¹⁰⁵

The clash between philanthropists from big business and those who upheld academic freedom was explained on the theses of "conspiracy" and "cultural incompatibility". According to the "conspiracy" theory big business was believed to support the universities only to further its own interests, and attacks on academic freedom were regarded as part of a plutocratic plot. The thesis of "cultural incompatibility" was to the effect that the values of the factory and the counting house were in conflict with the values of research, and attacks upon academic freedom were the consequence of this dichotomy.¹⁰⁶ Both theories received some support and criticism, but the amount of support cannot be measured. It is also probable that professors of social science were more hostile to businessmen than professors of business administration. Moreover, the correctness or otherwise of these theses has not been proved although there are many cases of professors who were dismissed because they criticised or antagonised powerful business interests.¹⁰⁷

Those who supported the "conspiracy" theory were of the view that there were basically essential conditions for an effective cause of the curtailment of academic freedom. These entailed a liberal professor, pursuing his science, and a conservative board dominated by business. These were regarded as the necessary conditions. The efficient cause was regarded as the presence of an antagonistic trustee or an imperious patron.¹⁰⁸

An analysis of the cases on which the "conspiracy" theory was based revealed certain flaws in it. It was an over-simplification and lacked the social and psychological dimensions that the complexity of the situation required. It overlooked many significant factors like the disposition of the president, the professional status of the accused, and the standing of the complainants. It also omitted factors like the geographical location of the college, its particular ideals and traditions, its receptivity to various pressures and the power and personality of the patron. It did not distinguish between different kinds of professional heretics such as theorists and activists, or between different kinds of business patrons, such as those who shared the biases of their community and those who were themselves nonconformists, or between different kinds of pressure from business, such as that which arose from patrons and trustees and that which originated from outside. It also falsely attributed to one faction, the economic conservatives, a uniquely sinister role. Despite these objections, the germ of truth in the thesis of conspiracy is the corrupting influence of power. "Devil theories of history are rarely categorically false,

particularly when the devils they delineate are men who are very rich, who have taken controlling positions, and who are accustomed to being obeyed. But power may be a function of numbers, as well as a function of wealth; and power may be curbed and chastened by the safeguards of tradition and form."¹⁰⁹

Besides the conspiracy theory, the clash between academics and big business was ascribed to the clash between the culture of science on the one hand and the culture of business on the other. The scientists were interested in the pursuit of knowledge for its own sake, while the businessmen who were sitting in the boards of trustees or in the administration were actuated by profit motives. They brought in a whole new culture alien to that of the academics, a culture that had a crude utilitarian outlook which they imposed on universities. This had the effect of turning mansions of learning into what tended to be business establishments. Universities, owing to the influence of businessmen, adopted a hierarchical structure used in business management. They also encouraged a spirit of competition similar to that of business. Professors were reduced to the status of hirelings. Each of these business practices were perceived to be subtle restraint on the academic freedom of professors. The bureaucratization of the university was perceived to serve as a convenient way of controlling the faculty from above; the promotional activity of the university stressed intellectual acquiescence; and the reduction of the scholar to the status of an employee damaged his self-respect and limited his freedom of action.¹¹⁰

Although these accusations contained important elements of truth, they were liable to exaggeration. Although bureaucracy introduced a strain between the university's interest in efficiency and its interest in creative thought, certain business practices were adopted by the universities to facilitate efficiency owing to the size of universities. Bureaucratization also arose from the ranks of professors, partly as a result of the increasing competition for placement. As the number of available teachers increased, their bargaining power decreased. The increase in the number of job-hunters made job-holders feel insecure. This led to the demand for academic tenure. The demand for academic tenure meant a demand for rules and regulations which led to bureaucratization. Strictly speaking these bureaucratic features were not necessarily in conflict with academic freedom. It was more the way they were perceived that led to their being so regarded. Obviously the rules are not self-enforcing, but are enforced by those in charge and this may sometimes lead to arbitrariness.¹¹¹

The emphasis on bureaucratization changed the course of the struggle for academic freedom in America. The fight for academic freedom as a result became the fight for precautionary rules, for academic legislation. This was so because it is no use fighting for the rectification of injustice after it has occurred. It is much better to prevent it. For this reason academic freedom and academic tenure became inseparably linked. The problem with emphasis on the security of tenure was that it made academic freedom synonymous with the security of professors in the guild rather

than the social necessity of appointing men who were independent thinkers."¹²

There is no evidence that the presidents who adopted business attitudes were responsible for the timidity and acquiescence of academics. On the contrary, some of them "brought university ideals to business, as well as business ideals to the university". They led the fight for evolution and the introduction of German ideals. They also promoted love for knowledge, interest in research and the concept of academic freedom. There obviously were exceptions. Even they were an educative force as they had to reiterate these platitudes in the course of academic rituals. Although the thesis of cultural incompatibility saw the businessman corrupting academia, and not the academia enlightening the businessman, the truth is that these two cultures, through the mediation of presidents, tended to influence each other."¹³

On the accusation that the business culture changed professors into hirelings, it must be admitted that certain trustees did propagate the idea that the views of the professors had to be subservient to those of the boards of trustees. But on the whole the businessmen on the boards of trustees did not depart from academic tradition. The theory that professors were employees was not new. Even the courts had supported that view. To regard this as being a product of the business culture was therefore imprecise. In a number of court cases the view that professors were hirelings was supported."¹⁴

2.4.7.5 The establishment of the AAUP and its influence on academic freedom

The establishment of the American Association of University Professors (AAUP) in 1915 was an important event in that it marked the culmination and the beginning. It was the culmination of the process towards professorial self-consciousness that had been in existence for many decades. It was the beginning of an era in which the principles of academic freedom were codified, and in which violations of academic freedom were systematically investigated and punished. There are various reasons why the AAUP was established late although there were conditions which justified its earlier establishment. These reasons are that professors, unlike workers in industry, were often working in isolation; they were restricted by the disciplinary laws of each institution; and the professors themselves disliked organising themselves into a body that smacked of trade unionism for material gain. Both the ideology and the dignity of the profession militated against the idea of a pressure group. With time this had to change.¹¹⁵

It was the spirit and ideology of progressivism that precipitated the formation of the AAUP. This was the spirit of reform. Opposition to boss rule in the cities manifested itself as opposition to trustee rule in the universities. There was a need to make university government more responsible. This led to the need for consultation when matters of appointment, promotion and tenure were considered. As some felt that these reforms were cosmetic, they advocated

the democratisation of the universities with the purpose of limiting the power of trustees. They also advocated the establishment of an association for better government to realise schemes for reform. As far as academic freedom was concerned, there was a great diversity of opinion on its principles and scope, and a great diversity of practices relating to its protection. With the hope of creating some order, three societies collaborated in 1913 to formulate general rules of academic freedom and tenure. A joint committee of the American Economic Association, the American Sociological Society and the American Political Science Association worked for a year to solve the complex problem of principles. On the issue of academic freedom the committee doubted whether universal rules should apply to colleges and universities; to teachers of junior as well as advanced students, to men who expressed themselves on matters outside their subjects as well as to those who remained within their competence, and to extramural as well as intramural utterances. It was also difficult to draw the line between propriety and impropriety. On the issue of tenure, they were undecided whether a professor should be virtually irremovable; whether a distinction should be drawn between an officer of higher grade and one of low grade; whether there had to be trial before dismissal; and whether the reasons for dismissal had to be given or withheld.¹¹⁶

The call for a conference to consider the establishment of a national association emanated from the professors of Johns Hopkins University addressed to the faculties of the nine leading institutions of the country. Seven of them responded

by sending delegates. The delegates formed a committee on organization. When the organization had been fully mapped out, invitations were extended to persons of full professorial rank whose names appeared on the list of distinguished specialists. 867 professors in 60 institutions accepted this invitation and became the charter members of the AAUP. Although the membership was initially small and elitist, it gradually grew so that by 1922 it had 4,046 members from 183 institutions. There was also initial suspicion and reluctance from some leading academics who were sceptical of the role and efficiency of the Association. The Association however, gradually won respectability. While it focussed on the issues of academic freedom, it had to be forced to investigate cases of unfair treatment and to impose penalties.¹¹⁷

The first attempt of the AAUP to work out the scope of academic freedom was Committee A's Report on Academic Freedom and Academic Tenure of 1915, the general philosophy of which was referred to above. Its basic premises were that academic freedom was a necessary condition for a university's existence; that trustees occupied the position of public officials discharging a public trust; that the only exception to this was when they served private propagandistic purposes, in which those purposes had to be made clear; that in the classroom professors were constrained by the norms of neutrality and competence; that outside the university professors had the same right as any other citizens to freedom of utterance and action, limited only by the duty to observe professional decorum.¹¹⁸

The report offered more than generalities and gave practical proposals. The practical proposals had the objectives of limiting the trustees' prerogative to dismiss teachers and to provide security and dignity in the academic job by providing definite rules of tenure. The committee suggested that mistaken opinion should never be grounds for dismissal. Although there were differences in traditions and local conditions which made the application of uniform substantive limitations difficult, the committee held that there should be uniform procedural limitations. It suggested that every university or college teacher should be entitled to a hearing before dismissal or demotion. This entailed that charges against him be stated in writing in specific terms and that he should have a fair trial on those charges before a special or permanent judicial committee chosen by the faculty senate or council. At this trial the accused teacher should be given the opportunity to present evidence, and if the charge was one of professional incompetence, a formal report upon his work should be first made in writing by the teachers of his own department and of cognate departments in the university, and if the teacher concerned so desired, by a committee of his fellow specialists from other institutions appointed by some competent authority. On the issue of tenure the committee held that in every institution there should be an unequivocal understanding on the term of each appointment. In those state universities which were legally incapable of making contracts for more than a limited period, the governing boards should announce their policy with respect to the presumption of reappointment in the several classes of position, and these announcements, though not legally enforceable, should be

regarded as morally binding.¹¹⁹ These were the ordinary principles of natural justice based on the common law.

The practical proposals were elitist and tended to protect the position of professors more than those below them. The AAUP code was also greeted with cynicism. Its practical proposals were dismissed by the Committee on Academic Freedom and Tenure of Office of the Association of American Colleges (AAC), an organization of college presidents also established in 1915. The presidents' committee tended to distort some of the proposals of the AAUP. It regarded the AAUP as a revolutionary dictate rather than a serious attempt to solve a professional problem. Within six years, however, the attitude of the AAC college presidents towards the AAUP report had for a variety of reasons, completely changed to that of agreement.¹²⁰

Another criticism of the 1915 statement is that it confined the violation of academic freedom in a narrow way, as something that happens in a university and not something that happens to a university. Nothing was mentioned in this document about the relations of the academy to the state authority. The external enemies of the university like the inquisitorial church official, the meddlesome minister of education, the intruding policeman and the biased judge although history had amply demonstrated these. Moreover, the document was silent on threats to the autonomy of the university that were not, at one and the same time, threats to the livelihood of its members; "indeed, it was not even clearly acknowledged that a corporate academic interest, as

distinct from an individual academic's interest, existed and had also to be preserved."¹²¹

After a lot of preliminary negotiation, the American Council on Education convened a conference in 1925 which was attended by the representatives of the American Association of University Women, the American Association of University Professors, the Association of Governing Boards, the Association of Land Grant Colleges, the Association of Urban Universities, the National Association of State Universities, the Association of American Colleges, and the Association of American Universities. At this conference they adopted a statement. Only the AAUP and the AAC endorsed it. This had the effect of closing the great chasm between the two organizations. The colleges and universities did not incorporate the 1925 statement into their rules except in rare cases. The reason for this was that it was couched in the form of mandatory rules which were perceived as violating the charter provisions of the various colleges and universities. Although most of the presidents and trustees accepted the spirit behind it, they rejected it because it gave equal weight to principles and procedures. By 1939 only about six or seven boards of trustees in the whole of the United States had formally adopted the statement. The feeling that what was required was a statement of policy that needed approval rather than a set of rules to be adopted, led to a revision of the code by the AAUP and the AAC in 1938. This conference gave an opportunity to rectify the long-standing discriminatory provisions against the junior members of the profession. A probationary period of six years was set, after which the

teacher was entitled to permanent tenure. Notice of dismissal was to be given for one year for all the teachers. During the period of probation a teacher had the academic freedom that all other members of the faculty had.¹²²

The AAC endorsed the 1938 report with several amendments. This necessitated a further reconsideration by the two associations. The new agreement reached in 1940 altered a few things, namely the probationary period was changed to seven years. The 1940 statement is so important that it merits quotation in full:

"The purpose of this statement is to promote public understanding and support of academic freedom and tenure and agreement upon procedures to assure them in colleges and universities. Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.

Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning. It carries with it duties correlative with rights.

Tenure is a means to certain ends; specifically: (1) Freedom of teaching and research and of extra-mural activities, and (2) A sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence tenure, are indispensable to the success of an institution in fulfilling its obligations to its students and to society.

ACADEMIC FREEDOM

(a) The teacher is entitled to full freedom in research and in the publication of the results, subject to the adequate performance of his other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

(b) The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject. Limitations of academic freedom because of religious or other aims of the institution should be clearly stated in writing at the time of the appointment.

(c) The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as

a citizen, he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his profession and his institution by his utterances. Hence he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others and should make every effort to indicate that he is not an institutional spokesman.

ACADEMIC TENURE

(a) After the expiration of a probationary period teachers or investigators should have permanent or continuous tenure, and their services should be terminated only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies.

In the interpretation of this principle it is understood that the following represents acceptable academic practice:

- (1) The precise terms and conditions of every appointment should be stated in writing and be in the possession of both institution and teacher before the appointment is consummated.

- (2) Beginning with appointment to the rank of full-time instructor or a higher rank, the probationary period should not exceed seven years, including within this period full-time service in all institutions of higher education; but subject to the proviso that when, after a term of probationary service of more than three years in one or more institutions, a teacher is called to another institution it may be agreed in writing that his new appointment is for a probationary period of not more than four years, even though thereby the person's total probationary period in the academic profession is extended beyond the normal maximum of seven years. Notice should be given at least one year prior to the expiration of the probationary period if the teacher is not to be continued in service after the expiration of that period.
- (3) During the probationary period a teacher should have the academic freedom that all other members of the faculty have.
- (4) Termination for cause of a continuous appointment, or the dismissal for cause of a teacher previous to the expiration of a term appointment, should, if possible, be considered by both a faculty committee and the governing board of the institution. In all cases where the facts are in dispute, the accused teacher should

be informed before the hearing in writing of the charges against him and should have the opportunity to be heard in his own defense by all bodies that pass judgment upon his case. He should be permitted to have with him an adviser of his own choosing who may act as counsel. There should be a full stenographic record of the hearing available to the parties concerned. In the hearing of charges of incompetence the testimony should include that of teachers and other scholars, either from his own or from other institutions. Teachers on continuous appointment who are dismissed for reasons not involving moral turpitude should receive their salaries for at least a year from the date of notification of dismissal whether or not they are continued in their duties at the institution.

- (5) Termination of a continuous appointment because of financial exigency should be demonstrably bona fide."¹²³

This statement had great persuasive authority on universities. It also placed the idea of academic freedom on a secure footing. Furthermore, it had the effect of reconciling academic freedom with colleges having denominational connections. It also reconciled the idea of faculty participation in the selection of personnel with the possession, by trustees, of great powers. Security of tenure was shown not to be incompatible with a need for competence.¹²⁴

In the area of the investigation and punishment of malpractices against academics, the AAUP was less successful. It was limited by personnel and financial shortages. This investigative function required it to be a policeman, judge and jury. It required the AAUP to have an array of lawyers, advisors and investigators which it could not afford. The investigation itself required a lot of ingenuity. There was also hostility on the part of the administrators to these investigations. The compiling of the report took a long time. When it came to sanctions, the association had no power to punish except to "blacklist" an offending institution.

This in itself was controversial and had dubious effect. The reporting and publicising of the injustices was regarded as another form of punishment. The reported cases confirmed the assumption that academic freedom is dependent upon academic tenure and due process. Despite its many limitations, the AAUP introduced an apparatus for finding facts in an area that hitherto had been shrouded in mystery and was governed by untested testimony. It revealed certain institutions where malpractices had for years gone undetected. The threat of an investigation was in many cases a sufficient deterrent and caused administrators to rethink. It also became clear that there was no substitute for courage on the part of each academic.¹²⁵

With the outbreak of the First World War in 1917, the principle of academic freedom suffered a severe set-back in the United States. This had the effect of nullifying the gains that had been gradually made over the years. This was caused

by the fact that the war created a fanaticism which undermined academic freedom. The nation was pervaded by zealous patriotism. All over the nation patriotic zealots on boards of trustees, in the community and on faculties harassed those college teachers whose passion for the war was dubious or lukewarm. Professors were expected to show total allegiance and loyalty to the nation during the war and any show of disloyalty was a serious misdemeanour. Any person who was regarded as a "slacker", "pro-German" or a "pacifist" was liable to prosecution by the state. This new orthodoxy was pervasive and transcended any other form of orthodoxy - religious or otherwise; "it exceeded economic conventionalism, for it permitted no havens of dissent. Its pharisaical division of the saved and the damned was not only the concern of sectarians, but of every group in society."¹²⁶

The fear was largely based on the doubtful loyalty of new Americans whose loyalties were divided by immigration and who were therefore not regarded as sufficiently patriotic. For this reason there was concern that many Americans with pacifist tendencies were not sufficiently bellicose. It was not sufficient to be neutral. One had to display his loyalty and be pro-war. This new orthodoxy did not allow room for academic freedom or one to be critical of decisions of the government relating to the war. No German sympathies were allowed. Academics could not express themselves freely on these issues. If they did, even if they did not do anything seriously seditious, they were liable to prosecution and to dismissal by the boards of trustees. A number of such cases

took place and these cases demonstrated the vagueness or morbidity of what was regarded as disloyalty.¹²⁷

Within the ranks of the AAUP the war produced severe conflicts. As Metzger puts it. "The Association could not, lest it betray all that it stood for, consider academic freedom a peacetime luxury. Its docket of academic freedom cases was filling up with sordid evidences of the censorship that called itself patriotism and the malice expressed in the name of loyalty. At the same time, it had given itself without compunction, to those martial symbols and apocalyptic hopes with which America goes to battle. Its historians had given up research to write propaganda tracts for the Committee on Public Information; its scientists were devoting their skills to the multifarious problems of war."¹²⁸

The report of the AAUP Committee on Academic Freedom in Wartime presented the association's decision. It was of the opinion that there are two sides to the duty of the citizen in time of war. The more urgent one was to help win the war. The other one was to preserve democratic institutions. The committee mentioned four grounds on which academic authorities might legitimately dismiss professors. These were (a) conviction of disobedience to any statute or lawful executive order relating to the war; (b) propaganda designed or likely to cause others to resist or evade the compulsory service law or the regulations of the military authorities; (c) action designed to dissuade others from rendering voluntary assistance to the efforts of the government; and (d) in the case of professors of Teutonic origin and sympathy,

violating the obligation to refrain from public discussion of the war, and in their private intercourse with neighbours, colleagues and students, avoiding all hostile or offensive expressions concerning the United States and its government.¹²⁹

The committee introduced various qualifications, namely that the trustees should exercise magnanimity in dealing with pacifists, that teachers had to be spared the extreme penalty of dismissal on their first offence, and that the proceedings should be strictly judicial in character. The committee assumed that the war had fundamentally changed the conditions of academic freedom and that the university should assume responsibility for its professors' utterances.¹³⁰

Although there have been problems with academic freedom after the First World War, none was similar to that of the First World War. The reason for this is that a more sympathetic and profound understanding of academic freedom became more widespread among teachers, administrators and trustees than in 1917. The institutional mechanisms for defending academic freedom had been better developed. The AAUP had become more powerful. Although these are not an indefeasible bulwark, they give considerable security for professors who are determined to express their views.

2.4.7.6 The Second World War and its aftermath

Although developments after the First World War had created the impression that academic freedom among American universities was secure, the aftermath of the Second World War

ushered in a new wave of intolerance which led to severe attacks on academic freedom. These attacks were facilitated by the climate of public opinion in the United States and the form of academic government.¹³¹

The new wave of intolerance was precipitated by the "Cold War" and its accentuation especially since the Korean war. This new wave took on considerable proportions. It led to a vast increase of suppressive controls over books, public addresses and over all forms of expression of opinion. There was also a hunt for subversive material. This was based on the assumption that any kind of liberalism or non-conformity was a step on the road to communism. Any attack on the proponents of these ideas was regarded as a blow against communism itself. The convenient way of doing this was to label non-conformists as communists and thereby discredit them. What was painful was that not only real communists, but also people who were former communists or who showed liberal inclinations were branded with the same brush as "fellow-travellers" etc. Once they were labelled as communists, they were severely discredited. Their writings were either banned or censored. Libraries and librarians were coerced to exclude those books that had been regarded as spreading communist propaganda. The pretext was to protect the public that would be ignorant of this propaganda. The main casualties of this attack were academics and academic freedom. When books were banned, censored or destroyed, no expert evidence was obtained to support the allegations that they were communist inspired or spreading communist propaganda. People who regarded themselves as "patriots" simply styled themselves experts and declared this literature

undesirable. Many of them who were on boards of trustees of universities supported the dismissal of professors on flimsy grounds and sometimes without proper trials.¹³²

Concomitant with censorship was the passing of a spate of legislation by the state legislatures to suppress subversive activities - this without any noticeable increase in communist infiltration in the country. These acts were hastily drafted and left much room for identifying the new criminal offence. This was in addition to the pre-existing laws against conspiracy and treason which were wide enough to include such behaviour. The effect of this was to breed bitterness. It also led to the extension of the meaning of disloyalty with the consequence that any unorthodox behaviour or conduct deviating from the tribal code became punishable under the guise of patriotism. This spirit was manifested, among others, by the increasing imposition of loyalty oaths on people of all kinds, government employees, candidates for office, educators, speakers at public meetings on public property, applicants for fellowships provided by government grants and many more. Although a loyalty oath may seem innocuous, it was complicated by the inclusion of a clause renouncing membership in any subversive organization. This also had a negative effect on democracy as the investigations were often conducted by people who were anti-democratic and merely interested in conformism. For this reason, believers in civil liberties opposed any extension of such procedures beyond the demand of national security.¹³³

Certain conduct was labelled "un-American". This came to mean anything that those who supported the new orthodoxy did not agree with however incompatible that was with the great traditions of the country. It was reminiscent of the old Nazi charge against non-Nazis, that they did not have a "positive attitude toward the Party". The definition of un-Americanism was a negative attitude towards the "sound" doctrines of the supporters of the new orthodoxy. This had a negative impact on schools and colleges. Many areas of inquiry became, "in the eyes of the faithful, un-American". As MacIver further puts it: "It was un-American to mention unpleasant facts about the social order, and so a schoolbook was revised because it said one third of the people were badly housed. It was un-American to admit that our form of government, like every other in the history of the world, had collectivistic, or socialist aspects. It was un-American to plead for international organization or for international understanding."¹³⁴

Although this approach is called the "new orthodoxy", it was compounded of the old intolerance and the old narrow interests. What made it new was that it had a new appeal, a new mode of attack and a new label for the supposed heretic. "Whatever he may be, a liberal, an independent, a radical, an anti-Marxist socialist, a pacifist, a non-conformist of any kind, a simple believer in the rules of evidence, a conservative who upholds fair play, an advocate of civil rights, he is sure to be classified as one of the vast phantom army who are on the road to communism and are meantime aiding and abetting it."¹³⁵

A number of pressure groups were used to support this new intolerance. These aligned themselves with a variety of congenial political elements. At the same time they galvanized into action a number of other organizations, especially those with some form of economic interest, the self-interest of which they appealed to. This gave them a great impetus and impact on society. Their impact was increased by the belief they evoked that the great mass of the people is on their side and they took advantage of the state of mind "evoked by our time of trouble, the impatience and apprehensiveness and sense of frustration of a people which after winning a peace of heavy cost find itself menaced by a more portentous threat than before."¹³⁶

The organizations that became engaged in the campaign to control or influence education or educators may be classified into legislative committees, "patriotic" organisations, certain special-interest organizations and lobbies, and propagandist associations that set themselves up as having mainly or exclusively educational objectives. Their mode of operation was arbitrary. They had the tendency to impute guilt by association, the assumption that denunciations and expulsions were the proper way to deal with disaffection of the relatively small body of American communists and they were disinclined to seek the roots of the problem. Most of the legislative committees adopted unfair investigative procedures which violated the rules of decent and dignified investigation. The same could be said of other organizations. In the process they totally ignored or misconceived the function of the institution of higher learning and demanded

that all its teaching, in every relevant subject, be solely along the line of the particular viewpoint or doctrine to which they themselves adhered. When it came to research, they insisted that all its researches in every relevant subject, should arrive at the position from which they themselves started. Their main goal was conformity and they denounced difference. Moreover, they did not reason with those who differed from them, but they simply condemned them. Obviously they were not, unlike universities, interested in the pursuit of knowledge. Their mode of operation was repressive, seeking to remove whatever they disliked, whether it be textbooks of which they disapproved or teachers with whom they disagreed. To attain these ends, they did not appeal to educators, but to a public which they misinformed and to authorities they could pressurise. In the process they distorted the issues.

Their main weapon was the deliberate exploitation, for their own purposes, of the fear of communism. They incited that fear all the more in order to misdirect it. Their strategy was to exaggerate the number of communists in universities and the influence they wielded. They pretended that universities and colleges were overrun with communists, undermined by them, and infected by them. Anyone who advocated any social reform like social security, or state medical aid, or better facilities for housing, or more adequate relief for the unemployed, or more measures against unemployment, or some kind of international organization would be regarded as "statist", a "collectivist", a "socialist", a follower of the communist line, a fellow traveller, or a downright "red". Anyone who thought the economy might be improved, was accused of seeking

to destroy it. They were unconcerned with the falsity and misleading nature of these charges. They appealed to prejudice rather than to intelligence. In the process they seriously threatened not only academic freedom, but the whole broad freedom of thought and of inquiry.¹³⁷

The lines of attack on universities and academic freedom were economic, religious and social tradition. Anything that deviated from the accepted and orthodox ways was condemned and discredited.¹³⁸ But the greatest enemy was communism.

Those who sought to debar communists from being employed at universities relied on the argument that a communist, at list a Party member, has renounced his own intellectual liberty and is no longer qualified to seek the truth wherever it may lead or to impart knowledge without bias. The organization to which he belongs is extremely authoritarian and is against freedom of inquiry, of opinion, and of teaching and is himself committed to a movement to extinguish academic freedom. Moreover, he belongs to an organization that is intent on the violent overthrow of the government. Although some of these accusations are cogent, they tend to over-generalize and to be arbitrary. There may be communists who may believe in communism in general, but not in everything for which the Communist Party stands. Moreover, it would be unfair to dismiss a person because he is a communist unless he is indoctrinating students with communism or is advocating the violent overthrow of the democratic government.¹³⁹

There is no doubt that academic freedom in America has had a chequered career.

In the words of Metzger:

"No one can follow the history of academic freedom in this country without wondering at the fact that any society, interested in the immediate goals of solidarity and self-preservation, should possess the vision to subsidize free criticism and inquiry, and without feeling that the academic freedom we still possess is one of the remarkable achievements of man. At the same time, one cannot but be appalled at the slender thread by which it hangs, at the wide discrepancies that exist among institutions with respect to its honoring and preservation; and one cannot but be disheartened by the cowardice and self-deception that frail men use who want to be both safe and free. With such conflicting evidence, perhaps individual temperament alone tips the balance toward confidence or despair."¹⁴⁰

2.5 CONCLUSION

From the foregoing account it is quite clear that history has demonstrated that university autonomy and academic freedom are indispensable if the university has to fulfil its function of the pursuit of knowledge and truth. This function often puts

the university in conflict with the government or the church or society in general. From its inception the university had to struggle to maintain its autonomy and academic freedom from the church authorities. Later on the university had to contend with the government. It is interesting to note that university autonomy and academic freedom, like individual liberty, were not attained in the West as a result of a deliberate aim, but as a by-product of the struggle for power.¹⁴¹ In America academics had to contend with the power of boards of trustees. One would never imagine that in a country renowned for its commitment to democracy and liberty like the United States of America academic freedom would ever be under threat, but this has been the case. This means that university autonomy and academic freedom can never be beyond threat. The struggle for academic freedom has been long and arduous. Sometimes what has been gained over a long period of time is lost because of certain emergencies. This was the case in particular in the United States during the First World War and after the Second World War. But university academics have always striven to retain this autonomy and academic freedom.

FOOTNOTES

1. Pauw 13.
2. M Versveld Rondom die Middeleeue (1962) 30.
3. A N Allott The Future of Law in Africa (1960) 4.
4. R S Rait Life in the Medieval University (1918) 5; Pauw 13; Du Plessis 10ff; A Olubummo and J Ferguson The Emergent University with Special Reference to Nigeria (1960) 1-3; G G Oosthuizen (ed) The Challenge of a South African University: The University of Durban-Westville (1981) 1; R Hofstadter "The European Heritage" in R Hofstadter and W P Metzger (eds) The Development of Academic Freedom in the United States (1955) 3.
5. Pauw 14; Du Plessis 15; Olubummo and Ferguson 32.
6. H Rashdall The Universities of Europe in the Middle Ages vol I 2 ed (1936) 4 ff; Rait 4-6; G Leff Paris and Oxford Universities in the Thirteenth and Fourteenth Centuries (1968) 16-17; H R Hahlo and E Kahn The South African Legal System and its Background (1968) 492 footnote 47; H Wieruszowski The Medieval University (1966) 16.
7. Leff 15; Rashdall 75 ff; Oosthuizen 203; Wieruszowski 16; Hofstadter and Metzger 3; H Perkin "The History of Universities" 1991 International Higher Education 171.
8. Pauw 14-15; Rait 6; Rashdall 28 ff; Leff 78; Du Plessis 15; Hofstadter and Metzger 6; M Reeves "The European University from Medieval Times with Special Reference to Oxford and Cambridge" in W R Niblett (ed) Higher Education : Demand and Response (1969) 61-63.

9. Pauw 16; Rashdall 62; Du Plessis 17; Olubummo and Ferguson 3-4.
10. Rashdall 148 ff; Pauw 17; Olubummo and Ferguson 4; Hofstadter and Metzger 6.
11. Rashdall 159 ff; Pauw 18; Du Plessis 19; Hahlo and Kahn 492 ft 47; Perkin 173.
12. Rashdall 398 ff; Leff 20; Pauw 22; Oosthuizen 3; Wieruszowski 34; Perkin 174.
13. Rashdall 278 ff; Rait 28 ff; Pauw 23; Hahlo and Kahn 492 ft 47; Wieruszowski *ibid*.
14. Pauw 23-24; Wieruszowski 32-33.
15. Rashdall 299 ff; Pauw 24.
16. Leff 79 ff; Wieruszowski 36; Reeves 68.
17. Leff 82 ff; Wieruszowski *ibid*; Reeves 68-69; Perkin 174.
18. Rashdall 334 ff; Leff 31, 78; Pauw 25; Wieruszowski 32-33, 55; Hofstadter and Metzger 8. A similar occurrence took place at Oxford in 1209. A student killed a woman. The mayor and burgesses led an attack on his hostel; a number of scholars were arrested and several were executed. A cessation of lectures was ordered in protest. Masters and scholars migrated to Reading, Paris and Cambridge. The foundation of Cambridge dates from this time. At the time England was under papal interdict; when it was lifted in 1214 the pope interceded for the university. Through the papal legate he published what came to be a charter of liberties comparable to Philip II's at Paris in 1200.
19. Leff 31-32; Pauw 25; Rashdall 337-339; Rait 41-48; Wieruszowski 33; Hofstadter and Metzger 8-9.

20. Pauw 26; Rashdall 302.
21. Pauw *ibid.*
22. H R Hahlo and E Kahn The South African Legal System and its Background (1968) 492; see also H J Brinkman "Medeseggenkap van studente in Nederlandse universiteite" in H J Brinkman and B J van der Walt (ed) Medeseggenkap van Studente in die Universiteitsbestuur (1992) 1; Leff 20; Rait 11.
23. Rait 18; Pauw 29-30; on the position at Oxford see Leff 82 ff.
24. Pauw 30 ff.
25. Rashdall 340; Wieruszowski 21.
26. Rashdall 311 ff; Leff 51 ff; Pauw 31-32; Perkin 175; H R Hahlo and E Kahn 492 ft 47; W J Hosten, A B Edwards, F Bosman and J Church Introduction to South African Law and Legal Theory 2 ed (1995) 291.
27. Leff 53 ff; Rashdall 314; Pauw 32; Wieruszowski 36-37.
28. Pauw *ibid.*; Wieruszowski 37.
29. Leff 99-102; Wieruszowski 57-58; cf H Rashdall The Universities of Europe in the Middle Ages vol III (1936) 59.
30. Rashdall 193-194; Hofstadter and Metzger 9.
31. Rait 109-123.
32. Rait 63-65; Pauw 33.
33. Rait 124-132; Pauw *ibid.*
34. Rashdall 321 ff; Pauw 34.
35. Rashdall 324; Versveld 35.
36. Pauw 35-36; Rashdall 411; Wieruszowski 37-38.
37. Rashdall 325; Pauw 36-37; Rait 133 ff; H R Hahlo and E Kahn 492 ft 47; Wieruszowski 41 ff.

38. Pauw 38; Rait 28-29.
39. Rashdall 227; Pauw 39; Rait 28.
40. Rait 32-33; Rashdall 461-462; Pauw 39.
41. Leff 100-103.
42. Leff 116 ff; Pauw 40-41.
43. Rashdall 440; Pauw 43-44.
44. Rashdall 218-220; Pauw 43.
45. Rashdall 249, 445; Pauw 45-46; Reeves 68-69.
46. Rait 17-18; Pauw 48-49; Du Plessis 18.
47. Pauw 49; Rashdall 506 ff; Rait 49 ff; Leff 107 ff.
48. Pauw 50; Rashdall 111-169 ff.
49. H Wieruszowski The Medieval University: Masters, Students, Learning (1966) 109; Leff 110 ff.
50. Pauw 51-52.
51. Pauw 53.
52. Pauw 54-55.
53. B Beinart et al The Open Universities in South Africa and Academic Freedom 1957-1974 (1974) 12.
54. Beinart 13.
55. Oosthuizen 4; Du Plessis 21 ff; Olubummo and Ferguson 5; Bergh 72 ff.
56. Rashdall 268; Du Plessis 21.
57. Pauw 65; Du Plessis *ibid*; Oosthuizen 4.
58. Pauw 67; Du Plessis 22; Perkin 179.
59. Pauw 68-69; F Paulsen Die Deutschen Universitäten und das Universitätsstudium (1966) 50 ff.
60. Pauw 69-70; Paulsen 52 ff; Du Plessis 24; Olubummo and Ferguson 5; Oosthuizen 5.
61. Pauw 70; Paulsen 57 ff.

62. Pauw 71; Du Plessis 25-26; Oosthuizen 5; Paulsen 61 ff; Perkin 176.
63. E Shils "The modern university and liberal democracy" 1989 Minerva 427; Olubummo 6; Oosthuizen 5-6; Paulsen 339 ff.
64. Pauw 71-72; H Siebert Humboldt and the Reform of the Educational System (1942) 41; W P Metzger Academic Freedom in the Age of the University (1955) 109 ff; Olubummo and Ferguson 7; Paulsen 63 ff.
65. Pauw 72; Oosthuizen 6.
66. Siebert 42; Pauw 72-73; Paulsen 339 ff.
67. Pauw 73.
68. Pauw *ibid*; Shils 430.
69. Pauw 74.
70. G Neave "On Being Economical with University Autonomy: Being an Account of the Retrospective Joys of a Written Constitution" in M Tight (ed) Academic Freedom and Responsibility (1988) 33-34.
71. Neave 34.
72. Neave 35.
73. Neave 35-36.
74. Neave 36.
75. Neave *ibid*.
76. Neave 36-37.
77. Neave 37.
78. Pauw 74-75; Metzger 93 ff.
79. C Anorld Land-grant Colleges (1931) 318 ff.
80. Pauw 75; Metzger 106.
81. Metzger 3 ff discusses this issue in some detail; see also S M Jasper "Britain's Education Reform Act : A

Lesson in Academic Freedom and Tenure" 1990 Journal of College and University Law 474; W W van Alstyne Academic Freedom and the First Amendment in the Supreme Court of the United States : An Unhurried Historical Review" in W W van Alstyne Freedom and Tenure in the Academy (1993) 82-3; J P Byrne "Academic Freedom : A Special Concern of the First Amendment" 1989 The Yale Law Journal 273.

82. Metzger 9.
83. Metzger *ibid*; Duryea 25.
84. Metzger 29.
85. For a general discussion of this see Metzger 46 ff; Hofstadter and Metzger 320ff.
86. Metzger 68 ff discusses examples of these cases.
87. Metzger 72.
88. Metzger 89; Byrne 273; Hofstadter and Metzger 326ff.
89. Metzger 90; Byrne 274ff; Hofstadter and Metzger 344ff.
90. *ibid*; see also Byrne 275-6; Hofstadter and Metzger 363ff.
91. Metzger 91; Hofstadter and Metzger 365; the principles of natural justice are aimed at securing procedural fairness.
92. Metzger 92.
93. Metzger 103; Hofstadter and Metzger 367ff.
94. Metzger 112-113.
95. Metzger 113-114.
96. Metzger 117 discusses some of these cases.
97. Metzger 122; Hofstadter and Metzger 383ff; see also below in this chapter.

98. Metzger 125; W P Metzger "Academic Freedom in Delocalized Academic Institutions" in W P Metzger, S H Kadish, A DeBardleben and E J Bloustein (eds) Dimensions of Academic Freedom (1969) 2 ff.
99. Metzger 128.
100. Metzger 128-129; see also R M MacIver Academic Freedom in Our Time (1955) 4-5.
101. Metzger 129-130 discusses these issues in some depth.
102. Metzger 131.
103. Metzger 132-133 discusses this in some detail.
104. For a discussion of this see Metzger 133 ff.
105. Shils 429; Metzger 139 ff; MacIver 123 ff.
106. Metzger 145.
107. Metzger 146.
108. For a discussion of this see Metzger 151 ff.
109. Metzger 177.
110. Metzger 177 ff discusses this issue in great detail.
111. Metzger 179-180.
112. Metzger 182-183.
113. Metzger 184.
114. Metzger 184 ff discusses these cases in some detail.
115. Metzger 194 ff; W P Metzger "Academic Freedom in Delocalized Academic Institutions" in W P Metzger, S H Kadish, A DeBardleben and E J Bloustein (eds) Dimensions of Academic Freedom (1969) 2; Byrne 276.
116. Metzger 195 ff.
117. Metzger 202 ff; Metzger et al 2.
118. Metzger 206.
119. Metzger 206 ff; Byrne 277-79.
120. Metzger 211; Byrne 279ff.

121. Metzger et al 3; A DeBardleben "The University's External Constituency" in W P Metzger, S H Kadish, A DeBardleben and E J Bloustein (eds) Dimensions of Academic Freedom (1969) 69 ff.
122. Metzger 212-213.
123. As quoted by Metzger 213-215.
124. Metzger 215-216.
125. Metzger 216-221.
126. Metzger 222.
127. Metzger 222 ff.
128. Metzger 229.
129. Metzger 230.
130. Metzger *ibid.*
131. MacIver 21 ff.
132. MacIver 35 ff.
133. MacIver 40-42 also mentions examples of cases which illustrate this point.
134. 43.
135. MacIver 45.
136. MacIver 45-46.
137. MacIver 46 ff discusses these issues in great depth.
138. For a discussion of these see MacIver 124 ff.
139. For an in-depth discussion and critique of these accusations see MacIver 158 ff.
140. Metzger 232.
141. H A Hayek The Rule of Law (1975) 5.

CHAPTER 3

THE HISTORICAL EVOLUTION OF UNIVERSITIES AND UNIVERSITY AUTONOMY AND ACADEMIC FREEDOM IN SOUTH AFRICA

3.1 INTRODUCTION

Before one can discuss university autonomy and academic freedom in contemporary South Africa, it is necessary to trace the historical evolution of these concepts in South Africa in order to put them in proper perspective. It is hardly possible to discuss the historical evolution of university autonomy and academic freedom in South Africa without at the same time addressing the inception and historical development of universities in this country. It is in the light of this that we have to understand why, for instance, academic freedom is regarded as a fundamental right in our constitution whereas that is not so in many democratic countries.

Generally the university system in South Africa was modelled on those older countries which had minimized the exercise of state power over universities. These countries had accepted values such as university autonomy and academic freedom. Although before the era of apartheid there is no evidence of government interference with these, during the heydays of apartheid there was to be a drastic change in this which led to severe restrictions on university autonomy and academic freedom.

3.2 EARLY DEVELOPMENTS OF HISTORICALLY WHITE UNIVERSITIES IN SOUTH AFRICA

University education in South Africa had its humble beginnings in the establishment of the South African College in 1829 in Cape Town. It was largely modelled on the English "redbrick" and Scottish institutions of the time. It catered exclusively for the white population and its academic staff was largely drawn from Britain and to a lesser extent from the European continent. This college was established as a result of a petition that had been sent to the governor of the Cape. It was incorporated as a public institution in 1837. Its regulations stipulated that no student under the age of ten would be accepted. The college mainly did pre-university or secondary work "there being a very small university 'top' to the school." It merely prepared students for the matriculation and higher examinations of the University of London.'

Many schools or colleges similar to the South African College were established in the Western and Eastern Provinces of the Cape. The Church of England and the Dutch-Reformed Church were responsible for erecting a number of these colleges. These included the Diocesan College, Rondebosch (1848); Grey College, Bloemfontein (1855); St Andrew's College, Grahamstown (1855); Grey Institute, Port Elizabeth (1856); the Theological Seminary, Stellenbosch (1859); the Graaff-Reinet College in 1860; the Pietermaritzburg High School (1863); Gill College, Somerset East (1864); the Gymnasium (later Stellenbosch College and then Victoria College) (1866); the "Theologiese

School van de Gereformeerde Kerk", Burgersdorp (1869) and the Huguenot Seminary, Wellington (1874).²

After the granting of responsible government to the Cape in 1872, the University Incorporation Act of 1873³ was passed. In terms of this act an examining university, the University of the Cape of Good Hope, modelled on the University of London, was established. It was granted its royal charter in 1877 and had its chancellor, vice-chancellor, council and convocation. This institution did not do any teaching but conducted examinations for degrees in arts, law, divinity, agriculture, certain law certificates and matriculation examinations. Teaching was done by the colleges. The teachers of these colleges were not allowed to become examiners in their own subjects and the syllabuses were laid down by the university.⁴

3.3 THE UNIVERSITY OF THE CAPE OF GOOD HOPE AND THE UNIVERSITY COLLEGES

During the period between 1874 and 1916 considerable growth took place. The South African College developed as an institution which did only post-matriculation work in 1900. In 1881 Stellenbosch College was incorporated and became Victoria College in 1887; the university work at the Diocesan College was taken over by the South African College in 1911. Rhodes University College (which grew out of St Andrew's College) was incorporated in 1904 and the Huguenot College at Wellington in 1907.⁵

The council of the University of the Cape of Good Hope provided for the representation of Natal and the two northern republics. This was on condition that they contributed towards the expenses of the University. Natal made use of this opportunity in 1897 and the Transvaal and Orange River Colony in 1902.⁶

A School of Mines was established in 1896 in Kimberley. In 1903 it was transferred to Johannesburg as the Technical Institute. Later (1906) it became known as the Transvaal University College. In 1908 the college was split. Classes in arts, science and law were offered in Pretoria. By 1910 the Johannesburg branch became the South African School of Mines and Technology and the Pretoria branch became known as the Transvaal University College. The Natal University College which developed out of the Pietermaritzburg High School was incorporated by an act of the Natal parliament in 1909.⁷

The need for a teaching university grew especially after the 1899-1902 Anglo-Boer War. Two competing ideas developed, that of a single-college university and that of a federated university. Some even advocated a system of affiliation.⁸

In 1908 the Inter-Colonial Conference in London recommended that a South African University with constituent colleges be established. It was resolved that it was inexpedient to establish single college universities. A federal institution was seen as the only way out.⁹ Whereas up to 1910 all higher education was vested in provincial government, article 85

(iii) of the South Africa Act¹⁰ placed all higher education in the hands of the central government. The minister of education became responsible therefor. In 1913 a parliamentary select committee was appointed to investigate the whole issue of university education. It recommended that a commission be set up. The result was the Laurence Commission of 1914. The commission recommended that two universities be established to pursue teaching and research. One would be in the south with the South African College and the Victoria College as constituent colleges. The second one, the Northern University, was supposed to incorporate the Transvaal University College, the Grey University College and the Natal University College. Initially Rhodes University College was to be part of the southern organization but had an option to join the northern group later.¹¹ These recommendations were not implemented. With the outbreak of the world war, the government pushed the issue of the university to the background.

In 1916 two universities were established. They were the University of Cape Town¹² and the University of Stellenbosch.¹³ The 1916 legislation also provided for a federal examining university to be called the University of South Africa.¹⁴ This would incorporate the University of the Cape of Good Hope and a number of the existing teaching university colleges, namely Huguenot, Rhodes, Grey, Transvaal, the School of Mines and Technology and Natal. The South African College had to become the University of Cape Town and Victoria College had to become the University of Stellenbosch. Provision was also made for a joint matriculation board which had the function of

controlling the entrance examination which admitted students to the South African universities.¹⁵

The University of South Africa was to have its own chancellor, vice-chancellor, council, senate and convocation. Each constituent college which prepared students for the examinations and the degrees of the parent body were represented on the senate of the university although it had its own council, senate, principal or rector, faculties and departments. With the establishment of the University of South Africa, the University of the Cape of Good Hope came to an end after 45 years of existence.¹⁶

3.4 TOWARDS AUTONOMOUS UNIVERSITIES

Between 1918 and 1951 there was a period of accelerated growth which saw six of the seven original university colleges become fully-fledged universities. The School of Mines in Johannesburg was granted its charter in 1921 as the University of the Witwatersrand.¹⁷ At the same time the South African parliament incorporated the Potchefstroom University College as a constituent part of the University of South Africa.¹⁸ This college had been transferred from Burgersdorp.¹⁹

In 1930 the Transvaal University College became the University of Pretoria.²⁰ The Natal University College became the University of Natal in 1948.²¹ In 1950 Grey University College became the University of the Orange Free State.²² The University College of Rhodes became Rhodes University in

1951,²³ and in 1950 the Huguenot University College came to an end.²⁴

When the process of emancipating the constituent university colleges had been completed, the University of South Africa was converted²⁵ into a non-residential university which specialised in distance teaching by means of correspondence.²⁶

More than a decade later, two historically white universities were created. These were the University of Port Elizabeth²⁷ and the Rand Afrikaans University.²⁸ The establishment of these two universities was motivated by political and demographic reasons. The political motive was the establishment of Afrikaans universities to counter the influence of English universities like the University of the Witwatersrand in Johannesburg and Rhodes University which had sought to have a satellite campus in Port Elizabeth.²⁹

There were basic differences in the way these two universities came into existence. It is not quite clear whether this had been politically motivated. They became fully-fledged universities from their inception and did not start as university colleges sheltered under the University of South Africa until they had attained autonomous status as had been the case with others. The University of Port Elizabeth was a dual-medium university which was unlike most historically white universities although every effort was made to ensure the bias towards Afrikaans.³⁰

The use of ideological reasons for establishing a university was, however, nothing new. The creation of the University of Stellenbosch had been based on this idea. In a memorandum compiled by Dr D F Malan, Mr J G van der Horst and Prof Moorrees this was expressed as follows:

"Stellenbosch is the place where the Afrikaner nation can best realise his ideals from where it can exert the greatest influence on South Africa. It would be the best fulfilment the nation has yet found of a deeply felt need. It stands for an idea! To the nation it has therefore become not a mere educational institution, but also a symbol and the guarantee of its own vigorous, growing national life seeking to express itself."³

There were other universities which were established on the basis of political considerations. These were the historically black universities. Much will be said about these here below.

In 1955 the Universities Act³² was passed. This act applied at the time only to historically white universities and not to historically black ones, most of which were not yet in existence at the time. Even after their establishment the act did not apply to them. The purpose of this act was to consolidate the laws relating to universities. It provided, inter alia, for a committee of university principals, consisting of the principal or rector of each university and such additional members as would be appointed by the council

of each university.³³ The function of the committee is to make recommendations to the minister on any matter it considers to be of interest to the universities, or which may be referred to it by the minister or the director-general of the Department of National Education. It also prescribes the requirements for admission to every course of study at a university, excluding post-graduate study and approves that the certificate of any person who has complied with the minimum requirements for admission to study at a university be endorsed accordingly.³⁴

The traditionally western university grew spontaneously out of the community and was developed by the community itself, or the community for which it was created was involved in its establishment.³⁵ Similarly, white universities in South Africa, just like their western counterparts, came into being as a result of the initiative and participation of the communities concerned, aided and supported by the church. These were established by private acts and they were private, autonomous and relatively independent institutions where there was minimum government interference. This system of university autonomy entitled each university to choose its own staff, to decide the nature of its curricula and to select its own students from among those who were academically qualified. It was not a system of absolute autonomy as these universities were financed by the government and the government required these universities to submit annual accounts in a prescribed form. Despite the high government subsidy to the universities, the policy of the universities was an area in which the

government did not exercise its sovereign power and the government supervision of the universities had hitherto been reduced to a minimum which ensured that the state funds were properly administered.³⁶ With the National Party being firmly in power, it sought to change this and to impose its policy of apartheid in the admission and staffing policies of the universities. Before one can deal with this, it is necessary to sketch a brief historical background to put the matter in proper perspective.

3.5 THE DEVELOPMENT OF HISTORICALLY BLACK UNIVERSITIES

3.5.1 Early period of university education for blacks

Since their inception the Universities of Cape Town and Witwatersrand had an "open" policy to the admission of black students. In academic matters they pursued a policy of non-segregation, but in other issues like hostel accommodation, sport and social intercourse, segregation was applied as was the practice at the time.³⁷ This inconsistency was later used as justification by the spokesmen of the National Party in propelling through parliament the Extension of University Education Bill.³⁸

In 1936 the University of Natal provided part-time classes for black students. The university adopted a policy of segregation, whites and blacks being taught in separate classes. The same staff was used for teaching, the same examinations were written and the same degrees were awarded.

When the faculty of medicine was started in 1951 it exclusively admitted black students. In the other classes the attendance of classes took place over week-ends in order to enable students who lived far from Durban to attend them. With the purpose of having a semblance of "residential collegiate life and study" to the undertaking, a winter vacation school was held a fortnight annually in July at Adams College, a black residential college at Amanzimtoti in Durban.³⁹

The Universities of Stellenbosch, Pretoria, Orange Free State and Potchefstroom did not admit black students on their campuses. Rhodes only admitted a small number.⁴⁰

3.5.2 The establishment of the South African Native College

In 1916 provision was made for higher education of black people when the South African Native College, later Fort Hare, was founded. Its students sat for examinations of the University of South Africa although it was not a constituent college of that university. In 1951 it became affiliated to Rhodes University as the University College of Fort Hare.⁴¹ The University College of Fort Hare was originally open to white students although for all intents and purposes it was a black institution.⁴² Before this the standards of the South African Native College as it then was were regarded as lower than those of the other university institutions of the time. The cause of this was that there was one school at the time, Lovedale, which offered effective secondary education to black

people. This education did not go beyond the junior certificate.⁴³

With the increase of blacks who received secondary education, it became clear that the existing institution was inadequate for the needs of black students. The Report of the Commission on Native Education (1949-51) recommended that adequate facilities be provided with the purpose of eventually establishing a black university. The future development of university education for blacks, however, would have to be part of the total development plan.⁴⁴ The name South African Native College was altered in 1953 to University College of Fort Hare after the Brookes Commission had recommended accordingly in 1947.⁴⁵

3.5.3 Towards the establishment of black university colleges

In 1953 a three-man commission, the Commission of Enquiry on Separate Training Facilities for Non-Europeans at Universities,⁴⁶ under the chairmanship of Dr J E Holloway, was appointed "to investigate and report on the practicability and financial implications of providing separate training facilities for Non-Europeans at Universities". The commission was of the opinion that if separate facilities were provided, they had to be absolutely equal. If that were so, the commission felt, there would be no objection on the part of black people. In the words of the commission: "The Bantu do not object to segregation as such, but to enforced segregation. They fully realize that if there were

institutions based more specifically on their own economic and cultural level, these would have many advantages for them. For them it is coercion which goes against the grain."⁴⁷ The commission rejected, largely on financial grounds, suggestions that a new university for blacks be created or that a black section be created at Cape Town and Johannesburg. On the contrary, it recommended that black students be concentrated in Durban and Fort Hare and that coloured students be allowed to continue being admitted at "open" universities.⁴⁸

On the issues of university autonomy and academic freedom the Holloway Commission had the following to say, which, because of its seminal importance, is worth quoting extensively:

"In theory, therefore, it is true, in so far as the admission of European and non-European students to a university is concerned, that the State is equally competent to compel such an institution to admit Europeans and non-Europeans on an equal footing to classes as it is to prohibit their admission to the same classes or even the same institutions.

Although the State may possess this competency, there are, under a democratic system of government at any rate, certain spheres in which, in practice, it does not lightly venture to intrude.

This applies particularly to its dealings with certain institutions through which the highest in the human spirit finds expression, as, for example, in the case of religion and science. In these spheres very strong considerations must prevail before the state will in practice interfere and take away or curtail traditionally existing rights."⁴⁹

Further on the Commission had the following to state:

"Any limitation of a university's autonomy is, however, always a serious matter because it may open the door to interference in the purely internal policy of the universities."⁵⁰

The progress of science is dependent to the most profound degree on the freedom to search for the truth. Where new knowledge, new truths, may not be sought, the expansion of the range of human knowledge suffers incalculable harm. On this fact is based the fundamental claim to one of the academic freedoms of a university, namely its freedom to seek the truth.

The concept of academic freedom, has another aspect as well, namely, the freedom to communicate acquired knowledge to others and not only such knowledge but also hypotheses. The communication of

their knowledge and hypotheses to one another by research workers and thinkers is of cardinal importance for their co-operation in the advancement of knowledge. To this must be added the fact that to the extent to which a research worker or thinker is prevented from imparting his findings to others, the dissemination of knowledge and its useful application by mankind are repressed. A university's freedom to communicate knowledge to others connotes by implication the freedom of others, such as students, to receive the information imparted. On the strength of this argument the concept of academic freedom can be expanded to include the freedom of the student to study, and hence the establishment of the academic facilities to enable him to do so.

The members of a university should therefore have the right, so long as it occurs on strictly scientific lines, to think freely, to seek the truth without restraint, and to give free expression to their thoughts and findings, even if these should be erroneous. The only way to show that a view is wrong, is to answer it by refutation and not to stifle it by authority imposed from above.

It follows from the foregoing that the preservation of academic freedom at universities,

as centres where the truth can be sought and imparted to others, is for them a matter of the most vital importance. Whatever trammels academic freedom hampers the universities in the execution of their task. Restriction should be introduced only with the utmost circumspection and in the most serious circumstances, as is today the case in regard to certain aspects of atomic research."⁵¹

This statement by the Holloway Commission on university autonomy and academic freedom is a classic and is to be endorsed wholeheartedly. Although this statement was quite cogent, it is not the view that was later followed by the government.

There were a number of suggestions made to the commission. One of the most important ones came from the University of Pretoria. This tended to coincide with later developments. It advocated the creation of a separate black university in the north. This institution was supposed to be Afrikaans in its orientation. It was part of the proposal that black universities be set up according to ethnic lines. A university for coloureds would be set up in the south under the control of the University of Stellenbosch. The University College of Fort Hare was supposed to be reconstituted as a university of the Nguni group under the guardianship of Rhodes University. The black section of the University of Natal in Durban would be allocated to the Indian group. The eventual goal was that all would become independent universities as they developed.⁵²

The Holloway Commission, unfortunately could not support total university apartheid. In spite of the recommendations of this commission, the government appointed an interdepartmental committee (the Van der Walt Committee) to work out the cost to be incurred in providing separate university facilities for blacks without excessively draining the state coffers.⁵³ This committee was to provide justification for the establishment of ethnic universities in accordance with the policy of separate development.⁵⁴ This by implication meant that the government had rejected the advice of the Holloway Commission and that theories of the Department of Native Affairs had prevailed.⁵⁵

In the course of 1955 the minister stated that the policy of the government was to have separate university facilities for blacks. This would, however, take time because provision would have to be made for blacks who were already attending white universities.⁵⁶

The Van der Walt Committee summed its findings up as follows:

"Underdeveloped societies are particularly prone to suffer from a certificate complex and are inclined to neglect the development of personality. The Committee is of the opinion that, in order to restrain this evil tendency, there ought to be a great preponderance of internally trained scholars, and the expansion of facilities for internal study should therefore receive priority. How necessary

this shifting of the numerical preponderance to the internal sector is, becomes sufficiently clear from the very low percentages of successes reflected in the external sector.

From the above it follows that more university facilities for non-Europeans should be provided and that ... these should be created for them. To enable non-Europeans to enrol as internal students, bursaries and loans will have to be granted."⁵⁷

The Van der Walt Committee made an estimate of capital costs for the establishment of two university colleges for blacks and the take over of Fort Hare. It recommended that this be spread over three years. It further recommended that these university colleges be created.⁵⁸

3.5.4 The Extension of University Education Act and its implications

Despite the recommendations of the Eiselen and Holloway Commissions, in April 1957, the minister introduced the Separate University Education Bill in parliament.⁵⁹ The policy formulated in the bill was as follows: "The necessity of maintaining ethnic ties in university institutions flows from the conviction that the future leader during his training, including his university training, must remain in close touch with the habits, ways of life and views of members of his population group. What we envisage is to make provision for a

separate university college for the Xhosa population group at the existing University College of Fort Hare, as well as a separate university college for the Zulu group in Zululand, one for the Sotho group in Northern Transvaal, one for the Coloureds at Athlone in the Cape Peninsula and one for Indians near Durban in Natal. The Coloured population is concentrated here in the Cape Peninsula and their institution will, therefore, be in their midst, and that applies also to the Indians in Durban."

Whites were not supposed to be admitted to these university colleges and blacks were not to be admitted to white universities. The Minister of Native Affairs, and not of Education, Arts and Science, was to control these institutions. This control included the appointment and dismissal of professors and lecturers. They would be state employees subject to the disciplinary code similar to that of the civil service which even prohibited staff members from publicly commenting adversely upon the administration of any department of the government or of any province. It also prohibited the propagation of any idea or participation or identification with any propaganda or acts likely to cause or promote antagonism in any section of the population against another or to impede, obstruct or undermine the activities of any government department.⁶⁰

There was considerable opposition to the bill on the grounds that it seriously violated the autonomy of universities and the academic freedom of university staff. In its eagerness to

introduce university segregation, the government had overlooked the fact that the Bill was a hybrid one that affected private interests as well as matters of public policy. This meant that it should have been published well in advance in order that the private individuals and bodies concerned might be afforded an opportunity to state their views.⁶¹ An amended Bill appeared later in the session without the clauses affecting private interests. This passed its second reading in May 1957. The bill was then referred to a select committee.⁶² Owing to the prorogation of parliament, the committee recommended that a commission, consisting of the members of the committee, be established to conclude the investigation. On 19 August 1957 the Commission on the Separate University Training Bill was appointed to investigate and report on the provisions of the Separate University Training Bill, taking into account the principles contained therein as accepted in the second reading of the Bill. The Commission reported on this in 1958. The essence of its report was that many educated Africans were not serving their communities because they had been educated along European lines. As they were underdeveloped people who lacked the sense of responsibility, initiative or necessary knowledge to found and control their own universities, the government had to do it if it was in earnest about the full development of the Bantu. Owing to the need for leaders in many fields the whole development plan would collapse if they were not available in large numbers. The "open" universities were inadequate. Consequently separate university colleges should be established on an ethnic basis with the object of each group

serving its own community, guiding and developing the group in all respects, and training their students to "realize their duty towards a greater South Africa and to humanity as a whole and to maintain a balanced outlook". The state had a duty to ensure that they should undergo a sound process of development and not to remain at an inferior level. Moreover, they should serve the black section of the population just as the white universities served their communities.⁶³

State control was regarded as ideal because the state, "as guardian of the non-Europeans, had taken the initiative to set up the university colleges and was responsible for their success". This control was supposed to be temporary only during the formative years. Eventually it would be transferred to the councils of the university colleges which would then exercise the powers which had previously been exercised by the council of an autonomous university. Full university status would ultimately be accorded to the black university colleges as soon as they were mature enough to manage their own affairs.⁶⁴

The minority report took a different view to the problem. The minority members were not convinced that a university can fulfil its true function only if its aims and aspirations were specifically based upon the needs of the community it has to serve. They agreed rather with a memorandum submitted by the University of the Witwatersrand which stated:

"The University holds the view that there is only one basic type or kind of genuine university education and that all those who attend a university ... should, broadly speaking and in spite of their respective racial, religious or cultural differences, receive the same kind of education and training... The Witwatersrand University as a South African university is well aware of the fact that no university and least of all no South African university functions in racial, religious or cultural vacuum... While ... differences do impose variations upon a common theme, the theme itself is the same for all universities."⁶

The minority report rejected ethnic grouping and the design for separate councils and senates. It advocated the creation of autonomous councils which had the power to appoint, subject to the approval of the minister, its own staff. It also recommended the association of the black colleges with South African universities and that the closing of "open" universities be postponed for ten years. Moreover, it specified that the Minister of Education had to take charge of the new university colleges because not to do that would make it difficult to maintain the same standards.⁶

The Extension of University Education Bill was introduced in parliament without prior consultation with either the University Advisory Committee or the Committee of University

Principals. The Extension of University Education Act⁶⁷ was passed in 1959 despite heated opposition from the opposition parties. This act was a misnomer as it restricted rather than extended university education. The act provided for two racially separated councils for each university college. The council of the college would consist of whites only and an advisory council would consist exclusively of blacks.⁶⁸ The purpose thereof was to prevent any racial integration in the councils. It was envisaged that when the black advisory council had been trained, the two groups would exchange roles.⁶⁹ There was, however, no mechanism built into the councils which could enable the advisory council eventually to take full responsibility over the affairs of the university. Each council had power to appoint, promote or discharge staff in certain academic posts.⁷⁰

In terms of the Transfer Act,⁷¹ the University College of Fort Hare was transferred to the Minister of Bantu Education as from January 1960. The new university colleges commenced their activities between 1960 and 1961. The University College of the North, with its seat at Turfloop, was supposed to serve the Sotho, Tswana and Venda groups; the University College of Zululand, with its seat at Ngoya, was supposed to serve the Zulu and Swazi groups; the University College for Indians, with its seat in Durban, had to serve the Asiatic group; and the University College of the Western Cape, with its seat in Bellville, was to serve the coloured group. The University College of Fort Hare, at Alice, had to serve the Xhosa group.

Initially the relationship between the council and the senate was rather tenuous.⁷² There were two senates, the senate made up of white lecturers and an advisory senate consisting of black lecturers.⁷³ Once again the purpose of this was to forestall any racial mixing in accordance with the government's policy of apartheid. The advisory senate discussed everything but senate matters. It did not advise the senate, nor did its agenda have any academic content. Moreover, there were no advisory faculty boards to give substance to its deliberations. Although both black and white staff members taught the same black students, they could not sit jointly and plan curricula or to discuss the achievement and progress of their students. The whole situation "could be regarded as a travesty of university education."⁷⁴ Moreover, it was a serious infraction of university autonomy and academic freedom.

In terms of the Extension of University Education Act the Minister of Bantu Education had wide powers in relation to the black university colleges. He was empowered to appoint the rector.⁷⁵ The council could acquire stores and equipment subject to the conditions stipulated by the minister.⁷⁶ The minister also had the power to determine the faculties and departments and to prescribe courses to be offered;⁷⁷ he determined the number of students to be registered;⁷⁸ he also determined the ethnic group(s) of students to be registered;⁷⁹ he granted bursaries and loans to students;⁸⁰ he decided on the establishment and classification of posts on the establishment;⁸¹ he was empowered to appoint, promote and

discharge persons at the college;⁸² and he determined the conditions of service of the staff.⁸³

The effect of these was that the university colleges were outposts of the Department of Bantu Education. The management and control of the university was overly centralized in the person of the minister. The management structure of the university college therefore did not grow out of its own philosophical foundation.⁸⁴ Moreover, these colleges had no autonomy whatever. Academic freedom could also not flourish under such conditions.

In terms of the 1959 act, blacks could not attend white universities except under specific conditions and with the approval of the Minister of Education, Arts and Science.⁸⁵ Sections 31 and 32 stipulated that no black student who was not registered at an established university when the act came into operation might attend such a university without the consent of the responsible minister. These sections did not apply to the University of South Africa which offered correspondence courses or to the Natal Medical School. Contravention of one of these sections was made an offence punishable by a fine of R200 or by imprisonment for six months. In order to ensure the maintenance of academic standards the university colleges had to write the examinations of the University of South Africa. The problem with this arrangement was that there was no formal relationship between the senates or faculty boards of these institutions. Contact between them was confined to the level

of academic departments. Although the university colleges had to teach the syllabuses of the University of South Africa and conduct examinations approved by it, there is no evidence of the management role UNISA played in the teaching or research programmes of these colleges. The only role UNISA played in staffing was confined to the selection of applicants for appointment in academic posts. There were no staff development programmes or academic support programmes. Moreover, the approach of UNISA to teaching was based on distance teaching as opposed to the teaching approach of the colleges which, as residential institutions, was premised on the interface between lecturers and students.⁸⁶

The establishment of separate university colleges resulted in a dual system of state-controlled university institutions which existed alongside state-aided universities.⁸⁷ It put paid to the whole concept of university autonomy. Even the historically white universities were restricted on who to admit as students. The debate that accompanied the passage of the bill was of a political nature. Support for the legislation was based on race and ideology. It was premised on the desire on the part of the government to make provision for black students in separate institutions which could develop towards independence on their own bases. It was also contended that this would enable blacks to develop fully on what was "peculiarly their own" and they would be the "bearers of their own culture to stimulate the culture among their own national groups". Moreover, future leaders would be trained there not to break down the colour bar but to retain it in the best

interests of both whites and blacks. This was based on the opposition to all sorts of social integration which could flow from integration at university. Such integration would be disastrous for South Africa because it would be dominated by black masses. The state as a guardian, the argument further continued, was establishing the separate institutions because the respective communities could not be expected to do it; the white guardian had to help their development along 'right lines' until the black communities were ready to acquire full control.⁸⁸

The Extension of University Education Act was severely criticized both inside and outside parliament for a variety of reasons.⁸⁹ It was criticized for instance for depriving universities of the right to determine their admission policies and thus infringing their autonomy. The University of Cape Town, on 29 July 1959, consequently dedicated itself to freedom of association and to the right "to determine who shall be taught, who shall teach, what shall be taught, and how it shall be taught in this University, and to strive to regain the right to determine who shall be taught, without regard to any criterion except academic merit".⁹⁰ On 26 July 1960 a bronze plaque which recorded the deprivation of its academic freedom was erected in the lobby of the university library. It was unveiled by the chancellor the Hon Dr A van de Sandt Centlivres. The spirit of protest was kept alive by the inauguration of academic freedom addresses at the "open" universities. In 1959 the University of Cape Town instituted the T B Davie Memorial Lecture, an annual lecture on the theme

of academic freedom "to keep before the University a reminder of the seriousness of its loss, to keep alive its faith that the lost freedom will one day be restored, and to keep its members vigilant lest further inroads into the remaining freedoms should be made." A number of distinguished speakers delivered this lecture, starting from the Chancellor the Hon Dr A van de Sandt Centlivres. This lecture was supplemented by the address on the Day of Affirmation of Academic and Human Freedom of the Students' Representative Council." In 1968 a second plaque was unveiled. It recorded that in that year the right of appointing teachers at the discretion of the university alone had been removed. The University re-dedicated itself to the "constant opposition to all forms of academic segregation on racial grounds"."

The University of the Witwatersrand reacted in a similar way. In 1961 a plaque was unveiled at a formal ceremony which declared:

"We affirm in the name of the University of the Witwatersrand that it is our duty to uphold the principle that a university is a place where men and women, without regard to race and colour, are welcome to join in the acquisition and advancement of knowledge; and to continue faithfully to defend this ideal against all those who have sought by legislative enactment to curtail the autonomy at the University. Now therefore we dedicate ourselves

to the maintenance of this ideal and to the restoration of the autonomy of our University."⁹³

In the same year the university declared that it would hold a triennial public lecture to be known as "The Chancellor's Lecture" when it would pledge itself to the above ideal. This lecture was delivered by a number of eminent speakers from here and abroad. It was supplemented by the Students' Representative Council's Annual Richard Feetham Memorial Lecture to fill the gap between the chancellor's lectures. These were further complemented by the National Union of South African Students (NUSAS) lectures on Academic Freedom and Human Freedom. These lectures were delivered on the various English-speaking campuses. The tenth anniversary of the passing of the Extension of University Education Act was marked by protest and solemn meetings. At the University of the Witwatersrand this led to a confrontation with the police and to the arrest and prosecution of nineteen students for distributing pamphlets condemning university segregation.⁹⁴

Although the reaction of these universities was laudable, it was to some extent an exaggeration as previously they had not pursued a completely non-racial policy to the treatment of black students. Although the University of Cape Town had never officially adopted a policy of excluding black students on racial grounds, the same could not be said of the University of the Witwatersrand. Even the University of Cape Town had bowed down to the pressure of the Provincial Administration on the use of provincial hospitals for the clinical training of

black students. Here segregation was used. African students were not admitted to the medical faculty of the university. In 1912 an Indian who had wanted to be admitted to the medical faculty had been persuaded to go elsewhere. The university had to accommodate the sensibilities of the white patients and the attitude of the white nurses.⁹⁵

In 1927 the white nurses in Mafeking went on strike against Dr Silas Molema, a practitioner and graduate of Glasgow University. Their action was supported by country doctors. As a result of this the Cape Provincial Administration adopted a regulation to the effect that doctors on the staff of a hospital would require permission in writing from the hospital in order to have access to the hospital for the purpose of so attending patients.⁹⁶

Admittedly the University of the Witwatersrand did not officially adopt a policy of excluding students on the grounds of race or colour. Its first principal, Jan Hofmeyr, had stated in his inaugural address that the University should be open to all groups of the community irrespective of class, wealth, race or creed. But when the question of the admission of non-whites arose in 1925, as a result of a coloured student who had applied for admission to the medical school in 1926, legal advice confirmed that the university act and statute did not prohibit a black student. Although the admission of this student caused "little trouble", the registrar of the university, H van der Brugge, intimated to the secretary for Education in 1927, "chiefly owing to the discreet attitude of

the student himself", that it was nonetheless anticipated that "considerable friction may arise, both amongst the students and also possibly between coloured students and members of the staff, when one of the former should enter the second year of study, which embraces the subjects of Anatomy and Physiology."⁷

In 1926 the university had appointed a committee "to ascertain what procedure (was) necessary to empower the university to exclude students on the grounds of colour". Apparently the council was reluctant to take the steps itself but wanted the government to exclude black students from white universities or to make available separate facilities especially for the training of medical students. The Hertzog government refused to do this, arguing that it was the university's prerogative to do this.⁸

When the government appointed a committee in 1927 to enquire into the training of "Natives in Medicine and Public Health" under the chairmanship of C T Loram, the council of the University of the Witwatersrand testified before the Loram Committee and stated that the university was not averse to the training of black students for the medical profession provided they were taught in separate classes although the training would be the same as for whites." It was Dr C Louis Leipoldt, a leading Afrikaans poet and editor of the Journal of the Medical Association of South Africa who put the council of the university to shame by publishing an article in the journal of 22 December 1928 where he said: "We work and live alongside of

and in close proximity to natives in all phases of our life, and do not find any great difficulty in doing so. Deep down in our hearts we have no real antipathy to the native. Why, as educated university men, do we not act as true citizens of the Universities and throw our portals open wide to anyone, whatever his colour, who satisfies the same conditions as the European?"¹⁰⁰

Despite these protestations white prejudice won the day. The Transvaal Provincial Council passed a Public Hospitals Ordinance, 18 of 1928 which empowered hospital boards to disallow any registered medical practitioner to have access to any public hospital or any specified portion thereof. This ordinance was later used to exclude non-white medical students from the wards of Johannesburg General Hospital and enabled the university to exclude non-whites from its medical school.¹⁰¹

In 1931-33 the university was again confronted with requests for admission to the medical school of two individuals "obviously of native birth", A Mtinkulu and R J Xaba. Both of them could not be admitted on the grounds that the university could not provide them with appropriate clinical training. Although the board of the Johannesburg General Hospital was willing to allow these students to work in the non-European wards, the university authorities feared the "social implications of a possibly far-reaching character". The university wanted the government to bear the responsibility for non-admission.¹⁰²

In June 1932 the principal of the university, H R Raikes, wrote to the secretary for education on behalf of the senate. He pointed out that the senate wanted to bring to the notice of the minister of education that they were receiving an increasing number of applications from "coloured and native students" but the government had not laid down a clear policy for university councils to follow. The government, however, did not interfere in this matter. He also wrote to the Student Representative Council allowing student societies to invite black visitors from time to time, subject to strict rules such as the provision of separate seating. He reserved the right to refuse permission for blacks to attend a meeting if he considered that there might be a potential for racial friction.¹⁰³

In 1934, however, the university moved towards a more open policy. At first this was done cautiously. The annual report of the university council of that year stated:

"In the course of the year several enquiries were received from, or on behalf of, prospective students of Indian, Coloured and Native birth.

Since the Act and Statutes of the University do not make mention of differences of colour or race ...

it may therefore be expected that in the near future, students belonging to these categories will offer themselves for the various courses of study.

It is hoped that the exercise of tact and discretion will avoid the difficulties which are

sometimes attendant upon the closer contact of the various races."¹⁰⁴

There were various reasons which compelled the University of the Witwatersrand (WITS) to adopt a more open policy on the admission of black students. One of these was the pressure of white liberal opinion which pressed for the open admission of black students. The other factor was the change of government. The government had a liberal minister of interior, education and public health, Jan Hofmeyr who was the former principal and vice-chancellor of Wits and who favoured that Wits should open its doors to black students. In spite of these pressures it cannot be said that Wits had thrown its door wide open to black students although "it had nudged the door ajar". Black students remained few and they continued to be denied access to clinical training at the medical clinic of the university.¹⁰⁵

Although in 1935 a number of blacks were admitted to the university, including a post-graduate to the medical school, they were still debarred from medical studies. It was only in 1938 that the university relaxed this prohibition somewhat by admitting three Indian students to the medical school on condition that they would do three years of their study at the university and for the remainder they would have to go overseas.

In 1939, however, an uncle of one of the students approached J H Hofmeyr, who was then chancellor with a request that the

student be allowed to complete his studies at the university. Hofmeyr conveyed the request to the council. The council regrettably turned down the request "under the present circumstances". In the following year the students approached the board of the Johannesburg Hospital which permitted them to attend the "Non-European wards". This it did without consulting the university. The university had then to allow the students to continue with their studies.¹⁰⁶

Not only in the admission of black students was the university hesitant, but also in the appointment of blacks as academic staff. A typical example is that of B W Vilakazi who in 1935 was appointed as a language assistant in the Department of Bantu Studies. The appointment had been "sanctioned after some furious infighting at Senate and Council". It sparked off a great deal of controversy which forced the Senate committee to issue a press statement that the appointment was subject to certain conditions. His status was not that of a lecturer; students would not be compelled to consult him and he would have no disciplinary authority over students. Regrettably Vilakazi was never elevated to the status of lecturer at that university despite his obtaining a D.Litt in 1946.¹⁰⁷

From this account it is clear that, as Welsh and Savage point out:

"the admission of black students had been for both institutions a matter of acquiescence, rather than an active concern to promote any kind of racial

'integration'. The universities were deeply conscious of powerful segregationist norms in the white community outside, and were accordingly reluctant to go any further than permitting black students to 'academic equality' while seeking to preserve social segregation inside each institution. Various awkward formulae for this incongruous dichotomy were produced."¹⁰⁸

As a typical example of this the authors refer to a statement of principles published in 1957 by the "open" universities where they said:

"Segregation is only applied at what may be described as the purely social or non-academic level: that is to say, it is applied at the university residences, dances and sports. The open universities believe that practice in these matters depends on the conventions of the community in which these universities exist. Moreover non-white students have not clamoured for changes and the vast majority of them value their membership in spite of the element of social segregation."¹⁰⁹

The history of the University of Natal when it comes to the admission of black students is hardly inspiring. From 1916 to 1936 Indian applicants had been refused admission. When the university was ultimately forced by a threat of a court order to admit two Indian candidates who had obtained articles of

clerkship and required tuition for the Natal Attorney's Admission Examination, this was provided in separate classes. Parallel classes were arranged during the period 1939-41. This was discontinued when the war broke out.¹¹⁰

Even when part-time classes were provided by the university for non-white teachers, the council would not allow mixed classes. The teaching staff consisted partly of lecturers who belonged to the Natal University College and partly of graduate teachers who were in full-time employment of the Natal Education Department. This was regarded as a temporary measure as an Indian college was being envisaged.¹¹¹

Although there were isolated cases of non-white students who attended full-time classes for whites, this was done clandestinely. In 1952 the Department of History and Political Science declared openly to the university authorities that the "non-European classes were part of the main stream of University life, not a kind of hole-and-corner effort to provide special coaching for workers".¹¹² This did not receive any enthusiastic support from the university. The university largely bowed to white prejudice against non-whites.¹¹³ At the Medical School only blacks were allowed and although there was no prohibition against white students, no white students were admitted by 1952 at a time when apartheid had affected all university education.¹¹⁴

The above exposition is not meant to drag skeletons out of the cupboard, nor to embarrass the universities concerned. It is

merely to point out that the view that these universities were always open is not true. They were obviously subject to the pressure of white public opinion at the time. No university can exist in a vacuum. White prejudice of the time could not countenance integration even at university level. This is not unique. Welsh and Savage point out that: "(e)ither the university is rooted in a particular segment of the population and becomes their symbol of intellectual awakening; or the university may seek to straddle the ethnic cleavages, when it may well become a battleground for its own possession. Rarely, it would appear, is the university able to remain aloof from the powerful, and often divisive forces of nationalism in the society in which the university is situated."¹⁵

After referring to a number of examples to substantiate this point of view the authors conclude in the following terms:

"In all of the situations referred to above, universities have displayed little or no ability to act as agents of integration and reconciliation or as broker institutions where they exist in divided societies. In fact it may well be that universities, staffed partly or wholly by nationalist-minded intellectuals teaching readily mobilised student bodies, have heightened rather than diminished outside conflicts."¹⁶

Similarly, the South African university system has been shaped by ethnic, racial and geographical factors and "has arisen in

a society whose deep cleavages and inequalities, between Afrikaner and English as well as between white and black, need no recitation here."¹¹⁷

It might be contended that although these universities had shown reluctance to admit black students, at least they had not formally adopted a policy against the admission of black students. Admittedly that is so, but the same can be said of the other historically white universities which had never admitted black students. Although they had never adopted a formal policy to that effect, they excluded black students by virtue of convention.

This argument is not intended to convey the impression that there was no distinction between the two types of historically white universities. Concededly there was. But it was not a formal one. The distinction is that whereas both types of university had the power to admit black students, the one type of university never exercised that power in favour of black students whereas the other type of university sometimes exercised it in favour of these students. There was, however, no uniformity among the latter group of universities on the treatment of black students after admission.

The National Party government therefore did what some of these universities had asked the previous government to do, namely to exclude black students formally by statute. They had in vain attempted to pass the buck. Their subsequent reaction therefore is a question of political posturing rather than

action out of conviction. This, however, does not mean that what the government did was commendable. What the government then did is still open to criticism on the grounds that it stifled development towards open universities. It was also an unwarranted interference with the cherished values of university autonomy and academic freedom.

The above is not merely a scurrilous attack against the "open" universities. Mrs Helen Suzman in 1959 admitted in parliament that if these universities openly admitted black students they could experience a backlash from the white community. In her words:

"I have the utmost confidence in the sense of responsibility of the authorities at these open universities, who have always themselves been mindful of the traditions and conventions in South Africa. I have no reason to believe that they will be unmindful of those conventions in future. Indeed, if they attempted to breach the accepted mores of South African society they would soon find that the parents would refuse to send their children to these universities.""

To the credit of Mrs Suzman, however, it should be pointed out that she did not condone these conventions and anticipated their eventual alteration. As she put it:

"They will change as the South African traditions and conventions change, and I have every reason to believe that in future when we overcome this sad period of darkness through which we are going at present, South African traditions will change, I hope, in a progressive direction."¹⁹

As has been said this account of the "open" historically white universities is not meant to condemn them for criticizing the Extension of University Education Act or to castigate them for even making this imperfect attempt while turning a blind eye to those white universities which, although they had the power, never admitted black students. It is merely to point out that universities in South Africa, have always been ethnic. Whatever autonomy these universities had possessed previously had not been used maximally in favour of the admission and equality of treatment of black students in all respects. The move towards open universities is therefore a "long haul". It has been fraught with problems based on societal prejudices of the time.

3.5.5 The case for the "open" universities

Apart from the inconsistency displayed by the "open" universities, it must be conceded that they had a formidable case to present for university autonomy and academic freedom. This case cannot be faulted on its merits and deserves a detailed exposition. On 12 December 1956 the council of the University of Cape Town resolved that:

- " (i) It is opposed in principle to academic segregation on racial grounds;
- (ii) It believes that separate academic facilities for Europeans and non-Europeans could not be equal to those provided in an open university;
- (iii) It is convinced that the policy of academic non-segregation, which as far as possible the University of Cape Town has always followed, accords with the highest university ideals and has contributed to interracial understanding and harmony in South Africa;
- (iv) It desires that the University be permitted and enabled to carry on its functions under the same conditions as hitherto, and that nothing be done to change or impede the University's policy of academic non-segregation."¹²⁰

On 14 December 1956, the council of the University of the Witwatersrand took a similar resolution. It resolved that:

- " (i) It is opposed in principle to legislative enforcement of academic segregation on racial grounds;
- (ii) In its view the policy of academic non-segregation accords with the highest university ideal and contributes to interracial understanding and harmony in South Africa;

(iii) It desires that the University be permitted and enabled to carry on its function under the same conditions as hitherto, and that nothing be done to change or impede the University's policy of academic non-segregation."¹²¹

On 18 December 1956, these resolutions were made public. It was also announced that the councils of the two universities had agreed to organize jointly a conference consisting chiefly of senior members of the academic staff of the two universities to prepare and publish a reasoned statement on the subject of the "open" universities in South Africa. It is this case that is being outlined. The essence of this case was that the legislative enforcement of academic segregation on racial grounds was an unwarranted interference with university autonomy and academic freedom, which in their opinion, were fundamental values not to be interfered with, except with the utmost circumspection. If the government contemplated such interference, it had the onus to justify its proposed action in clear and irrefutable terms.¹²²

As a point of departure the two universities adopted and endorsed the views of the Holloway Commission on university autonomy and academic freedom.¹²³ They built upon these and drew the following conclusions. In their view the policy of academic non-segregation provided the ideal conditions under which the pursuit of truth and the promotion of racial harmony could best be advanced. To impose academic apartheid on them would deprive the South African community as a whole, both white and black, of an invaluable service. This was a serious

violation of university autonomy and academic freedom. The four pillars of academic freedom constituted an indivisible whole, namely the right to decide what may be taught, how it may be taught, who may teach, and who may study. If one of them was violated, the others would also be adversely affected. If universities were compelled to accept some non-academic criterion for the admission of students, respect for university freedom would be diminished and no longer stand in the way of unwarranted outside interference on what may be taught in universities, how it may be taught and who may teach there. Moreover, a limitation on admission for other than academic reasons inhibited the search for truth which has been the chief endeavour of universities since the Middle Ages. Universities in the Middle Ages were cosmopolitan in nature. The diversity in the membership of the university community contributed to the discovery of truth, "for truth is hammered out in discussion, in the clash of ideas."¹²⁴

If a university was coerced to accept a practice that was incompatible with its ideal, this was an infringement of academic freedom which not only adversely affected the intellectual climate where members of the university lived and worked, but which also created fear, fear that advances in knowledge may also be judged by irrelevant considerations. In such a situation the country would neither retain its best scholars nor succeed in attracting distinguished scholars from abroad. As Centlivres et al further put it:

"Truth is a hard mistress. Those who are endowed with a talent to lead in the advancement of knowledge are limited in number. If, of this number, some are excluded for non-academic reasons - whether it be religion, sex, race or colour - or are kept out by the fear created by such a policy, the discovery of truth is hampered and the community loses the fruit of their talent. The whole experience of eight centuries of university life makes it clear that the loss is not only to the excluded group, but also to those excluding them."¹²⁵

The "open" universities wanted to remain open. They believed that the advantages which black students enjoyed under the policy of academic non-segregation far outweighed any disadvantages emanating from social segregation which entailed the exclusion of black students from certain sporting and social activities. As pointed out above, this was specious. Nonetheless these universities rejected the idea that they should be forced to close their doors to black students simply because they were not open enough.¹²⁶

The "open" universities further rejected the notion that the presence of black students on their campuses led to the lowering of academic standards. On the contrary, they believed that their academic standards were not inferior to those of any other university in South Africa. They would always strive to maintain their academic standards. Nor were they disturbed

by the contention that if they continued their policy of admitting black students they would eventually become "black". This was because they had faith in the capacity of white people of South Africa to maintain their place in the intellectual life of the country. Racial diversity within the university, in their opinion, was essential to the ideal of a university in a multi-racial society. They regarded it as their bounden duty to provide higher education to all those who could benefit from it, irrespective of race or colour. That the racial composition of their students could alter in such a way that they became predominantly "black" was a remote possibility which did not perturb them and which was dependent on unforeseeable contingencies.¹²⁷

The "open" universities further rejected the argument that they should close their doors to non-white students on the ground that in being "open" they were in conflict with an established South African tradition. In their view apartheid was not the only relevant established tradition in the country. The tradition they followed was firmly rooted in the Cape Colony and was not only South African, but was also in line with the universality of Christendom.¹²⁸ In this they relied on the view of the Holloway Commission which said:

"The position is ... that the desirability of any restriction of university autonomy which may be proposed must be examined on its merits. Broad social considerations as well as those peculiar to a university are necessary to that end.

Any limitation of a university's autonomy is, however, always a serious matter ... Restrictions must not be introduced unless they can be supported by reasons which should be regarded as overriding in the social sphere."¹²⁹

The "open" universities were of the opinion that a university is not merely organized for teaching, learning and research, but that it was based on certain fundamental and universally acknowledged ideals and traditions which formed part of the western way of life. These were the values and traditions they upheld and which formed part of Western European civilization long before the first European settlement was established at the Cape. The "open" universities, although of recent origin as compared with the ancient universities of Western Europe, regarded themselves as members of an international community of universities, that was continuously enlarging itself along with the extension and diffusion "of our kind of civilization and culture ... It is by virtue of these universal ideals and traditions that a particular university may on occasion find itself in conflict with sectional interests or with a narrow interpretation of national loyalties and interests. When such conflicts do arise, as the result of pressure from outside, and a university is obliged to yield against its judgment, then we have a serious interference with its autonomy."¹³⁰

The "open" universities also felt that they not only had the right to resist any unwarranted interference, from the

government, but that they also had an obligation to do so unless they wanted to become party to the betrayal of their own ideals and traditions. As Centlivres et al further put it:

"These ideals and traditions demand the rejection of any policy involving the exclusion of students on racial grounds. To force a university to abandon its ideals and principles is to affront its dignity and to restrict its legitimate activities, a situation which no self-respecting university can accept with equanimity. As open universities view the matter, it is part of their function in a society such as ours to continue to represent and maintain ideals and principles upon which they have always taken their stand. In so doing they hold firmly to the view that they have rendered, and are rendering, a valuable service to human relations in a multiracial society, a service which is in the long-term interests of South Africa."¹³

By bringing together students from all racial groups, the "open" universities saw themselves as playing a positive educative role for both black and white students. This was an exercise in race relations. Students were enabled not only to prepare themselves professionally, but also to be useful members of a multi-racial society. "Understanding, tolerance, sympathy, a capacity for seeing the other man's point of view - all these are different ways of expressing the same fundamental fact that if a multiracial society is to survive,

what it needs above all else is a humane and civilized people. For the young white men and women who enter an open university there is an unrivalled opportunity to acquire an educated, humane and civilized point of view on race relations. There they have the opportunity of meeting (possibly for the first time in their experience) a racial situation in which the usual relations between white and non-white do not obtain. This experience should help to broaden their minds, and mind-broadening is one of those exercises that every university should provide for its students."¹³²

Referring to the adage that he who pays the piper calls the tune, as a justification for compulsory university apartheid on the grounds that the government was heavily subsidising university education and therefore entitled to dictate terms, in line with its policy, the two universities rejected this as imprecise. In their opinion no government would be justified in using its control over the national purse as a lever for such a purpose. This was so because all sections of the population contributed to the national income including university endowments. It was the taxpayer that should call the tune and the taxpayer was not only white. State interference with the way in which universities select their students is bad in principle and dangerous in tendency. It could not be advocated for any university in the country.¹³³

Government interference with the university autonomy and academic freedom was regarded as obnoxious because it frustrated the university in fulfilling its functions. These

functions could not be fulfilled unless members were left free to pursue knowledge. The pursuit of knowledge and truth would hardly be possible if ideas and discoveries were not communicated to others. Such knowledge would be lost and the labour wasted. The clash of ideas was conducive to the creation of new knowledge. In the words of Centlivres et al:

"There is no substitute for the clash of mind between colleague and colleague, between teacher and student, between student and student. It is here, that is found, in its most intense form, the stimulus of the new, the exciting and the different. It is here that the half-formed idea may take shape, the groundless belief be shattered, the developing theory be tested by the criticisms of one's fellows. It is here that controversy develops, and out of controversy, deeper understanding. For challenge is as essential to knowledge as to life. This is why discussion may be most fruitful when it begins with disagreement, and when it is conducted between persons from different environments, holding different beliefs, and approaching problems from different standpoints. For knowledge is not advanced through conformity: without the continuous need to defend his convictions from the attacks of the unconvinced, the sceptic, or even the heretic, the individual has little protection against the dangers that his own prejudices may bring into his own thinking. It

is as a product of this disputation among different persons that new questions are asked and new answers tested."¹³⁴

The "open" universities also rejected the claim that separate but equal university facilities could be provided. In this they relied on the American decision where the separate-but-equal doctrine had been rejected as being inherently contradictory.¹³⁵ The basis of the rejection was that the separate-but-equal doctrine ignored factors which matter most, namely factors which could not be assessed in physical or monetary terms.¹³⁶ As Centlivres et al further pointed out:

"The real disintegration of the 'separate but equal' doctrine came when it was realized that a university cannot be treated as if it were a public amenity. There are factors and spiritual values which cannot be weighed and measured, and these are the ones that matter most. The ethos of the university and the professional reputation of particular faculties cannot be assessed in physical or monetary terms. Gradually it was realized in the United States that segregated education, to the extent that it entailed a restriction of choice in these matters for Negroes, entailed inequality. With this realization the doctrine fell by its own inherent and inevitable weakness. In 1950 the importance of 'intangible considerations' was

unmistakably recognized and made the basis of a decision which condemned certain segregated educational facilities as being 'unequal'. And finally in 1954 in a now famous judgment the United States Supreme Court unanimously declared that: 'in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal'."137

As has already been said, this was a formidable argument. The significance of the case presented by the "open" universities is that it focused attention on the central role to be played by the university. It also provided the first comprehensive exposition of university autonomy and academic freedom in South Africa. It further developed the tentative ideas on these concepts expressed by the Holloway Commission. In the course of this, these universities articulated the salient features of university autonomy and academic freedom. Clear parameters were set to what is permissible government action in relation to the universities. Moreover, it constituted an unequivocal rejection and refutation of enforced academic apartheid as being incompatible not only with the role of the university, but also as being a violation of university autonomy and academic freedom. These universities demonstrated that a university should not be a "hand-maiden" of the government, but should challenge the government when it oversteps the line of what is legitimate involvement in university affairs. In the process these universities had to influence others. They also had to make a painful

re-evaluation of their own practices to bring them in line with what they professed. As a result steps were taken, where the law permitted, to extend all university facilities to all students, irrespective of race. During the debate on the Extension of University Education Act, the "open" universities had been criticized by government spokesmen who had contended that black students had been denied full education at these universities because of the policy that restricted certain social activities and many sporting events to white students.¹³⁸

Despite the forceful case presented by the "open" universities, the government was not deterred, but continued to pass and to implement the 1959 Act. As has been said, this piece of legislation had various implications for universities and university education in general. It may be necessary to add a few to those already referred to. The multi-racial nature of "open" universities was altered. Black students diminished at these universities and this led to further deterioration of attitudes between black and white students. Those students who had commenced studying at these universities in 1959 or earlier were allowed to continue with their courses, provided they qualified in terms of ordinary university regulations applicable to all students for re-admission. After 1959 black students were admitted to these universities only with the consent of the responsible minister. This meant that permission would generally be granted where no alternative facilities existed at the black university colleges.¹³⁹

The 1959 Act effectively restricted the right of universities to decide who to admit as students. Students at the "open" universities refused to approve segregated societies on their campuses. In 1965 for instance, the constitution of the newly formed Conservative Students' Association was rejected by the SRC and the council of the University of Cape Town on the grounds that it contravened the existing SRC constitution, which stipulated that membership of student societies should be open to all students. This attracted the reaction of the Minister of Education, who threatened that the government would intervene if the university authorities persisted with this. Later in the year the University Amendment Bill and the Extension of University Education Amendment Bill were introduced. The first one prohibited discrimination against any person at any university on the grounds that he advocated or practised racial separation. Should the minister be satisfied that such discrimination had taken place he might compel the university council to remedy the matter by withholding grants-in-aid. The second Bill was intended to debar "non-white students" from joining student associations consisting largely of whites. When the council of the University of Cape Town had introduced a new constitution for the SRC which modified the total prohibition by allowing societies to apply for recognition as racially segregated student organizations, these Bills were withdrawn. The dispute that ensued between the council and the SRC was resolved in 1968 when the council permitted the SRC in its own standing orders to prohibit discrimination on racial grounds in the membership of societies, subject to the right of any society

to approach the council. The University of the Witwatersrand adopted a similar procedure.¹⁴⁰

In 1968 the Universities Amendment Act 24 of 1968 extended the powers of the government to impose conditions for the grant of university subsidies. At the time the Minister of National Education denied that this was aimed at re-introducing the principles of the 1966 Bills although he warned that such legislation would be introduced in future if necessary.¹⁴¹

The 1959 Act did not place any restrictions on who should teach at the universities. Africans, Coloureds and Asians were therefore appointed at some of the historically white universities. There was one occasion, however, where the government prevented the appointment of an African academic to the staff of the University of Cape Town. In 1968 Mr Archie Mafeje, who held the degree of MA from the University of Cape Town and who was then doing research at the University of Cambridge, was appointed as senior lecturer in social anthropology. This decision was rescinded after the council had been threatened by the Minister of National Education with legislation to prohibit this or any similar appointment. This led to a nine-day sit-in protest in the university administrative block by the students of the University of Cape Town. This protest spread to the University of the Witwatersrand although there the protest was intercepted by the intervention of the then Prime Minister, Mr B J Vorster.¹⁴²

Undoubtedly the Extension of University Education Act was open to criticism in more respects than one. As has been said, it may be criticized for the fact that it deprived those universities of the lever that they were gradually developing of admitting black students. It also gave rise to other problems. Criticising this legislation Sir de Villiers Graaff expressed the fear that the university colleges established by this legislation would become "incubators for black nationalism, mass-produced Black Nationalism."¹⁴³ And indeed his fears have been more than realized in later years.

The black community obviously did not take kindly to this legislation. It, however, had no option. Apart from the criticism levelled against it at the time, it has been criticised a number of years later by Nkabinde in the following words:

"This Act was viewed by many Africans as an encroachment upon their liberty because it deprived them of the right to choose where they wanted to be educated. It also sealed the fate of the "holy" alliance between education and Christianity which the African people had known for about 100 years. There was a firm suspicion in the minds of many African people that the said Act was designed to lower their standard of education. This view found support in the fact that the Extension of University Education Act was passed during the time when white politicians of the day believed in the

superiority of the white man. 'White supremacy' was generally accepted by a large section of the white population of South Africa. In accordance with this belief, the South African Parliament could pass laws without first discussing them with people affected by such laws. The Extension of University Education Act also followed closely upon the heels of the much-maligned Bantu Education Act. The Extension of University Education Act confirmed the fears of many people that education of the African people had gone beyond the pale. The Act was the last straw!"¹⁴⁴

Although the university colleges to which the Extension of University Education Act gave rise were often criticized as "bush colleges", they have weathered the storm and continued to exist up to today. Most of them have tried to shed the stigma of apartheid and they have made a contribution to the manpower needs of the country. But at the time this happened, the situation was uninspiring.

Although the 1959 Act did not affect the appointment of staff in general, at some of the historically black universities it did. When Fort Hare was transferred to the Department of Bantu Education by the University College of Fort Hare Transfer Act eleven members of staff resigned.¹⁴⁵ This act not only put Fort Hare under the Department of Bantu Education, but it also had a twisted effect on the whole university set-up. The creation of a council and senate consisting of whites only and an

advisory council and advisory senate consisting of blacks only, had the effect that Prof Z K Matthews who had been acting principal and other African heads of departments who had sat on senate and had been elected members of the council, could no longer be such members but had become members serving in an advisory capacity. This also meant that the faculty members at Fort Hare who had enjoyed the academic freedom permitted at the other universities, became comparable in status to school teachers or civil servants; academic freedom was drastically curtailed and faculty members were precluded from taking part in any political activity.¹⁴⁶ When the transfer was effected the government did not consult the council to consider this drastic change. In the process of the transfer the principal Professor H R Burows and two other senior staff members were not re-appointed, while six other staff members were dismissed. On the issue of dismissals the Minister of Bantu Education was reported to have said: "I disposed of their services because I will not permit a penny of any funds of which I have control to be paid to any persons who are known to be destroying the Government's policy of apartheid."¹⁴⁷

3.5.6 The development of black university colleges

The new university colleges continued under the guardianship of the University of South Africa until they were granted full university status a decade after their establishment.¹⁴⁸ With some minor alternations their structures largely remained the same.

These universities were still supposed to serve the national units for which they were created. Seven years later the Medical University of Southern Africa was established¹⁴⁹ to serve black students in South Africa. The councils of these universities were given the discretion to admit students other than those for which these universities were created if they felt the admission was justified. But the first admission of any such student had to be subject to the approval of the Minister of Bantu Education.¹⁵⁰ White persons were precluded from registering as students of these universities.¹⁵¹

The provisions of the Acts which constituted the historically black universities were largely similar.¹⁵² Each university had a chancellor,¹⁵³ a rector and vice-chancellor,¹⁵⁴ a council,¹⁵⁵ an advisory council,¹⁵⁶ a senate¹⁵⁷ advisory senate,¹⁵⁸ joint committees of the council and the senate, academic staff¹⁵⁹ and registrar and administrative staff.¹⁶⁰ These universities did not enjoy an autonomy that was comparable with that of the other universities. The respective ministers responsible for the three different groups retained extensive powers over the appointment of the Rector and Vice-Chancellor, the staff, the promotion and discharge of members of staff and the approval of salary scales and conditions of service. Even the drawing up of regulations by the council required ministerial approval.¹⁶¹ These universities also did not fall under the more important provisions of the Universities Act¹⁶² which governed the other universities in the country. Their rectors for instance, were not members of the Committee of University Principals and the joint statutes that governed standards for

South African universities and facilitated inter-university mobility of students did not apply to them. The students at these universities were regulated by rigorous rules of conduct.¹⁶³

From the time the historically black universities were made largely autonomous, a number of developments took place which led to the attainment of greater autonomy. In 1973 in terms of the Black Universities Amendment Act¹⁶⁴ provision was made for each university to establish branches at other places with the approval of the minister and in consultation with the council.¹⁶⁵ It was, however, stipulated that the university could not borrow money without the approval of the minister.¹⁶⁶ The provisions relating to the council and the senate were amended by granting the council and the senate of each university the power to appoint committees of the council and the senate, which would consist of members of the council or the senate, as the case might be, and other members and to give powers and functions to these committees. The council or the senate would, however, not be divested of its powers and would be entitled to alter or set aside the decision of the committee at its next meeting.¹⁶⁷

The Black Universities Amendment Act of 1977¹⁶⁸ brought further changes to the acts of the various historically black universities by removing some of the obnoxious provisions which were remnants of the Extension of University Education Act. This act repealed the advisory council and the advisory senate and provided for the establishment of the

convocation.¹⁶⁹ This was an important step in moving away from the discriminatory practice of relegating black people to the advisory council and advisory senate which had no real powers. Provision was also made for the reconstitution of the council which gave black people representation on the council.¹⁷⁰ It was provided that a vice-rector be a member of the council; provision was also made for four members to be appointed by the state president and three members to be elected by the senate. One or two persons had to represent the convocation and two or more persons had to represent the governments of the various ethnic groups served by each university.¹⁷¹ The act further provided for the appointment of the rector or acting rector by the council with the concurrence of the minister.¹⁷² Further provision was made for the appointment of the vice-rector by the council with the concurrence of the minister.¹⁷³

Provision was also made for the council to determine the establishment of the university. The creation or abolition of posts would, however, be subject to the approval of the minister.¹⁷⁴ Fees payable by a student had to be determined by the council with the concurrence of the minister in consultation with the minister of finance.¹⁷⁵ The Black Universities Amendment Act also repealed section 38 of the acts of the various historically black universities. This section provided for the delegation of powers by the minister to the secretary and to the council.¹⁷⁶

Although the Black Universities Amendment Act was a further process of change in the structure of the historically black universities in that it swept away the moribund advisory councils and senate, it still left the management of the universities centralized in that the approval of the minister was required for a number of important decisions. Other restrictions were also left intact. The process of change had to be taken a step further by the Universities for Blacks Amendment Act of 1979.¹⁷⁷

The act repealed the restriction imposed on each university to admit only persons of a specific black ethnic group and made provision for each university to admit every black person.¹⁷⁸ It also made provision that every person registered as a student would only be registered for one year or for such shorter period as determined by the council. His registration would be renewable at the end of each year.¹⁷⁹ The prohibition of the admission of white students was also repealed.¹⁸⁰ The council was empowered to admit non-black students with the permission of the minister which had to be in writing.¹⁸¹ This meant that persons of all racial groups could now be admitted to these universities.

The Universities for Blacks Amendment Act of 1982¹⁸² made further amendments to the constitution of the council and the senate of the University of Zululand and repealed obsolete designations. The constitution of the councils and senates of the historically black universities were vested with greater responsibility and autonomy in relation to the internal

matters by the Tertiary Education (Education and Training) Act of 1984.¹⁸³ The staff of the university is, for instance, supposed to be determined by the council.¹⁸⁴

The council was vested with the power to determine the conditions of service of the staff.¹⁸⁵ The council of each university was enjoined to submit an annual report to the minister, of its proceedings and of the management of the university together with an audited financial statement of the previous year and any other information that he might require on the administration and finances of the university.¹⁸⁶

The Universities for Blacks, Technikons (Education and Training) and Education and Training Amendment Act¹⁸⁷ effected further amendments to the structure of the historically black universities. Provision was made for the appointment of one or more vice-rectors by the council with the concurrence of the minister. The rector was empowered to delegate some of his powers to the vice-rector.¹⁸⁸ The council was also empowered to cancel the registration of a student if it considered it to be in the interests of the university.¹⁸⁹

In terms of the Universities and Technikons for Blacks, Tertiary Education (Education and Training) and Education and Training Amendment Act,¹⁹⁰ provision was made for the appointment of more than one registrar and more than one vice-rector.¹⁹¹ It was also provided that the vice-rectors be members of the council although, if there was more than one vice-rector, not more than two could be members of the

council. It further provided for the increased representation of donors on the council.¹⁹²

Perhaps the far-reaching amendments to the structure of the historically black universities were effected by the Universities (Education and Training) Amendment Act of 1987.¹⁹³ The act made the provisions of the Universities Act¹⁹⁴ applicable to the management and control of the affairs of the historically black universities. Certain sections of the University of Zululand Act and the University of the North Act were repealed.¹⁹⁵

In terms of the Universities and Technikons (Education and Training) Amendment Act of 1990,¹⁹⁶ provision was made for the appointment of an acting rector without the concurrence of the minister. Provision was also made for the appointment of the members of the council not by the State President but by the minister.¹⁹⁷

The development and the evolution of more autonomy for the historically black universities has largely been the same in respect of all these universities except for the University of Fort Hare, the act of which was last amended in 1980. These amendments have had the effect of bringing them in line with historically white ones. The University of the Western Cape had a new and revised act in 1983.¹⁹⁸ The same applied to the University of Durban Westville.¹⁹⁹ There have been more recent amendments to make the historically black universities more democratic in their structures of governance. In the meantime

independent homelands like Bophuthatswana, Transkei and Venda established their own universities. With the establishment of the new democratic dispensation, these universities have been re-incorporated, like the homelands of which they form part, into South Africa.²⁰⁰

In 1981 Vista University came into existence.²⁰¹ It would appear that this additional black university was established to provide a university for blacks in the urban areas, presumably with the purpose of easing the pressure for the demand of admitting black students into white universities. Moreover, the existing black universities are in the rural areas. This university would provide "more generous opportunities and more adequate facilities for the urban Black to receive tertiary training within their own residential areas."²⁰²

From the above discussion it is quite clear that unlike their white counterparts, which were established as a result of the initiative and with the participation of the communities for which they were created, black universities were established not only without the consultation of the black communities for which they were meant, but they were also established against the opposition of those communities.²⁰³ They were consequently imposed on those communities. This led to the legitimacy crisis which these universities have encountered. Moreover, these universities were exclusively in the control of white officials and did not enjoy any autonomy. This exacerbated the problem of legitimacy and has been regarded as being

responsible for instability at these universities.²⁰⁴ This was evidenced, among others, by the violence that erupted and the resultant burning down of the administration building and a portion of the chapel at the University of Zululand in 1976. These disturbances were also an expression of solidarity with the uprisings in Soweto. The South African Students' Organization was largely responsible for engineering the whole episode which was seen as a fight against the white oppressors. The reason behind the burning of the chapel was because it had been a gift from the NGK. The administration building was gutted because it was perceived as a symbol of the white establishment.²⁰⁵

For some of these reasons black academics have advocated the Africanisation of the black universities.²⁰⁶ In 1975 Dr R E van der Ross, a distinguished scholar of the coloured community was appointed rector of the University of the Western Cape.²⁰⁷ Prof A C Nkabinde was appointed the first black rector of the University of Zululand in 1978 and Prof W M Kgwane was appointed as the first black rector of the University of the North. These appointments have been followed by the rapid increase in the number of black senior staff at historically black universities. These developments demonstrate that the earlier policy of the government was short-sighted. Even Viljoen pointed out that it was wrong in the first instance to have vested the control of the black universities in white hands. He felt that in order for the university to be legitimized in the eyes and experience of the group concerned, two vital elements must be met: firstly, the university should

visibly be seen to be controlled by the group concerned itself; and secondly, members of the group should go to their university of their own free will and volition because they want to.²⁰⁸ This is what the Afrikaner did when it came to the Afrikaans universities. There was no compulsion. When black leaders were appointed as rectors of these universities, they could, however, not be wholly accepted because they were perceived as being part of the "establishment"²⁰⁹ and had to contend with many difficulties.

3.6 FURTHER DEVELOPMENTS RELATING TO WHITE UNIVERSITIES

While various developments were taking place in the historically black universities, a different kind of development took place among historically white universities. In 1968 the government appointed a Commission of Enquiry into Universities in South Africa.²¹⁰ This commission was chaired by Mr Justice J van Wyk de Vries. Its terms of reference were "to inquire into and report, in so far as universities for Whites in the Republic of South Africa are concerned, on the educational, academic, financial and developmental aspects of universities, and on any other matters which the Commission deemed to be of importance..."

The commission had a very wide brief. Although the commission published an interim report in 1969 dealing with the subsidization scheme for financing universities and a second interim report in 1972 on certain non-academic activities of students, largely relating to student unrest, the main report

of the commission was published in 1974.²¹¹ Admittedly the commission was supposed to inquire into the position of white universities and not black universities. Its findings and recommendations were, however, equally relevant to the black universities.

The commission dealt with various aspects of universities under different headings. These included the nature and functioning of a university as an institution, student involvement, and finance and future policy in connection with the development of universities. It will not be possible to have a detailed discussion of all the findings and recommendations of the commission. Only the salient features thereof will be alluded to.

3.6.1 The definition and nature of a university

In giving attention to the definition of a university, the commission was confronted with two views. There was the view of the English-language universities which regarded a university as an autonomous community of teachers and students dedicated to "the search for or service of truth". According to the Commission this view exalted the university to a supra-national institution with its relationship with the state and society being purely incidental. A contrary view that emanated from especially the Afrikaans-language universities was to the effect that a university is very much part of the community and the relationship between the community, the state and academics was inextricably

interwoven. After an intensive consideration of these viewpoints, the commission concluded that a university is not a supranational institution that stands apart from the community and the state. On the contrary, it is an entity that comprises scholars, the community in which it is situated, society and the state.²¹² It would appear that in making this evaluation the commission omitted to take into account the historical background to the universities especially in the Western world. The independence or autonomy of universities can be traced to the autonomy of the monasteries and this autonomy was inherited by the universities in the Middle Ages.²¹³

According to the commission, the nature of the university determines its function. The function of the university is essentially to advance learning by bringing to light the knowledge amassed through the ages, by systematising it, and by incorporating every facet into the various disciplines as a component of the whole structure of knowledge, and by new discoveries through investigation and research. This knowledge and research must be applied in society.²¹⁴

3.6.2 The conscience clause

The commission also considered the conscience clause which appears in the acts of a number of white universities. It stipulates that no test whatever of religious belief should be imposed on any person as a precondition to his becoming or

continuing to be a member of staff or student of the university.

Although a number of submissions were made to the commission and advocated its abolition, the commission felt that the universities in South Africa did not take any action against teaching staff and students on the grounds of religious belief. In practice the conscience clause was an ineffectual measure that could easily be circumvented.

The commission consequently concluded that a university should be free to determine its own character and direction. For that reason it should have the right to retain the conscience clause or to replace it with a modified or amended provision. If the conscience clause is replaced by another formula, a provision should be included to the effect that no person may be refused admission as a student on the grounds of his religious belief.²¹⁵

3.6.3 University autonomy and academic freedom

The commission also considered university autonomy and academic freedom. It defined university autonomy as involving the powers of self-government by the university in respect of its affairs free from extraneous regulation. It includes the academic, managerial and administrative aspects of the university. Academic freedom, on the other hand, is concerned with the working conditions and conditions of service of staff and students as regards teaching and learning, research, the

expression of opinions and publication.²¹⁶ According to the commission the autonomy of the university is not absolute. In South Africa in particular university autonomy is qualified by the nature of the university which circumscribes its capacity and function. It is also qualified by the fact that its essential structure unites scholars, the community, society and the state, all of which have to be taken into account in the exercise of all self-governing powers in order to preserve a harmonious equilibrium between them. It may further be qualified by the general law of the country or statutory law relating to its establishment and functioning.²¹⁷

The nature and function of the university determine the content of its academic freedom. According to the commission this freedom is confined to the academic field. The academic freedom of the university as an institution consists of its power to regulate, organise and control all the facets of its academic function in its discretion without extraneous regulation by the state or society. This relates to the powers of the university to appoint academic staff, to lay down curricula and standards, to decide who must be admitted as students, to decide who should be taught and how and to strike a balance between teaching and research.

The academic freedom of a teacher or student entails the intellectual freedom for each to exercise his respective functions. The teacher is at liberty to perform his teaching function according to his own conception of fact and truth, to express and publish his views, to study, investigate and do research of his own choice and to be free from discriminatory

treatment on the grounds of sex or convictions or any other impermissible grounds. The student is entitled to study, learn, do research and publish in intellectual freedom and should not be discriminated against. This freedom, may be curtailed by the nature and function of the university or by the university itself in order to be able to carry out its functions more effectively.²¹⁸

In addition to the views of the Van Wyk de Vries Commission it is important to point out that university autonomy and academic freedom trace their origin to the Middle Ages and they developed at more or less the same time.²¹⁹ It is also interesting to note that universities have always had to struggle to protect their autonomy and academic freedom from especially the church and the state.²²⁰

3.6.4 The university and professional councils

On the issue of the relationship between the university and professional councils, the commission was of the opinion that while this relationship was sound, the various professional councils had gained an increasing hold on the universities and were in a position to prescribe the contents of the training they require and how it should take place and at what level. The university obviously provides training for the various professions like accountancy, engineering, medicine, dentistry, nursing and surveying to mention a few. The professional councils which have been created by these professions lay down the basic requirements for admission to

their professions and codes of conduct. The commission was of the view that while it was necessary for universities to take account of the needs of the professional councils, there was a real danger of these councils dominating universities resulting in the subservience of the universities to these professional councils and thereby diminishing their true function. The curricula of the universities could then take too practical a bias. This the commission did not support.²²¹

3.6.5 The university and the state

The commission also paid attention to the relationship between the university and the state. It noted that while in the past, owing to there being few universities, there was less interference between the state and the universities, this was changed by the increase in the number of universities.²²²

After considering a number of submissions on the relationship between the university and the state, the commission concluded that the two entities are interdependent although the state should not dominate the university. Each has a distinct sphere of operation. The state has to assist the university financially from public funds in order to enable it to carry out properly its function of teaching. This does not entitle the state to interfere in the university's sphere of activity or to prescribe to it what to do or not to do in relation to its real function of research and disseminating knowledge and information. But the growth of universities is dependent on the amount of funding from the government and it is the

government that determines this in the light of all the relevant factors in the national interest. Although the subventions to universities and the methods of calculating and allocating them were sound, the commission felt that there were shortcomings and discrepancies.

The extensive development of universities demanded a new approach. Although bodies such as the university advisory committee, the committee for university principals and the joint matriculation board provided a sound and good foundation for future development, these bodies had serious shortcomings in their functioning which needed to be rectified to cope with altered conditions in the field of universities.²²³

It was perhaps owing to the recommendations of the commission that in 1976 a universities advisory council was established.²²⁴ It consisted of a chairman and eight members appointed by the minister²²⁵ as well as a public servant appointed by the minister.²²⁶ He would be the executive officer of the council.²²⁷ Its main function was to advise the minister on the granting of subsidies to universities, the creation of faculties and departments and the establishment of study courses at universities, the founding, developing and extending of universities, the manner in which co-ordination on these matters could be achieved, other university matters referred to it by the minister, and generally all policy questions arising out of the Universities Act.²²⁸ It also had the power to inquire of its own accord into matters which were of interest to a university or to universities in general.²²⁹

The council was empowered to appoint committees to assist it in its work.²³⁰ It could also appoint any of its members to serve on committees of inquiry relating to higher education.²³¹ The council was abolished in 1983 by the Universities and Technikons Advisory Council Act.²³² This act created an advisory council representative of all the universities and technikons in South Africa. Its function is to advise the government on all matters affecting universities and technikons, such as the academic fields in which they should be active, their financing and general policy. This is supposed to ensure greater co-ordination and liaison among the institutions at tertiary level.²³³

3.6.6 The university and other tertiary institutions

The commission, in considering the relationship between the university and other institutions at the tertiary level, felt that greater flexibility at the tertiary level should be allowed. This would facilitate a freer flow of students between the university and the colleges for advanced technical education especially in the engineering and technological fields. Consequently it recommended the reciprocal granting of credits and recognition of qualifications.²³⁴

3.6.7 Transition from school to university

The commission examined in detail the various issues connected with the transition from school to university and in particular the high failure rate of first-year students. The

high failure of undergraduates, especially first years was a matter of grave concern to the state, the universities, parents and students themselves. It is not only a financial loss, but it is also a great waste of spiritual and intellectual potential.

Although the commission did not favour stricter admission requirements, it considered the remedies to deal with the high failure rate. The commission attributed the high failure rate to the transition from school to university. The rapid adjustment of the student to the life and work at university where he found himself freed from the constant supervision and the restraint of school discipline was the major problem. At university a student has to be independent and self-disciplined. He has to adapt to self-study techniques and the rapid pace at which university teaching has to take place.

The commission emphasised that academic standards should not be lowered merely in the interest of a smooth transition from school to university. It also accepted that the pace of teaching had to be more rapid at a university than at school. Yet it felt that the approach to the question of academic standards should be more flexible. There should be a greater degree of flexibility to enable first-years to bridge the gap between the school and the university.²³⁵

The commission made a number of recommendations which universities should implement in order to facilitate the transition from school to university. It felt that owing to

the increasing student numbers, the traditional dialogue between student and teacher is disappearing. Consequently there is an urgent need for tutorial or small group discussion classes. Moreover, a system of tutors for first years was advocated. It also advocated a guidance and counselling service for students. In addition it recommended that a university department of didactics for the teaching staff be established which would instruct lecturers in teaching techniques and thereby improve their ability to impart knowledge to their undergraduate students.

As regards teaching aids, the commission felt that while these aids and their further development are important for improving the effectiveness of university teaching, they should be used with care and discrimination so that their use should not lead to superficiality in teaching and neglect of the students' capacity for abstract thinking.

The commission did not find any convincing reason for recommending that the minimum periods laid down for degrees at South African universities should be extended. On the contrary, it was of the view that a larger proportion of students than in the past ought to be able to obtain a first degree within the minimum prescribed period.

The commission felt that universities should consider lengthening the academic year for first-year students. Moreover, well-planned academic work for the vacations should receive more consideration. In order to maintain acceptable

academic standards a system of external examiners from outside the university should be used for final examinations. The use of external examiners would ensure that the students are assessed fairly and objectively by someone unknown to them. It also recommended that at the beginning of each semester and for each course, all undergraduates should be provided with a programme of the topics to be covered by the lectures in the course of the semester, as guidelines for independent study and reading in preparation for the lectures.

On the issue of the training of post-graduate students, the commission recommended that owing to the high cost of equipment and materials for research, consideration should be given to the joint use of resources. A system of specialization should be introduced according to which each university takes responsibility for a particular field. This would enable students to pursue their post-graduate studies at a university other than the one at which they pursued their undergraduate studies.²³⁶

As regards unsatisfactory undergraduate students the commission recommended that ways and means be devised for weeding out, at an early stage, those students who neglect their studies. For this reason it advocated the amendment of the Universities Act²³⁷ so that universities be given the right to terminate a student's registration at the end of the first half-year on the grounds of unsatisfactory academic progress.

As a result of this recommendation the Universities Amendment Act of 1977²³⁸ was passed. In terms of this amendment every person registered as a matriculated student of a university is registered for one year of study or for such shorter period as the council may determine. At the expiry of the year or said period a person must renew his application if he wants to remain a student of the university.²³⁹ The council of a university has a discretion to prescribe minimum requirements of study for the purpose of the renewal of the registration of a person as a student of such a university. This the council has to do in consultation with the senate of the university. The council is also entitled to refuse permission to a student who fails to satisfy the minimum requirements of study so prescribed to renew his registration.²⁴⁰

The Van Wyk de Vries Commission made a number of recommendations which have a direct influence on universities. Many other recommendations have to do with the subsidy system and financing of universities. It would be unnecessary to deal with them here. Many of these recommendations have been implemented and affect all universities in the country. Judged on the whole, the report may be criticised on the grounds that it sought to justify past and future governmental interference into the operation of universities and thus to limit university autonomy.

The report has also been criticized for assuming that it holds the only correct view about the nature of the university; that it attempts to make a logical point about the meaning of the

word "university" by looking at certain aspects of the de facto institution of universities in South Africa; that it is selective in what it takes as reality; that although it presumes to be realistic and sensitive to facts, it does not allow the coexistence of two different views of a university to count as facts which should be realistically accepted and respected; that it is parochial and one-sided in its interpretation of university autonomy; that it emphasises national ties with the university to the exclusion of international links; that it underplays the importance of cultivating a critical attitude to the state, to the volk and to the values held sacrosanct by members of the ethnic group; that it supports the view that the state should decide for the different communities what true culture, good citizenship and healthy society amount to; and that it claimed that the university is a "mirrored image of society" without analysing the controversial concept of society.²⁴¹

3.7 ACADEMIC FREEDOM

Although there was no law passed by the government during the apartheid era to limit academic freedom, there is no doubt that during this period academic freedom suffered severe restrictions. This is because this was an era where civil liberties in general in South Africa were curtailed by a plethora of security legislation. As academic freedom is closely linked with the other fundamental liberties of a free society, when these are restricted, academic freedom is similarly restricted. As Beinart et al put it:

"Freedom of academic expression, in the sense of freedom of university teachers to teach and to pursue research freely, is simply a special manifestation of the freedoms of speech, assembly and association. These freedoms are meaningless in a society which prohibits free inquiry, which arbitrarily punishes its citizens for radical criticism and the propounding of new ideas, and which forbids peaceful protest."²⁴¹

From the fifties the intellectual climate which engenders free inquiry was seriously restricted by a spate of legislative enactments and administrative actions that violated freedom of speech and individual liberty. Although these measures were aimed at the general public, they also directly affected the universities. It will not be possible to deal with all of them here. Only a few most important ones will be discussed and their effect on academic freedom as it related to what may be taught and how it should be taught.²⁴²

3.7.1 Security legislation and freedom of speech

Although no law directly restricted a teacher's freedom to teach, draconian security legislation such as the Suppression of Communism Act,²⁴⁴ the Criminal Law Amendment Act of 1953²⁴⁵ the Suppression of Terrorism Act²⁴⁶ which were later consolidated into the Internal Security Act,²⁴⁷ provided severe penalties for anyone inciting anyone to commit certain actions

which were aimed at bringing about social and political change in South Africa. It was not defined what type of social and political change was prohibited. Evidently any act that was designed to change the then prevailing political dispensation was proscribed. One could not even freely discuss the oppressive nature of this security legislation. These statutes seriously restricted free and open discussion of issues such as civil disobedience and the theory and practice of communism by members of the academic staff.

This situation was exacerbated by the fact that although the lecturer might be familiar with the provisions of these statutes, he could not rely on the students' knowledge and discretion. It would therefore be highly imprudent of him to give the students an opportunity in a free academic discussion to expose themselves to prosecution. Prosecutions demonstrated that no clear distinction was sometimes made between incitement and free discussion. Moreover, an informer might easily misconstrue or distort what a speaker intended in a free discussion on a subject relating to social change. There was no way of refuting his allegations. The existence of these security measures thus engendered an atmosphere of fear of prosecution and therefore seriously inhibited free discussion and expression of ideas. Although there is no information on any student being prosecuted for such discussion, there is no doubt that the possibility of such prosecution was the proverbial sword of Damocles hanging over the necks of various students. Moreover, a classroom informer could distort the discussion to his superiors which could result in a student

being banned in terms of the Suppression of Communism Act instead of being prosecuted. Indeed a number of students and staff from especially liberal universities were silenced or detained without trial for protracted periods for unknown reasons and without being charged with any crime. It is not far-fetched to assume that some of them were detained for these academic discussions. The Minister of Justice was not obliged to disclose the reasons for detention and where a person was detained. The power of the authorities to silence opponents in this way resulted in students and staff being reluctant to have free debate on the need for and methods to bring about peaceful social change in South Africa. Ironically this should have been regarded as the primary function of a university. It also led to the selection of non-controversial courses for teaching and research. Moreover, support for social change could be wrongly confused with communism as a distinction was sometimes not drawn between communism and liberalism, or between opposition and subversion. This frequently led to the liberal universities being maliciously labelled as subversive "communist" outposts in South African society.²⁴⁸ There is therefore no doubt that the presence of draconian security legislation seriously undermined and limited academic freedom. Universities had to relinquish their role of being critics of the prevailing social and political order and of being beacons of hope in an otherwise gloomy social and political environment.

3.7.2. Contempt of court

Besides security legislation, the contempt of court proceedings in South Africa were in the past sometimes used to inhibit the freedom of academic discussion of especially sensitive and controversial issues relating to race and security. A typical example is the case of the late Barend van Niekerk, then at the University of the Witwatersrand, who was prosecuted for contempt of court in that he had published an article in the South African Law Journal²⁴⁹ where he had critically discussed the influence of race on the imposition of the death penalty in South Africa. Although he was acquitted on the grounds that he had not intended to be contemptuous of the courts of the land, this prosecution was not at all encouraging free academic discourse.²⁵⁰ The judgment implied that anyone embarking on scientific research in this area could face contempt proceedings. In this way the courts also did not support free academic discussion of issues. This was regarded as an attempt on the part of the authorities to discourage critical examination of the judicial process.²⁵¹ This judgment was severely criticised by the Council of the Society of the University Teachers of Law of South Africa.²⁵²

The threat of contempt of court proceedings was further emphasized by a subsequent prosecution of Professor Van Niekerk for contempt of court and attempting to obstruct the course of justice in that he had called upon judges, at a public protest meeting over detention without trial, to reject evidence elicited from witnesses who had been held in

detention for lengthy periods in terms of the Terrorism Act. This time the Appellate Division upheld the conviction.²⁵³ This was evidence that the issue of contempt of court was not an idle threat. After this case only brave academics could have continued to discuss something that could have been regarded as bordering on contempt of court.

3.7.3 Censorship laws

Academic freedom was also limited by the censorship laws of this country. The two most important ones were the Publications and Entertainments Act²⁵⁴ and the Suppression of Communism Act.²⁵⁵ In terms of the Publications and Entertainments Act a publications control board was established and empowered to declare any literary work "undesirable". Once a work was declared "undesirable", it would be banned. Indeed thousands of literary works, many of which were books of high literary quality, were banned. Possession of such works was later prohibited.²⁵⁶

In terms of the Suppression of Communism Act (later the Internal Security Act) the writings of any person listed or prohibited from attending any gathering or who had been resident in South Africa and who the Minister of Justice was satisfied was directly or indirectly furthering any object of communism, could not be lawfully used either as references for teaching purposes or as sources for scholarly writings. As a result of this, the works of well-known scholars who fell in this category such as Prof H J Simons and many others, could

not be distributed, discussed in the lecture room or cited in any writings. What was disturbing was that, even if the work did not deal with a politically sensitive issue, it was still censored. Even if it dealt with non-contentious subjects such as zoology or non-political controversial legal issues, it fell foul of the law. The book by Simons on the Legal Status of African Women was a unique and excellent piece of work on this subject and yet for many years it was banned. The effect of this was that a scholar who wished to use the ideas expressed by a banned author had either to risk prosecution or ignore these ideas, thus exposing himself to criticism that he had not taken cognizance of them, or use them without acknowledgement, in which case he could be accused of plagiarism.²⁵⁷ There is no doubt that such censorship laws had a deleterious effect on open debate at university and seriously inhibited the free flow of ideas and scholarly inquiry. "Censorship tends to cast a pall of orthodoxy over the classroom in South African universities and to undermine high standards of scholarship."²⁵⁸

3.7.4 Restrictions on freedom of research

In addition to the above restrictions on research, the government prohibited certain academics from pursuing research or publishing without the consent of the minister. Many of the academics restricted under security legislation, were precluded from both teaching and research in terms of their restriction orders. Others were allowed to continue teaching but were prohibited to publish without ministerial consent.

The restrictions on research and publishing had negative consequences, in particular in the social sciences where many of the topics for investigation and scholarly research were politically unpopular. This obviously deterred some scholars from pursuing research in these areas and diverted their attention to less sensitive areas. Others left South Africa rather than work under these conditions. Those who nonetheless persisted in doing research in these areas had to overcome many obstacles. The government sometimes did not permit research workers to enter African areas to do field work. A number of foreign scholars were either refused visas to come and do research here or found it impossible to pursue research in the stifling environment.²⁵⁹ The effect of this was to isolate South Africa academically and to stifle free academic inquiry.

3.7.5 Restrictions on freedom of assembly and the right to protest

Although freedom of assembly and the right to protest are regarded as fundamental rights in a free and democratic society, in South Africa during the apartheid era these suffered severe restrictions. When students protested and demonstrated against the government's invasions of educational and civil liberty, the government became irritated by this. Previously a protest march required the consent of the local authority and this was usually granted. But in the late sixties the local authorities became less willing to grant permission and in 1970 the power to grant it was virtually

removed from them and vested in the chief magistrate of the district in question for any procession that had been authorized by the local authority.²⁶⁰ This did not mean the end of protests. Sporadic but unlawful protest marches by students did take place.²⁶¹

A typical example is that of the nation-wide student demonstrations in support of the cause of free and compulsory school education for all races in South Africa. These protests arose in part as a result of the rustication of the students of the University of the North after they had protested against the expulsion of Mr Abraham Tiro, who had condemned the system of bantu education at a graduation ceremony. This country-wide protest commenced on 1 June 1972. The government moved to stop these picket demonstrations. Students were arrested from contravening municipal regulations in Cape Town, for which they paid admission-of-guilt fines. Police moved in and broke a peaceful demonstration on St George's Cathedral by means of baton charges. Further protests ensued in Cape Town and Johannesburg. Picket protests on the steps of St George's Cathedral, for which the permission of the church authorities had been obtained, were banned in terms of the Riotous Assemblies Act.²⁶² Those who had gathered there were dispersed with tear gas and baton charges. Similar action took place in Johannesburg.²⁶³

On 7 June 1972 the Minister of Justice, acting in terms of section 2(3) of the Riotous Assemblies Act, banned "the assembly in any public place of any public gathering of a

political nature, that is to say, a public gathering at which any form of state or any principle or policy of the government of a state is propagated, defended, attacked, criticized or discussed, or which is held in protest against anything; with the exception of such a public gathering which, for as long as it lasts, takes place within the walls of a building." This prohibition was made applicable to all towns where there was a university and was in force for a month.²⁶⁴

Protests continued on university property. At the University of the Witwatersrand 7000 people assembled indoors at a general assembly of the University where the following resolution was adopted.

"We here present at this Assembly of the University do solemnly resolve to, affirm that it is the right of university students as of other bodies of citizens to express peacefully by public assembly and procession, their opinions on matters of public policy and their right thereby to seek public support for the opinions thus expressed

record our conviction that it is particularly appropriate for university students as a privileged educational group to concern themselves with the inequities, deprivations and other shortcomings resulting from policies which affect the education

of less privileged sections of the peoples of South Africa

express our extreme distress and indignation at the violent measures taken by the Government to suppress the peaceful public assemblies and processions of university students, and at the exercise by the Government of extreme powers to restrict the free expression of opinion on matters of public policy in circumstances which do not constitute an emergency endangering the security of the State."²⁶⁵

Professor G R Bozzoli, Vice-Chancellor and Principal of the University of the Witwatersrand, on the same day, addressed an open letter to the then Prime Minister, Mr B J Vorster wherein he called upon the government to have a thorough investigation of the student grievances over the inequality in educational facilities among the various racial groups.²⁶⁶

The actions of the police in dealing with student protests in Cape Town and Johannesburg were open to serious criticism. Peaceful protests were dispersed with teargas and baton charges. In order to forestall the recurrence of this in future the University of Cape Town applied for and obtained a temporary interdict from the Supreme Court in order to prevent future invasions of the university campus under the Riotous Assemblies Act.²⁶⁷ A large number of students and members of the public was arrested during these raids and charged under

the Riotous Assemblies Act. In Cape Town fourteen people were convicted in the magistrate's court. On appeal, however, they were acquitted. In the case of S v Turrel and Others²⁶⁸ the court stated that freedom of assembly forms part of the democratic rights of every South African citizen. And as Van Zijl A J P further said:

"Free assembly is a most important right, for it is generally only organized public opinion that carries weight and it is extremely difficult to organize it if there is no right of public assembly."²⁶⁹

After this decision 38 students of the University of the Witwatersrand were found not guilty on charges under the Riotous Assemblies Act and discharged. Various charges against many students were withdrawn. But this apparently did not alter the attitude of the government towards student protests. In 1974 the Minister of Police reported that R34 280 had been paid in out-of-court settlements to 43 persons unlawfully arrested or assaulted in Johannesburg and Cape Town during the confrontations between the police and the students in 1972. This precipitated the amendment of the Riotous Assemblies Act to widen the powers of the authorities to prohibit meetings on both private and public property.²⁷⁰ The 1974 restriction of the right to protest did not stop the protests because, in 1976 the country experienced another student uprising in Soweto schools and in historically black universities against bantu education.²⁷¹

3.7.6 Restrictions on individual liberty

Since 1957 there was a proliferation of the number of arbitrary measures and the use of existing measures that had the effect of muzzling political dissent. These measures were also used against staff and students especially from the liberal universities. Although they did not effectively silence the universities, they created a climate of fear which is inimical to free academic inquiry, especially in socially sensitive areas.²⁷² Some of these measures have been referred to, but it will be necessary to discuss them in some depth. The effect of these measures was to limit personal freedom of citizens in general and of university staff and students in particular.

In terms of the Suppression of Communism Act, the Minister of Justice was empowered to restrict the freedom of movement and speech of a person whom he believed to be encouraging the attainment of any of the objects of communism or engaged in activities which might further the attainment of any of these. The banning order entailed that a person should be confined to a particular place and would be prevented from attending any gathering (in practice consisting of more than two persons), would be prohibited from entering the premises of any educational institution and would be barred from publishing or preparing for publication, in any form, anything on any subject without ministerial consent.²⁷³

A number of academics and students, especially from liberal universities were banned. Some of them were prohibited by their banning orders from teaching and research. The effect of these was to deprive a university of its right to retain staff and was a drastic interference with academic freedom. The banning of university teachers was condemned by the authorities and students of the liberal universities and led to widespread protests.²⁷⁴

The provision in security legislation for detention without trial for prolonged periods²⁷⁵ was also used to detain persons among whom were students and staff of universities. Some of the detainees were brought to trial and certain of them were convicted of offences under the security laws, but a number of them were released without any charges being preferred against them. These actions created the impression that some persons were punished for their views rather than their unlawful acts.²⁷⁶ Moreover, detention without trial is incompatible with a free and democratic society. It therefore undermined academic freedom in this country.

In addition to these, the government had unrestricted powers to deport or refuse residence visas to foreigners and to prohibit the travel abroad of South Africans or to insist that if they left the country they should not return. These powers were used against a variety of persons including staff and students of universities. This had the effect of isolating South African scholars from the international community of scholars.²⁷⁷

As has been said the government also used informers on various campuses. The knowledge or suspicion of the presence of informers in lectures and student meetings created insecurity and inhibited free academic discussion of sensitive issues for fear of being reported or misreported by informers to the authorities who could act on this information without recourse to a court of law. This was condemned by university authorities as being interference with academic freedom.²⁷⁸

From the above discussion it is clear that during the apartheid era academic freedom among universities in this country suffered severe attacks and restrictions where formal and informal measures of restricting this on the part of the government were used. Under such conditions only the brave continued to engage in free academic discourse.

3.8 THE NATIONAL COMMISSION ON HIGHER EDUCATION

This discussion would be incomplete without a discussion of the report of the National Commission on Higher Education on this issue. The Commission acknowledged that academic freedom is important to the functioning of the university system. They regarded academic freedom as a precondition for critical, experimental and creative thinking and therefore, for the advancement of intellectual inquiry, knowledge and understanding. The Commission further acknowledged that academic freedom can only be upheld in institutions with a certain degree of autonomy. While the Commission conceded that neither individual academic freedom nor institutional

autonomy can be absolute because they have to be balanced with accountability, it nonetheless stressed the importance of upholding the principles of academic freedom and institutional autonomy as key conditions of a well-functioning system of higher education³⁷⁹.

The Commission also advocated the concept of co-operative governance, which should ensure that the different interests are acknowledged and that all stakeholders should be committed to a code of conduct based on the acceptance of joint responsibility for the future of higher education in South Africa²⁸⁰. One of the main role players is the government which, in terms of this idea of co-operative governance should exercise its authority and its powers over the higher education system in a transparent equitable and accountable manner, and in a discernible pursuit of the public good. In its relations to institutions and to the system as a whole, the Commission felt that there should be a recognition of the maximum degree of practicable autonomy and a commitment to consultation and negotiated solution to problems²⁸¹.

Although the Commission advocated the idea of co-operative governance, it was of the view that this should be implemented with due regard to the principles of academic freedom and institutional autonomy. The Commission noted the provisions of the Constitution on academic freedom and concluded that the Constitution makes the principle of co-operative government and inter-governmental relations applicable to all spheres of government and all organs of state within each sphere. The

Commission also noted that higher education institutions could be regarded as falling within the ambit of the definition of "organs of state"²⁸¹.

The inclusion of higher education structures in the definition of "organs of state", the Commission further noted, would imply the compulsory application of the basic values and principles governing public administration. This would result in the adoption of national legislation to facilitate the promotion of these values and principles affecting higher education institutions. These principles include responsiveness to public needs and encouraging the public to participate in policy making, accountability and transparency, fostered by providing the public with accurate information.

The Commission was of the opinion that while these principles are closely linked, they should be differentiated in understanding academic freedom to mean the right of individuals to pursue the goals and procedures of academic thinking without outside interference or censure based on any political, religious or social orthodoxy. Such freedom is the prerequisite for the effective advancement of teaching, learning and creative research²⁸².

Taking into account the meaning of institutional autonomy and individual academic freedom, and the limitation thereof by the demands of accountability, the Committee proposed that the principles of academic freedom and institutional autonomy be retained as key conditions for a vibrant higher education

system. It emphasized that the proposals on co-operative governance preclude any form of state control over, or arbitrary state interference in the affairs of institutions. It was quick to add that co-operative governance does not mean government indifference to higher education, but was based on the assumption that both government and higher education institutions are committed to the same societal goals²⁸³.

In order to attain these goals, the Commission proposed a new configuration of functions and responsibilities for the relationship between government and institutions. This new configuration, would require from institutions adequate provision for stakeholder consultation, sensitivity to the changing needs and expectations of society and appropriate consideration of the public interest. On the part of the government this will require the creation of a new organizational and regulatory framework which can facilitate negotiated planning, responsible interaction and productive partnerships.

These will undoubtedly have an impact on the scope of institutional autonomy in that they will require a culture of co-operation and will lead to increased accountability. Increased accountability will, however, not be the product of repressive external control, but would be the counterpart of a greater interest in and estimation of the social role of higher education institutions, involving not only political authorities but society in general. "Within the framework of negotiated planning and responsible interaction, institutional

autonomy might indeed be enhanced as a dynamic achievement through imaginative mission development and operational initiatives, inspiring the trust and confidence of organised society and ensuring the indispensability of higher education"²⁸⁴

The effect of the Commission's proposals would be that certain things in higher education institutions would change while others remained as they are. There would for instance be no change in the structures for the day-to-day management of institutions. The system of funding would also remain largely the same except that there could be earmarked funding which would have to be spent on designated areas. The issues of staff and staffing, their conditions of services and appointments would still remain in the hands of the individual institutions, except that equity demands should be met and all forms of discrimination on grounds of race or gender should be eliminated²⁸⁵.

There would be some changes when it comes to student recruitment where external authorities will have a say. Individual institutions would still be free to set their own entrance requirements beyond statutory minimums for specific courses and to decide on which students are offered the allocated and available places. On course or curriculum planning, the proposals on accreditation and incorporating higher education qualification programmes into a national qualifications framework would entail a degree of curtailment of existing autonomy. Autonomy would be extended on the modes

of teaching and learning, by the proposals on the freedom to introduce distance learning at traditionally contact institutions. Institutional autonomy would, however, no longer be the final word in assessing academic freedom²⁸⁶.

The Commission felt that the best safeguard of academic and educational standards is not external validation and control, but the development of a responsible, self-critical academic community. A realistic quality assurance policy would require a combination of internal and external valuation and control. For these reasons the Commission recommended that all authorities should recognize the right to academic freedom for all individuals engaged in responsible academic work, and the right to autonomy for higher education institutions in fulfilling their educational and academic roles, within the context of an increased accountability implied by the principle and system of co-operative governance²⁸⁸.

3.9 CONCLUSION

Although South African universities were largely modelled on the British and German systems which allowed a measure of autonomy and academic freedom, these freedoms were seriously violated especially during the apartheid era. This had a negative effect on universities in general and on their role in teaching, learning and research. Although even before the adoption of the new Constitution, the situation had considerably improved, the new Constitution which protects academic freedom and the recommendations of the National

Commission on Higher Education are likely to safeguard and strengthen academic freedom and institutional autonomy, without derogating from accountability and responsibility.

FOOTNOTES

1. A L Behr and R G Macmillan Education in South Africa (1966) 205; John A Marcum (ed) Education, race and social change in South Africa (1982) 1; E H Brookes A history of the University of Natal (1966) 1; Van Wyk de Vries Commission 9; E A Walker The South African College and the University of Cape Town (1929) 11 ff; R F Currey Rhodes University 1904-1970: a chronicle (1970) 2; M Boucher Spes in arduis: 'n geskiedenis van die Universiteit van Suid-Afrika (1973) 2 ff; J Dreijmanis The role of the South African government in tertiary education (1988) 18; M Horrell African education: some origins and development until 1953 (1963) 66; L Thompson "Some problems of Southern African universities" H W van der Merwe and D Welsh (eds) The future of the University in Southern Africa (1977) 287-288; Bergh 216.
2. Behr and Macmillan *ibid*; Marcum *ibid*; Currey 4; Dreijmanis *ibid*; H B Thom Stellenbosch 1866-1986: honderd jaar hoër onderwys (1966) 1 11; Bergh 219 ff.
3. Act 16 of 1873 (Cape); see also Boucher 27.
4. Behr and Macmillan 206; W A Joubert The law of South Africa (1979) vol 8 235 (hereinafter LAWSA); Brookes 1-2; Van Wyk de Vries Commission 9; Walker 37 ff; Boucher 37.
5. Walker 43 ff; Currey 13-18; Thom 31; Bergh 221-223.
6. Behr and Macmillan 207; Brookes 4-8; Van Wyk de Vries Commission 10; Walker 66 ff; Boucher 84.

7. The University College Act 18 of 1909; Behr and Macmillan *ibid*; Brookes 10; Van Wyk de Vries Commission 10.
8. Behr and Macmillan *ibid*; Van Wyk de Vries Commission 10-11.
9. Walker 69; Bergh 224.
10. The Union of South Africa Act of 1909.
11. Behr and Macmillan 208; Brookes 23-24; Walker 89-90; Currey 28 ff; Thom 66-67; Boucher 129; Bergh 225.
12. University of Cape Town Act 14 of 1916; Van Wyk de Vries Commission 11; Walker 93 ff.
13. University of Stellenbosch Act 13 of 1916; Thom 69; Van Wyk de Vries Commission 11.
14. University of South Africa Act 12 of 1916; Boucher 137 ff; Van Wyk de Vries Commission 11; Bergh 225-226.
15. Marcum 2; Behr and Macmillan 208; Brookes 26; Van Wyk de Vries Commission 11.
16. Behr and Macmillan *ibid*; Brookes *ibid*; Boucher 139 ff.
17. By the Witwatersrand, Johannesburg (Private) Act 15 of 1951. It now exists by virtue of the University of the Witwatersrand, Johannesburg (Private) Act 15 of 1959; see Van Wyk de Vries Commission 12; B K Murray Wits: the early years: a history of the University of the Witwatersrand Johannesburg and its precursors 1896-1939 (1982) 3.
18. It was formerly known as "Het Potchefstroom Universiteitskollege voor Christelik Hoger Onderwijs" which developed in 1919 from "De Theologiese School van de Gereformeerde Kerk van Zuid-Afrika".

19. Behr and Macmillan 209.
20. By the University of Pretoria Act 13 of 1930.
21. By the University of Natal (Private) Act 4 of 1948. It now exists by virtue of the University of Natal (Private) Act 7 of 1960; Brookes 69-71.
22. By the University of the Orange Free State (Private) Act 21 of 1949.
23. By the Rhodes University (Private) Act 15 of 1949; Currey 112-116.
24. Behr and Macmillan 210; Van Wyk de Vries Commission 12.
25. By the University of South Africa Amendment Act 30 of 1951; Bergh 229.
26. LAWSA 236; Behr and Macmillan 211-212; Marcum 3; Boucher 147 ff.
27. By the University of Port Elizabeth Act 1 of 1964.
28. By the Rand Afrikaans University Act 51 of 1966.
29. I Wilkins and H Strydom The Super-Afrikaners (1978) 265-266; Marcum 173, 176; Bergh 229-231.
30. Behr and Macmillan 217-218; Wilkins and Strydom 266; Marcum 3; see also E J Marais "The university and culture - the special role of a dual-medium university" in H W van der Merwe and D Welsh (eds) The future of the university in Southern Africa (1977) 196.
31. Translated from Dutch and quoted by M de Vries Inaugural Address as Rector of the University of Stellenbosch (1979) reproduced by Marcum 177 at 178; see also R W Wilcocks Verlede, Hede en Toekoms van die Universiteit van Stellenbosch (1953); H B Thom Universiteit en Maatskappy 1965).

32. Act 61 of 1955.
33. s6 of Act 61 of 1955.
34. s7 of Act 61 of 1955.
35. Bergh 215.
36. Bergh 262; Centlivres et al 1-2.
37. A L Behr "Towards open universities in the RSA: the long haul" 1985 Journal of Education 13ff; A L Behr New perspectives in South African education 2ed (1984) 135; Behr and Macmillan 212; Murray 298.
38. Minister of Justice, House of Assembly Debates 10 April 1959 cols 3391-3393.
39. Brookes 44-45; Behr New perspectives 135; Behr "Towards open universities" 22-23; Behr and Macmillan 212.
40. Behr and Macmillan 213.
41. Behr and Macmillan 210; Bergh 234-235; for a comprehensive discussion of the establishment of Fort Hare see A Kerr Fort Hare 1915-48: the evolution of an African college (1968).
42. Behr and Macmillan 212; Bergh 235.
43. Behr "Towards open universities" 17; Kerr 16-17.
44. Report of the Commission on Native Education 1949-51 (UG53/1951) 72 ff; Behr and Macmillan 213.
45. Report of the Brookes Commission 5.
46. Report of the Commission of Enquiry on Separate Training Facilities for Non-Europeans at Universities, 1953-1954 (also known as the Holloway Commission).
47. para 40-41.
48. Holloway Commission Report paras 54 ff; Behr and Macmillan 213.

49. paras 33-35.
50. para 39.
51. paras 42-45.
52. Behr and Macmillan 213-214.
53. Union of South Africa Short summary of the findings of the interdepartmental fact-finding committee on the financial implications in connection with the establishment of separate university colleges for non-Europeans (WP C-5) (1957); Behr New Perspectives 136.
54. Bergh 248.
55. Centlivres et al 19.
56. Behr and Macmillan 214.
57. Van der Walt Committee Report 4.
58. 9-10.
59. House of Assembly Debates 8 April 1957 column 4227.
60. Behr and Macmillan 214.
61. House of Assembly Debates 8 April 1957 column 4228; see also Beinart et al 8.
62. House of Assembly Debates 8 April 1957 column 7008.
63. Report of the Commission on the Separate University Education Bill (UG.32/1958) 3 ff; Behr and Macmillan 215.
64. Report of the Commission on the Separate University Education Bill 9 ff; Behr and Macmillan *ibid*; Bergh 254 ff.
65. Cited by Behr and Macmillan 215.
66. Report of the Commission on the Separate University Education Bill 58 ff; Behr and Macmillan *ibid*; Bergh

- 260; S Bhana "The racial factor in Indian university education" in H W van der Merwe and D Welsh op cit 216.
67. Act 45 of 1959.
68. ss8 and 9.
69. Behr and Macmillan 216.
70. s14.
71. Act 64 of 1959.
72. s8(4) of Act 45 of 1959.
73. ss10 and 11.
74. A C Nkabinde "Welcome address: symposium on the definition of goals 7-9 September 1981" in A J Thembela (ed) A University on African soil - towards a definition of goals (1982) 4-5; Bhana 216 ff.
75. s10 of Act 45 of 1959.
76. s11 of Act 45 of 1959.
77. s12.
78. s13(4).
79. s13(5).
80. s18.
81. ss23 and 24.
82. s25.
83. s26.
84. A C Nkabinde "Some remarks on the management of strategic information and the resources of the University of Zululand made at a meeting held on the 4th May 1992 for the purpose of briefing heads of academic and administrative departments" unpublished 1992 2.
85. s21.

86. A C Nkabinde "Need for Certain Policy Decisions to be Taken by the Council" 1992 unpublished paper 11.
87. Behr and Macmillan 216; E G Malherbe Autonomy of our University (1957).
88. House of Assembly Debates 1958 vol 97 2066, 2075-6; House of Assembly Debates 1959 vol 99 1535-40; House of Assembly Debates 1958 vol 100 3169-73, 3186, 3503-14.
89. Bhana 217-218.
90. Behr "Towards open universities" 13; Beinart et al 11; Z K Matthews Freedom for my people Memoir by M Wilson (1981) 195; African Watch Report Academic Freedom and Human Rights Abuses in Africa (1991) 74.
91. Beinart et al 11-12.
92. UCT Calendar, 1985 9-11.
93. Behr "Towards Open Universities" 14; Beinart et al 12.
94. Beinart et al 12-13.
95. Behr "Towards Open Universities" 17.
96. Behr idem ibid; Murray 301.
97. Murray 308.
98. Behr "Towards Open Universities" 17-19; Murray 304-307.
99. Murray 305-306; Behr idem ibid.
100. Quoted from Murray 307; see also Behr idem 19.
101. Behr "Towards Open Universities" ibid.
102. Murray 308-309.
103. Murray 309-310.
104. Quoted by Murray 310-311; see also Behr "Towards Open Universities" 20.
105. Murray 311-312.
106. Murray 316; Behr "Towards Open Universities" 21.

107. Murray 313.
108. D Welsh and M Savage "The University in Divided Society: the Case of South Africa" in Van der Merwe and Welsh op cit 139.
109. The Open Universities in South Africa 20; see Welsh and Savage ibid.
110. E H Brookes A History of the University of Natal (1966) 44; Behr "Towards Open Universities" 22.
111. Behr "Towards Open Universities" 23.
112. Brookes 75.
113. Brookes 77.
114. Brookes 83.
115. 131.
116. 133.
117. Welsh and Savage 134.
118. House of Assembly Debates 10 April 1959 cols 3415-3416.
119. House of Assembly Debates 10 April 1959 col 3416.
120. As quoted by Centlivres et al 4.
121. As quoted by Centlivres et al 5.
122. Centlivres et al 5.
123. As quoted above.
124. Centlivres et al 6, 14-15.
125. Centlivres et al 15-16.
126. Centlivres et al 6, 17-20.
127. Centlivres et al 6, 21-22.
128. Centlivres et al 6-7.
129. paras 38 and 39.
130. Centlivres et al 25-26.
131. 26.

132. Centlivres et al 29.
133. Centlivres et al 7, 32.
134. 34-35.
135. Brown v Board of Education of Topeka 347 US 483 (1954).
136. Centlivres et al 41, 431.
137. Beinart et al 15.
138. Beinart et al 13-14.
139. Beinart et al 15-16.
140. Beinart et al 16.
141. Beinart et al 17.
142. House of Assembly Debates 10/11 April 1959 col 3705.
143. "Welcome address" 3-4.
144. Matthews 196-197; African Watch Report 75. These are Professors Z K Matthews, C L S Nyembezi, S B Ngcobo, D G S Mtinkulu, A M Phahle, E A Mayisela, C S Ntloko and six other staff members.
145. Matthews 196; African Watch Report 74-75.
146. Beinart et al 19.
147. In 1969 parliament passed the University of Fort Hare Act 40 of 1969; the University of Zululand Act 43 of 1969; the University of the North Act 47 of 1969; the University of the Western Cape Act 50 of 1969 and the University of Durban-Westville Act 49 of 1969.
148. Medical University of Southern Africa 78 of 1976; in 1981 Vista University was established by Act 106 of 1981.
149. s22 of Act 40 of 1969; s22 of Act 43 of 1969; s22 of Act 47 of 1969; s19 of Act 78 of 1976.

150. s21 of the University of Fort Hare Act 40 of 1969; s21 of the University of Zululand Act 43 of 1969; s21 of the University of the North Act 47 of 1969.
151. LAWSA 268.
152. s5 of the University of Fort Hare Act 40 of 1969; s5 of the University of Zululand Act 43 of 1969; s5 of the University of the North Act 47 of 1969.
153. s6 of the University of Fort Hare Act 40 of 1969; s6 of the University of Zululand Act 43 of 1969; s6 of the University of the North Act 47 of 1969.
154. s8 of Act 40 of 1969; s8 of Act 43 of 1969; s8 of Act 47 of 1969.
155. s9 of Act 40 of 1969; s9 of Act 43 of 1969; s9 of Act 47 of 1969.
156. s10 of Act 40 of 1969; s10 of Act 43 of 1969; s10 of Act 47 of 1969.
157. s11 of Act 40 of 1969; s11 of Act 43 of 1969; s11 of Act 47 of 1969.
158. s14 of Act 40 of 1969; s14 of Act 43 of 1969; s14 of Act 47 of 1969.
159. s4(h) of Act 40 of 1969; s4(h) of Act 43 of 1969; s4(h) of Act 47 of 1969.
160. Beinart et al 20.
161. Act 61 of 1955.
162. Beinart et al 22.
163. Act 6 of 1973.
164. s2(2) of Act 40 of 1969; s2(2) of Act 43 of 1969; s2(2) of Act 47 of 1969 substituted by ss1, 5 and 9 of Act 6 of 1973.

165. s3(2A) of Act 40 of 1969; s3(2A) of Act 43 of 1969; s3(2A) of Act 47 of 1969 substituted by ss2(b), 6(b) and 10(b) of Act 6 of 1973.
166. s8(7) of Act 40 of 1969; s8(7) of Act 43 of 1969; s8(7) of Act 47 of 1969 substituted by ss3, 7 and 11 of Act 6 of 1973.
167. Act 57 of 1977.
168. s1 read with ss9 and 11 of Act 40 of 1969; s1 read with ss 9 and 11 of Act 43 of 1969; s1 read with ss 9 and 11 of Act 47 of 1969 substituted by ss8, 18, 20, 30 and 32 of Act 57 of 1977.
169. In this respect historically black universities started to have black representation in their councils before historically white universities did.
170. s8(a), (b), (d) and (e) of Act 40 of 1969; s8(a), (b), (c), (d), (e) and (f) of Act 43 of 1969; s8(a), (b), (c), (d) and (e) of Act 47 of 1969 substituted by ss6(1)(a)(b)(c), 17(1)(a)(b)(c)(d)(e) and 29(1)(a)(b)(c)(d) of Act 57 of 1977.
171. s7 of Act 40 of 1969; s7 of Act 43 of 1969; s7 of Act 47 of 1969 substituted by ss4(a)(b), 15(a)(b) and 27(a)(b) of Act 57 of 1977.
172. s7A of Act 40 of 1969; s7A of Act 43 of 1969; s7A of Act 47 of 1969 substituted by ss5, 16 and 28 of Act 57 of 1977.
173. s14(1) of Act 40 of 1969; s14(1) of Act 43 of 1969; s14(1) of Act 47 of 1969 substituted by ss9, 21 and 33 of Act 57 of 1977.

174. s26 of Act 40 of 1969; s26 of Act 43 of 1969; s26 of Act 47 of 1969 substituted by ss10, 22 and 34 of Act 57 of 1977.
175. s38 of Act 40 of 1969; s38 of Act 43 of 1969; s38 of Act 47 of 1969 repealed by ss11, 23 and 35 respectively of Act 57 of 1977.
176. Act 52 of 1979.
177. s2(3) of Act 40 of 1969; s2(3) of Act 43 of 1969; s2(3) of Act 47 of 1969 substituted by ss1, 6 and 11 of Act 52 of 1979.
178. s20(2) of Act 40 of 1969; s20(2) of Act 43 of 1969; s20(2) of Act 47 of 1969 substituted by ss3(a), 8 and 13 of Act 52 of 1979.
179. s21 of Act 40 of 1969; s21 of Act 43 of 1969; s21 of Act 47 of 1969 substituted by ss4, 9 and 14 of Act 52 of 1979.
180. s22 of Act 40 of 1969; s22 of Act 43 of 1969; s22 of Act 47 of 1969 substituted by ss5, 10 and 15 of Act 52 of 1979.
181. Act 14 of 1982.
182. Act 92 of 1984.
183. s14 of Act 43 of 1969; s14 of Act 47 of 1969 substituted by ss18(a) and 33(a) of Act 92 of 1984.
184. s15 of Act 43 of 1969; s15 of Act 47 of 1969 substituted by ss19 and 34 of Act 92 of 1984.
185. s35(2) (3) of Act 43 of 1969; s35(2) (3) of Act 47 of 1969 substituted by ss25 and 40 of Act 92 of 1984.
186. Act 71 of 1985.

187. s7A of Act 43 of 1969; s7A of Act 47 of 1969 substituted by ss1 and 10 of Act 71 of 1985.
188. s23A of Act 43 of 1969; s23A of Act 47 of 1969 inserted by ss7 and 15 of Act 71 of 1985.
189. Act 3 of 1986.
190. s4(d)(h) of Act 43 of 1969; s4(d)(h) of Act 47 of 1969 substituted by ss1(a) and (b) and 6(a) and (b) of Act 3 of 1986.
191. s8(1)(a) and (1)(g) of Act 43 of 1969; s8(1)(a) of Act 47 of 1969 substituted by ss3(a) and (b) and 8(b) of Act 3 of 1986.
192. Act 34 of 1987.
193. 61 of 1955.
194. by ss5, 8, 13 and 16 of Act 34 of 1987. These are sections 215, 17, 18, 19, 20, 22, 19, 33, 34, 35, 36 and 39.
195. Act 41 of 1990.
196. s8(1)(b) of Act 43 of 1969; s8(1)(b) of Act 47 of 1969 substituted by ss2 and 4 of Act 41 of 1990.
197. University of the Western Cape Act 78 of 1983.
198. University of Durban-Westville Act 81 of 1983.
199. In terms of s1 read with schedule 1 part 1 of the Republic of South Africa Constitution Act 200 of 1993.
200. Vista University Act 106 of 1981.
201. Dr Hartzenberg house of Assembly Debates 1981 column 835; see also Dreijmans 36; Behr New Perspectives 224-225.
202. Bergh 262 ff.

203. Verslag van Kommissie van Onderzoek na Aangeleenthedede Rakende die Universiteit van Wes-Kaapland (1974) 50; see also Report of the Commission of Inquiry into Certain Matters Relating to the University of the North (1975).
204. On the causes of the 1976 uprisings see Commission of Inquiry into the Unrest in Soweto and Elsewhere (1977) (known as the Cillié Commission).
205. W M Kgwane "The Role of Black Universities in South Africa" in Van der Merwe and Welsh op cit 233.
206. Beinart et al 23.
207. Viljoen 185; see also A Wandira "The Special Tasks and Problems of the 'One-Country-One-University' Institution in Middle Africa" in Van der Merwe and Welsh (eds) op cit 76 ff.
208. R E van der Ross "The Role of a Coloured University in Southern Africa" in Van der Merwe and Welsh (eds) op cit 242.
209. Government Gazette No 2217 of 22 November 1968.
210. Main Report of the Commission of Inquiry into Universities (1974); see also Behr New Perspectives 145 ff.
211. Main report 18 ff.
212. Bergh 104 ff.
213. Main report 31-32 ff. Reference has been made to this in chapter 1.
214. Main report 67 ff.
215. Main report 35 ff; see also G Caston "Academic Freedom" 1992 The Encyclopaedia of Higher Education vol 2 1295 ff; see further chapter 1 above.

216. Main report 74 ff; see also Bergh 113 ff.
217. Main report 75-76 ff.
218. Du Plessis Introduction to law 7; Pauw 26 ff; E F J Malherbe 360; D Mahony "Autonomy and the Demands of the Modern State: a Systematic Study" 1992 Higher Education Review 10-11.
219. Malherbe 360; Du Plessis 7.
220. Main report 149 ff.
221. Main report 80 ff.
222. Main report 105-106 ff.
223. s2 of the Universities Act 61 of 1955 substituted by s2 of the Universities Amendment Act 67 of 1975.
224. s2(1)(b) of Act 61 of 1955.
225. s2(1)(c).
226. s5.
227. s2(2)(a).
228. s2(2)(b).
229. s2(2)(c).
230. s2(2)(d).
231. s8 of the Universities and Technikon Advisory Council Act 99 of 1983.
232. Behr New perspectives 158.
233. Main report 166 ff.
234. Main report 228 ff.
235. Main report 284 ff.
236. Act 61 of 1955.
237. Act 65 of 1977; see also Behr New perspectives 153.
238. s10(2) of Act 61 of 1955 substituted by s2(a) of Act 65 of 1977.

239. s10(3) of Act 61 of 1955 substituted by s2(b) of Act 65 of 1977.
240. Degenaar 163-164.
241. 25.
242. Beinart et al ibid.
243. Act 44 of 1950, ss 11(b) and 1(1).
244. Act 8 of 1953, s2.
245. Act 83 of 1967, s2.
246. Act 74 of 1982, for a discussion of these see A S Mathews Freedom State Security and the Rule of Law (1986).
247. Beinart et al 26-27.
248. "Hanged By The Neck Until You Are Dead" 1969 SALJ 457; 1970 SALJ 60.
249. S v Van Niekerk 1970 (3) SA 655 (T); for a full transcript of this see 1970 Acta Juridica 77.
250. Beinart et al 27.
251. 1970 SALJ 467-8; for criticism of this decision see J R L Milton "A Cloistered Virtue?" 1970 SALJ 424; J C van der Walt 1970 THRHR 302.
252. S v Van Niekerk 1972 (3) SA 711 (A); for criticism of this case see J Dugard "Judges, Academics and Unjust Laws" 1972 SALJ 271.
253. Act 26 of 1963.
254. Act 44 of 1950.
255. Beinart et al 28.
256. Beinart et al 29.
257. Beinart et al ibid.

258. Beinart et al 29-30; one foreign academic who was refused a visa was Professor Gwendolen Carter of Northwestern University in the United States.
259. s15 of the General Law Further Amendment Act 19 of 1970.
260. Beinart et al 32.
261. Act 17 of 1956; for a discussion of 1972 student strikes as a result of Tiro's speech see M Motlhabi The Theory and Practice of Black Resistance to Apartheid: A Social-Ethical Analysis (1984) 140 ff.
262. Beinart et al 32.
263. Beinart et al 33.
264. As quoted by Beinart et al 33.
265. Beinart et al ibid.
266. Beinart et al 34; see also Bozzoli and another v Station Commander, John Vorster Square 1972 (3) SA 934 (W).
267. 1973 (1) SA 248 (C).
268. at 256.
269. Beinart et al 34-35.
270. For a discussion of this see J Kane-Berman Soweto: Black Revolt, White Reaction (1978).
271. Beinart et al 35.
272. ss5, 9 and 10 of Act 44 of 1950.
273. Beinart et al 36-37.
274. s17 of Act 37 of 1963; s25 bis of Act 56 of 1955; s6 of Act 83 of 1967.
275. Beinart et al 38.
276. Beinart et al 39.
277. Beinart et al ibid.
278. NCHE 73.

- 279. NCHE 177.
- 280. NCHE 178.
- 281. NCHE 194
- 282. NCHE *ibid.*
- 283. NCHE *ibid.*
- 284. NCHE 195.
- 285. NCHE *ibid.*
- 286. NCHE *ibid.*
- 287. NCHE 196.
- 288. NCHE 196-197.

CHAPTER 4

THE CONSTITUTIONAL PROTECTION OF UNIVERSITY AUTONOMY AND ACADEMIC FREEDOM IN SOUTH AFRICA

4.1 INTRODUCTION

The purpose of this chapter is to critically analyse and discuss the constitutional protection of university autonomy and academic freedom in South Africa today and the implications of that protection. This is obviously a novel situation in this country in the light of our new Constitution and therefore merits closer scrutiny. A constitution has been regarded as an attempt by a nation to come to grips with the problems of the past and to create a better and securer future. It has been characterised as "a snapshot at a moment in time, reflecting the hopes and fears of the nation at a specific moment between its misfortunes of the past and its aspirations for the future." This is what the South African Constitution is designed to attain. The portion on fundamental rights in particular is aimed at achieving this goal. It is also significant to note that the "postamble" to our interim Constitution regards the Constitution as an "historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful coexistence and development opportunities for all South Africans, irrespective of race, class, belief or sex". A bill of rights has been defined as "a legislative enactment primarily designed to safeguard the

fundamental rights and freedoms of the subject by restricting the competence of persons in authority to curtail those rights and freedoms by means of legislative or administrative interference."²

If the role of a bill of rights is to protect fundamental rights of the individual from easy violation by the executive or legislature, it becomes understandable why the South African bill of rights specifically protects academic freedom. In the previous chapter the various ways whereby the government seriously violated academic freedom in the past were narrated. It is obvious that to prevent that from happening in future provision had to be made in the Constitution for the protection of academic freedom. This explains why sections 14 and 15 of the interim Constitution make provision for the protection of academic freedom and the right to artistic creativity and scientific research. The protection of academic freedom in the Constitution is evidence that we have passed from an era where universities were at the mercy of the government into an era where they can truly have academic freedom and autonomy.

It is essential not only to analyse critically both sections 14 and 15 and the impact they are going to have, but also to look at various factors and other competing rights which could impinge upon university autonomy and academic freedom because these sections do not exist in isolation. Although there was in the past interference not only with academic freedom but also with university autonomy, there is no specific provision

in the interim Constitution which expressly protects university autonomy by name. Part of the reason for that could be that politicians do not like to emphasise the autonomy of universities because they feel that they should be entitled to interfere with universities as the government is responsible for subsidising universities. This explains why the word "autonomy" is not used in this context. The provision that protects academic freedom, however, is regarded as encompassing not only the freedom of an individual academic, to pursue his job of teaching and research without constraints but also institutional autonomy. Moreover, section 247(2) protects the controlling bodies of universities and technikons from interference by the national government through the alteration of their rights and powers before there are bona fide negotiations. This may also be interpreted as protecting institutional autonomy as these governing bodies are the policy makers of these institutions.

4.2 PROTECTION OF ACADEMIC FREEDOM IN THE CONSTITUTION

Section 14(1) of the interim Constitution provides as follows:

"Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning".

Section 15(1) stipulates:

"Every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media, and the freedom of artistic creativity and scientific research".

It is not clear why the rights to academic freedom and artistic creativity were regarded as separate appendages to other rights, namely freedom of religion, thought and opinion and freedom of speech and expression. Although academic freedom is closely related to freedom of conscience, religion, thought, belief and opinion, it is entirely distinguishable from these. Not only did it develop separately from these, but it also entails more than what these rights cover. As already stated, academic freedom not only involves freedom of speech and opinion, but also the duty to subject whatever views so expressed to critical scrutiny. Similarly, while the right to artistic creativity and scientific research may be closely related to freedom of thought, speech and expression, it includes more than what these rights entail.

One may speculate as to the reason behind the approach of lumping academic freedom together with the other related rights. The one reason may be historical. As was demonstrated in chapter 3 above, the South African government of the past restricted not only academic freedom in the form of freedom of thought, belief, conscience, opinion and critical inquiry of academics, but it also restricted scientific research and artistic creativity. It may therefore have been felt that these needed to be protected as separate rights as well. This

buttresses the view that a bill of rights has to reckon with what has happened in the past. The other reason may be conceptual, or a matter of technique. Most of the rights that are protected in the interim Constitution are individual and not institutional rights although provision is made that juristic persons can also enjoy these rights³.

As the interim Constitution was a product of compromise by the political parties involved in negotiations, this often meant that on certain issues there had to be give and take⁴. Some political negotiators may have felt uncomfortable with providing for the protection of academic freedom as an independent right which could be regarded as elitist. Moreover, academic freedom is not protected as a fundamental right in most of the constitutions of the world. It is only in the German⁵ and Namibian⁶ constitutions that academic freedom is specifically protected. Furthermore, some politicians may generally not be impressed by academic freedom which they may consider not only elitist but also a luxury which they may construe as an obstruction to their dealing with the operation of universities.

To have attempted to stipulate for academic freedom as an independent and separate right would therefore not have gone down well with certain politicians and this could have led to such a right not being protected at all which would have been a greater evil than the present situation⁷. A tactical move was therefore to lump it together with other fundamental

rights which could not be excluded from a respectable bill of rights.

As already pointed out, academic freedom is usually not protected as a separate right in many constitutions of the world, but it is subsumed under freedom of speech. Some would even argue that it is unnecessary to protect academic freedom as long as freedom of speech is protected. This view is, however, misconceived as it was pointed out earlier that academic freedom not only entails freedom of expression, but also the aspect of critical inquiry. Those who believe that academic freedom is contained in freedom of expression, conscience and religion contend that it is unnecessary to protect it expressly as a separate right. If in any case it is considered necessary to do so, as in the South African bill of rights, a casual and clumsy reference to various aspects of academic freedom can be avoided by at least providing for its separate protection.⁸

It also appears to have been unnecessary to separate the right to artistic creativity and scientific research from academic freedom as these form part of academic freedom. The reason may be that artistic creativity and scientific research are not confined to universities or what can be regarded as institutions of higher learning. There are individuals and other institutions which are not universities which engage in scientific research and artistic creativity. Perhaps a better formulation would have been one analogous to the German constitution which includes the protection of freedom to

pursue science, research and tuition. This would have eliminated a separate provision for scientific research in section 15(1) in addition to the protection of academic freedom in section 14(1).'

Apart from this, there is no doubt that academic freedom is germane to the category of free speech. As stated earlier on, academic freedom entails freedom of inquiry which includes not only the search for truth but also the freedom to be critical and to publish one's views. No doubt the search for truth implies that one should be able to follow truth wherever it leads him or her. Thus freedom of belief and of conscience also come into play as well.

According to the formulation of the South African Law Commission there should be a broad general clause to protect freedom of speech and expression, which includes academic freedom. This should read as follows:

"Every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media and academic freedom in institutions of higher learning."¹⁰

The Law Commission also points out that the approach of combining freedom of expression with artistic creativity and scientific research is not generally followed in international law. On the contrary, international law prefers to treat the freedom of artistic creativity and scientific research

separately from freedom of expression and to combine the said freedoms with the right to participation in the cultural life of the community.¹¹ These may also be regarded as forming part of academic freedom.

The proposals of the South African Law Commission have been overshadowed by the provisions of the interim Constitution and the final Constitution. The provisions of the interim Constitution have already been referred to. Section 16(1) of the final Constitution stipulates that everyone has the right to freedom of expression which includes, inter alia, freedom of artistic creativity and academic freedom and freedom of scientific research.¹² This demonstrates that academic freedom is regarded as an element of freedom of expression. Moreover, academic freedom, freedom of artistic creativity and freedom of scientific research have been brought together. Be that as it may, what is important is that at least academic freedom is protected.

A fundamental question is: on what basis is the university bound by the law and especially chapter 3 of the interim Constitution as against its staff and students? Two provisions of the interim Constitution are of relevance here. Firstly, the interim Constitution provides that the bill of rights is binding on all legislative and executive organs of state on all levels of government.¹³ A state organ is defined as a statutory body or functionary.¹⁴ This is interpreted as referring to a body which performs an authority function and not simply a body established by law.¹⁵ Although a university

is a statutory body established by law, it cannot be regarded as a state organ.¹⁶ There are no doubt cases where the courts have been prepared to regard a university as a state organ.¹⁷ The preferable view is, however, that a university is strictly speaking not a state organ.¹⁸

Secondly, section 35(3) stipulates that when interpreting a law, common or customary, a court should take into account the spirit, purport and objects of the bill of rights. What this means has not yet been interpreted by the courts. This may make the bill of rights applicable to individuals. In the recent case of Du Plessis and Others v De Klerk and Another¹⁹, however, the Constitutional Court held that chapter 3 could not be directly applied to the common law in actions between private parties. The effect of this decision is made uncertain by the provisions of the final Constitution. Clause 8(1) of the Constitution states that the bill of rights is applicable to all law and binds the legislature, the executive and the judiciary and all organs of state.

Higher education institutions provide education which is strictly speaking a function of government. This is so although these institutions are autonomous and can even act against the government. They are nonetheless established by the state to perform this function. In the performance of this function they ought to be bound by the provisions of the bill of rights. In the United States the Supreme Court developed the "doctrine of state action" which led to constitutional norms being applicable where private persons or

institutions performed governmental functions. What is meant by governmental functions has been debatable. The Supreme Court tried to restrict the scope of this category of activities to those that are traditionally associated with the organs of state²⁰. As has been said, education is strictly speaking a function of government. Moreover, universities and other institutions of higher education stand in a relationship of inequality with their staff, and even if they are not regarded as organs of government, they ought, in the performance of their functions or the exercise of their authority, to be bound by the provisions of the bill of rights because of this. The academic freedom of an individual would mean little or nothing, even if it could be enforced against the state, if individual universities would be entitled to violate it with impunity²¹. Van der Vyver, however, is of the opinion that if universities are bound by chapter 3 their rights to autonomy as juristic persons would be threatened²².

A question that has often been asked is why rights entrenched in the constitution should bind a democratically elected parliament. The reason behind this question is that it is regarded as anti-democratic for a group of unelected judges to bind the majority of the people's elected representatives. The answer to this is that a bill of rights encapsulates the rights and interests of the people. By elevating these rights to the status of being constitutional rights, the people bind their elected representatives to defer to these rights so that transient majorities should not violate them. After all the majority can also be wrong. This is implicit in the mandate

of the elected representatives. Strictly speaking the elected representations are supposed to execute the mandate of the people. No person would mandate a representative to act against his interests. This is also implicit in the practice of regular elections in terms of which the electorate can vote a government with which they are not satisfied out of power. Elections take place at certain intervals. In the meantime something should keep the elected representatives in check. That is the role of, inter alia, a bill of rights. The role of the judges is merely to call to order the elected representatives so that they do not violate the rights of the people. This obviously assumes that the judges will always be right in their interpretation which is highly doubtful. Nonetheless the rationale is that the people regard these rights as being so fundamental that they should not be easily violated²³. There is no doubt that there will always be those who will not be satisfied with this arrangement.

The scope of academic freedom as a constitutional right will largely depend on how it is interpreted by the courts and on the powers of the university in terms of autonomy and self-governance. This is usually determined by the Act of each university which determines the powers of the university as a public-law corporation and which also determines the parameters of academic freedom. Although it has been said that academic freedom is the composite term for independent basic freedoms which vest in an individual as a member of a university community, which include freedom of expression, freedom of association and vocational freedom,²⁴ it is better

to regard it as a distinct institutional right which includes not only freedom of inquiry but also the right to subject any view to critical scrutiny and in the process advance knowledge. That is only possible in a free and democratic constitutional dispensation.

Apart from what is said above, the constitutionalization of academic freedom does not create a new right. It merely entrenches a right that has existed over the years and makes it more secure. After all the greatest function of a bill of rights is not necessarily to create new rights but to protect existing rights from easy violation by the government or other powerful interests. Although the content of that right may be adjusted according to the exigencies of the situation, one can have recourse to history to determine what the content of that right is.

Academic freedom generally entails that the university as an autonomous employer, is free to enter into contracts and may determine its own conditions of service, subject to the recognition of the freedom of vocation as acknowledged by virtue of its autonomy. This means that an academic member is entitled to membership of the university and to participate in its governance. He is relatively free to choose his field of study and research and may continue his academic work without undue influence from the employer or the government, and subject to the university's syllabi, curricula and regulations. Once he has become permanent, he enjoys all the benefits of that position and is entitled to hold office until

he reaches the age of retirement. He may only be dismissed for misconduct, but only after he has received a fair hearing.²⁵

The freedoms of the academic staff are, however, limited by the fact that the employer is free to select and appoint its members and employees who have to act in the best interests of the university. Obviously once selected or appointed, they may be entitled to membership of and participation in the structures of governance, albeit in accordance with the guidelines provided by the university. Although they are free to pursue their own independent studies and research, these may be affected by rationalisation and specialisation within the university. There is no doubt that academic tenure and security depend on the financial resources of the employer, rationalisation within the system and the possible retrenchment of staff.²⁶ The employer also determines the grounds for misconduct and disciplinary procedures although the court may intervene where the university has acted in an illegal or irregular manner.²⁷

The principle of academic freedom also entails that the academic should be entitled to associate with other academics or academic groups inside and outside the country. This also encompasses freedom of association. Institutional autonomy may also have an impact on these.²⁸

Academic freedom also encompasses that the academic should work relatively free from internal and external intervention and enables him to express and defend his own views and

beliefs and to question and differ without authoritative repression or victimisation. This, however, does not entitle him to violate the rules and regulations of the university. In this way restrictions may be placed on the publications which may harm the good name of the university especially if they have no scientific or academic merit. This demonstrates that academic freedom is not an end in itself. On the other hand, it is impermissible for the university to use its autonomous powers to restrict academic freedom simply because it is over-sensitive to free political expression, or because it wants to ensure smooth management only.²⁹ In that case the freedom of the academic should prevail.

In the 1960's the prevalent view in South Africa, like that in America, was that academic freedom was the exclusive preserve of academics only and that students had no claim to it. This was in contrast with the position in Germany where academic freedom was regarded as involving both Lern and Lehrfreiheit for both students and academics.³⁰ This was partly due to the principle of in loco parentis upheld by Anglo-American universities, in terms of which university authorities had to exercise control over the training of (minor) students in the place of parents. Moreover, university autonomy guaranteed freedom from arbitrary or excessive interference by external bodies especially the state. This led to student revolts during the 1960's in the United States of America and Europe. Students rebelled against autonomous universities, which although they granted substantial academic freedom to their academic staff, gave none to their students.³¹

There is no doubt today that students are also entitled to academic freedom. They are entitled to the same academic freedom as that to which academics are entitled mutatis mutandis. They are entitled to choose a university of their choice and the course of study, provided they meet the admission requirements of the university concerned. A student is, however, bound by the university rules and regulations in terms of his contractual relationship with the university. The university is not entitled to curtail the academic freedom of a student arbitrarily. If it does, the student can appeal to the courts for redress. Academic freedom also entails that the student is entitled to the pursuit of knowledge and truth through teaching and research. He is entitled to freedom of expression and freedom from victimisation in class or examinations because of the reasoned views he may have expressed even though they may not be favoured by the teacher. The teacher is supposed to teach a student how to think and not what to think. Students may also express their views through their newspapers which may encourage responsible discussion on campus and the stimulation of a sense of community. These publications may also be useful to staff and governing bodies as a source of information about students' concerns and attitudes, as long as there are sufficient safeguards against the abuse of freedom of expression.³²

Students are free to criticise any aspect of the university affairs. If there is merit in such criticism, even if it may be damaging to the university, this should not lead to its being barred from publication. Students should be free to

express themselves not only on matters of university governance, but also on matters of the government of the country as a whole. They are entitled to freedom of expression guaranteed by the Constitution. Not only are students free to express themselves on matters of university governance, they may also participate in university governance and may act in the name of the university, sometimes as individuals and at other times through the intermediary of the Students' Representative Council (SRC). There is today increasing recognition of student participation in the universities' structures of governance as part of the democratisation process although there is no uniformity in all universities.³³

Academic freedom for students also involves fair treatment. Although the student is subject to disciplinary action by the university for misconduct, he is entitled to fair treatment which includes the observance of the principles of natural justice. These principles are not excluded by the contractual nature of the relationship between the student and the university.³⁴ Fairness should therefore be the corner-stone for all university activities between students and the university and between students inter se.³⁵

The entrenchment of academic freedom in the Constitution means that both the government and the individual university cannot violate it with impunity. The individual academic can challenge both the institution or the government should they interfere with his academic freedom. The government cannot either by administrative or legislative fiat violate this

right. This effectively protects this right from arbitrary action by the institution or the government.

Although academic freedom is a fundamental right entrenched in the interim and final Constitutions, it is not absolute. It can be limited in certain circumstances in the light of overriding imperatives. Such limitation, however, should comply with certain requirements; it must be reasonable, necessary and justifiable in an open and democratic society based on freedom and equality and such limitation should not violate the essential nature of the right.³⁶ These requirements imply that the government cannot simply limit academic freedom at its whim. Should it attempt to do so, the individual academic can challenge it in court where the government will have to prove that the limitation was reasonable and justifiable in a democratic society based on freedom and equality³⁷. Moreover, academic freedom does not exist in a vacuum. There may be a need to strike a balance between such academic freedom and other competing rights. In the case of a clash between academic freedom and other rights, the courts may be the ultimate authority to decide where the balance should be struck.

4.3 UNIVERSITY AUTONOMY IN THE CONSTITUTION

As was already pointed out above, the academic freedom of any university teacher usually depends on the autonomy of that university although even an autonomous university may nonetheless restrict the academic freedom of its staff

members. This underscores that university autonomy is a necessary though not a sufficient condition for academic freedom. Academic freedom is therefore distinguishable from university autonomy.

As already pointed out, the interim Constitution does not make separate provision for university autonomy by name. It is generally subsumed under academic freedom. This can be construed from the fact that in section 14(1) academic freedom is protected "in institutions of higher learning". If the purpose was merely to protect the freedom of an individual academic, it would not be necessary to mention "institutions of higher learning". Moreover, section 247(2) protects the rights and powers of the governing bodies of universities and technikons. The academic freedom of an individual academic cannot be effectively protected if an institution to which he is attached cannot take independent decisions regarding teaching and research. The fact that academic freedom concerns not only academics but also institutions of higher learning to which they are attached, implies that such institutions can assert their autonomy against the state whereas individual academics can assert their freedom not only against the state, but also against their university or other institutions of higher learning.³⁸

University autonomy is also generally recognized by virtue of tradition as involving self-governance on the part of the university. This has been the case, with exceptions, throughout the history of universities. It further refers to

the freedom of the institution to govern itself while academic freedom relates to the individual academic who exercises this freedom in the university milieu in terms of academic-related activities.³⁹ In the Constitution, however, no clear distinction is made.

A crucial question is whether university autonomy is compatible with democracy. The answer is obviously that autonomous institutions in general, and a university in particular, are compatible with a democracy and specifically a pluralist democracy.⁴⁰ The reason behind this, is that autonomous universities constitute an essential ingredient of democracy; university autonomy is regarded as an integral feature of democracy because it is a way of institutionalizing freedom of research and teaching. This does not mean that there may be no tensions and even conflicts between democracy and academic freedom in general. There may well be such conflicts. There is no doubt that there is interdependence between freedom and truth. Totalitarian systems have demonstrated that in order to abolish freedom it is necessary to control thought. In this way academic freedom is a necessary ingredient of democracy and constitutional democracy offers a better guarantee than any other political system that academic freedom will be respected and protected. This interdependence, however, does not preclude friction. As an institution that is subsidized by the government, some feel the government and society should have a greater say and influence over the conduct of universities. Moreover, it has been also contended, as the institution that provides

professional training at the highest level the university should not have exclusive right to determine what kinds of knowledge and what professional skills are required by society and the economy⁴¹.

There are those who would have a fundamental problem with a democratically elected government giving money to unelected officials of autonomous institutions to spend as those officials and institutions see fit. This can be justified on the grounds that good universities produce good knowledge and reliable information as well as analytical skills which the citizens may find useful in order to participate effectively in the ordering of society. Universities cannot do this effectively if they have to be restrained by the political agenda of the government in power at a particular time. Universities also improve the socio-economic well-being of the broader community by generating useful knowledge which may lead to the production of useful inventions and the consequent improvement of the quality of life of society. They can only do this best if they are not prescribed to by a transient government on what their research priorities should be.⁴²

The main mission of the university is to pursue academic excellence through teaching and research for the benefit of the community. The university staff and students also form part of the community so that the university is involved in a complex relationship that includes society, the government and the community. The university is also dependent on the financial resources from the state. The autonomy of the

university is therefore not absolute but limited because the university is not only dependent on the state for the subsidy, but it also has to act within the law. The very fact that universities are subsidized by the government have led people to believe that a university cannot claim autonomy from the government in line with the saying that he who pays the piper calls the tune. If one considers that the taxpayer is the one that subsidizes the university and not strictly speaking the government which is merely a trustee, then the picture changes. The taxpayer consists of citizens who belong to different shades of political opinion, and if the taxpayer is regarded as the sponsor of the university, then the university has an obligation to be critically analytical of everything for the benefit of all members of society.

The university is generally regarded as autonomous in relation to matters such as the appointment of some members of the governing body; the composition of its academic bodies (the senate and the faculty boards); the determination of priorities in research and teaching; generation of funds and the allocation of funds received; the appointment, dismissal and conditions of service of academic and other personnel; admission to, selection for and refusal of registration; recommendations on the establishment of faculties the creation of degrees and the designing of curricula; the determination of the contents of curricula; the examination for and conferment of degrees; and the general internal management administration and discipline.⁴³

There is a definite link between academic freedom, university autonomy and university governance. In order to perform all these functions effectively, and to justify autonomy, the university has to have an effective and efficient management and administration. It has to have organs and officers to perform its powers and functions. The university governance provides the framework, the authorized mechanisms for the realisation of university autonomy and university autonomy is the cradle of academic freedom. It is necessary to outline these structures of governance so as to determine what role they play in effectively upholding university autonomy.

The organizational structure of universities in South Africa is generally the same so that it is possible to make a general account of them. This is to be ascribed to the fact that universities have all have been established by legislation which has tended to create uniformity. The typical structure of control is a logical outcome of their nature.⁴⁴ As Schwartzman puts it: "Since their origins in Western Europe in the late Middle Ages, universities emerged by copying each other, and adapting their features to local conditions".⁴⁵ Whether or not this organizational structure is a product of autonomy or merely of historical development is not an issue.⁴⁶ What is important is that because of the need for autonomy universities have developed these structures of governance. A university in South Africa is normally created by an act of parliament. Its statute defines its powers and functions in greater detail.

The fact that a university is a statutory corporation implies that it has only those powers conferred on it directly or indirectly by the statute establishing it. This is in contrast to a university established by royal charter in Britain. A university established by royal charter has most of the powers possessed by an individual natural person. The importance of this distinction is that although in colonial times in South Africa and even after Union, it was possible for a university to be established by royal charter, it seldom happened. The reason behind this is that the right to confer academic degrees according to English constitutional law was part of the royal prerogative which passed to the university by privilege or royal grant. Theoretically, in South Africa the power to confer degrees vests in the sovereign authority. The right to confer degrees is therefore granted to a university by legislation.⁴⁷

Universities in South Africa in general are constituted as follows: a chancellor; a principal or rector who may also be vice-chancellor;⁴⁸ a council; a vice-rector, vice principal or vice-rectors or vice-principals;⁴⁹ a senate; a convocation;⁵⁰ the professors⁵¹, lecturers⁵² and students⁵³ of the university and; a registrar or registrars and the other staff of the university.⁵⁴

4.3.1 Chancellor

The chancellor is the titular head of the university and is empowered to confer degrees on behalf of the university. The

office of chancellor can be traced to the early development of universities in the Middle Ages. As the ceremonial head of the institution, he has little influence on its internal management.

At most universities the chancellor is elected by the council in terms of the statute of the university. At others he is elected by an electoral college, and at still others by the convocation. He is generally supposed to be somebody who upholds values for which a university stands including university autonomy and academic freedom. As titular head of the institution, he is not supposed to be involved in the internal management of the university. He may, however, defend the university from attacks by outsiders. He may also support it in its quest for autonomy and academic freedom.

4.3.2 Principal or Rector and Vice-Chancellor and his Deputies

All universities also have a vice-chancellor and deputies. If the chancellor is absent or unable to perform his duties and functions or to exercise his powers, the vice-chancellor must perform those duties and functions and may exercise the powers of the chancellor. In some cases the vice-chancellorship is a separate office, but in most universities the principal or rector is also the vice-chancellor, or he may be eligible as such.

The term "vice-chancellor" originated in the University of Oxford. Initially the chancellor was an official of the bishop. Until the fifteenth century it was customary for the chancellor to be a resident officer of the university and to serve for only two or three years. The practice then developed of electing to this office men of noble birth or of distinction in the service of the state usually for life. The office of chancellor therefore "fell to be one of dignity divorced from power". Authority came to be vested in a deputy who was normally elected for a period of one or two years from among the heads of colleges. The title "vice-chancellor" became common after 1450. Five hundred years later it was agreed that the vice-chancellor of Oxford did not have to be chosen from among the college heads and should serve for four years instead of two. The first non-college head was appointed in 1989. In the same year, it was recommended at Cambridge University that the vice-chancellor should hold office for longer than two years as was customary.⁵⁵ The office of vice-chancellor was adopted in South Africa with minor adaptations.

The principal or rector (hereinafter referred to simply as rector) is the chief executive officer of the university. By virtue of his office he is an *ex officio* member of the council and the senate and of every committee of the council or the senate as well as of every joint committee of the council and the senate. With the concurrence of the council he is entitled to designate any person in the employ of the university to serve in any particular case, or for such period as he may

determine, in his place in any such committee. The rector is usually appointed by the council in a manner prescribed by the statute and in some cases with the concurrence of the minister. His conditions of service and his powers, privileges, duties and functions are determined by the council.

There is no doubt that the rector is the most important official of the university. He is responsible for the overall supervision of the functioning of the university. He must therefore have considerable national and international stature owing to the fact that internally he is both the academic leader and chief executive officer of the university and externally he is the chief public relations officer of the university.⁵⁶ Because of this he must have distinguished himself academically and must have considerable administrative ability and experience. Moreover, he must be able not only to defend university autonomy and academic freedom but also to promote and advocate them. He should be fair but firm in dealing with staff, students and the government as he occupies a pivotal position in the whole university administration and management. As academic leader he must provide leadership to the academics among whom he is a primus inter pares. He is also the chairman of the senate and as such can exercise considerable influence on the academic performance of the university. In brief, he must ensure that the university is in a position to attain its goals and objectives.

As chief executive officer, the rector must ensure that the officers under him execute effectively the policy of the university as determined by the council or the senate. He is consequently responsible for and accountable to the council for the efficient operation of the university administrative machinery.⁵⁷ In addition to this he is the chief liaison officer with the public which consists of the students and former students, the parents of the students and other important stakeholders like the government and the donors. In this he must play a crucial role owing to the complexity of the relationship between the university and the public as a result of socio-economic and political factors. This requires insight and knowledge of the operation of the university. Obviously in fulfilling his role he has to be assisted by various officers. He must advise the council on the type of officers to be appointed to assist him and the expertise they should possess. The council relies heavily on him in the decisions it takes⁵⁸.

In the case of Schoeman v Fourie⁵⁹ De Wet CJ described the important role of the rector as follows:

As hoof van die inrigting is hy 'n beampte van die regspersoon d.i. die Raad... Hy is die man in onmiddellike bevel; hy is nie daar as 'n blote bystander of belangelose toeskouer nie maar as die vernaamste beampte van die Raad wat in geval van nood namens sy prinsipaal behoort op te tree en

... enige redelike tussentydse stappe ter beskerming van die belange van die inrigting te neem."

In the execution of his duties the rector must have considerable expertise in the handling of people, and he must also possess administrative acumen to be able to co-ordinate and integrate the activities of experts with differing backgrounds.⁶⁰ In the performance of his duties he must not violate or threaten the academic freedom of his academic staff. There are various ways whereby the rector can violate or threaten the academic freedom of his staff. He may align himself with a particular political party or the government of the day and may not tolerate staff that is critical of government policy. He may also stifle any debate on government-related issues. When it comes to appointments, he may not support the appointment of people whose views he considers unacceptable.

Most universities make provision for the appointment of one or more vice-principals or vice-rectors or deputy vice-chancellors. They are appointed by the council and, in some cases, with the concurrence of the minister. A vice-rector's conditions of service and powers, privileges, duties and functions are determined by the council. Usually the rector is entitled to delegate to a vice-rector any of his powers.

Owing to the complexity of the duties and functions of the rector, he needs assistance as no person, however capable, can do justice to all these. He must therefore be assisted by the

vice-rector who must also act during his absence. He nonetheless bears ultimate responsibility to the council for the performance of those duties.⁶¹ Moreover, in order to be effective, the spanner of control of the rector should be narrow and not too wide.⁶²

The rector and his deputies form the executive management of the university which is responsible for providing leadership to the institution. This distinguishes it from the administration which deals with the administering of decisions taken by the appropriate organs of the university. Through their collective leadership, the management of a university can exert considerable influence on university autonomy and academic freedom.

4.3.3 The Registrar(s)

Most universities have one or more registrars although some acts and statutes may not mention this officer expressly. The registrar is the chief administrative officer of the university. He is usually the secretary to the council and the senate although he is entitled to designate any other officer of the administrative staff to assist him. As secretary to the council and the senate, he must attend all meetings of the committees of the council and the senate although he has the discretion to designate any other officer of the administrative staff to assist him.

Sometimes the question is raised as to what the difference is between the function of the registrar and that of vice-rector. The major distinction is that the vice-rector has an executive function and assists the rector in providing leadership for the university. The registrar's function, on the other hand, is administrative. It is to administer the policies and decisions taken by the appropriate organs of the university. In that capacity, however, the registrar can exert an influence on university autonomy and academic freedom.

4.3.4 The Council

All universities have a council. The council is the supreme policy-making body of the university. Most acts stipulate that the control government and executive power of the university vest in the council. Although councils may have been established for different reasons than to foster institutional autonomy, there is no doubt that the existence of the council as a government of a university, reinforces such institutional autonomy. Its powers and competences to take policy decisions and to make the necessary appointments render it unnecessary for the government to be involved in this. As the government and policy maker for the university, the council can exercise a decisive influence on university autonomy and academic freedom. By the decisions it takes and the type of relationship it encourages between the university and the government, it can either promote or stifle university autonomy and academic freedom.

Although the composition of the council differs from university to university, the following are, with some minor variations, generally the members of each council: The rector of the university; the vice-rector or vice-rectors; not less than four and not more than seven members appointed by the minister;⁶³ between two and seven members of the senate elected by the university senate;⁶⁴ two or more persons elected by convocation from among its members;⁶⁵ two or three representatives of donors, elected by the donors themselves in a manner prescribed by the statute;⁶⁶ one or more members of the municipal council or councils most intimately connected with the university concerned;⁶⁷ some include representatives of bodies or institutions, usually situated within the area of the university's activities, which have historical, religious, educational or other links with the university;⁶⁸ some have student representatives;⁶⁹ one or more representative of the provincial government; some include representatives of the administrative staff of the university;⁷⁰ and members co-opted or elected by the council.⁷¹

The general rule is that, apart from the rector or vice-rectors and representatives of the senate and some administrative members, no member of the council should be a member of the university staff. There are, however, recent exceptions or deviations from this rule. The increasing representation of staff may pose some problems especially when junior staff members are represented on the council whereas their seniors are not. It may be difficult for senior staff

to maintain discipline over or to give instructions to junior staff who may be members of the council.

The council represents the major stakeholders of the university. These include the government, the community, the particular section of the community produced by the university and the scholars or academic staff. While these members are members of the council, they are not necessarily supposed to represent their various constituencies but are supposed to apply their minds to the affairs and interests of the university concerned objectively. The way in which members of the council are appointed should ensure an element of balance and an even distribution of expertise.

The council generally has a discretion to appoint committees of the council consisting of members of the council or of members of the council as well as other persons. It may delegate any of its powers or functions to any such committee. Such delegation will, however, not completely divest the council of any of its powers and functions. Delegation is always important for purposes of division of labour and expediting the taking of decisions. The council may at its first meeting alter or set aside any decision taken by such a committee.

The most important of these committees is the executive committee of the council. Generally this committee consists of the rector, the vice-rector or vice-rectors, the chairman of the council and a few other members of the council. The

executive committee of the council may, in addition to any other powers it has, exercise and/or dispose on behalf of the council, urgent business which cannot be postponed till the next meeting of the council. Particulars of the business so disposed must be submitted at the next ensuing meeting of the council for its information. It also has to advise and make recommendations to the council on policy matters. Moreover, it has to consider the reports of all committees of the council and to submit recommendations thereon to the council.

At all universities the council administers the property of the university and is generally in control of the university and of all its affairs and functions. It has to appoint the university staff it considers necessary for the efficient running of the university. In the appointment of staff, some universities adopt affirmative action as a policy to redress imbalances created by the apartheid policy of the past. Others have structures which deal with the issue of race and gender equity in the appointment and advancement of staff. Being responsible for the appointment of staff means that the council is responsible for one of the important legs of academic freedom in the form of institutional autonomy, namely to determine who should teach. In this way it can exercise considerable influence on academic freedom through the type of academics it appoints.

Although this is generally not mentioned in the acts or statutes, except a few, it is obvious that the council is responsible for policy formulation. In doing this, however,

the council has to rely on a number of committees, structures and officials. The most important structure of governance on which it relies for academic matters and the establishment of new departments and faculties is the senate. There are obviously other bodies, but the senate is the most important one. The council also relies heavily on the rector and his deputies in matters of policy.⁷² This implies that management, not only as management, but also as part of the council, can have an influence on university autonomy and academic freedom. Being responsible for policy formulation, the council can decide that the university will have a particular character. Although freedom of religion is for instance guaranteed in the interim Constitution⁷³, there is no doubt that a university through its council can decide that the said university will have a Christian character. This is part of its powers as an autonomous institution. A typical example is the Potchefstroom University for Christian Higher Education. The fact that a university may have a Christian character for instance does not mean that it has to discriminate against those who do not believe in Christianity. Autonomy has to be exercised responsibly and not as a pretext for discrimination.

In addition to this, the council has to be responsible for determining the organisational structure of the university, for financing the projects and programmes of the university, for provision of personnel, for determining work procedures and for control.⁷⁴ A council that supports academic freedom will not appoint academic staff that only espouses particular political views or only views that it supports, but will

appoint staff that is competent and well qualified in order to enable the university to fulfil its function of teaching and research. It should base its decision on academic grounds only. By virtue of their close relationship with the university, members of the council are in an ideal position to take appropriate decisions and to make appropriate appointments for the university.

4.3.5 The Senate

The senate of a university may be defined as the academic governing body of a university.⁷⁵ Its composition varies slightly from university to university. In general it consists of the following: The rector of the university, who is also its chairman; the vice-rectors;⁷⁶ not more than two council representatives usually elected by the council in a manner and for a period prescribed by the statute concerned;⁷⁷ professors of the university;⁷⁸ senior lecturers of the university who are also heads of departments;⁷⁹ lecturers of the university designated from time to time by the council after consultation with the senate;⁸⁰ some university acts specify certain other university staff members such as the university librarian⁸¹ or heads of research institutes;⁸² and such other members of the administrative staff of the university, who will not be more than three, whom the council may from time to time designate on the recommendation of the senate.⁸³

The senate has to supervise and regulate the instruction of the several faculties, departments, lectures and classes of

the university. It has also to organise and control the curricula and examinations of the university. In this way the senate is responsible for the two legs of academic freedom in the form of institutional autonomy, namely, to determine what to teach and how it shall be taught. By supervising what the faculties and departments have to do, the senate has to see to it that the university attains its goals of teaching and research and thus the generation and transmission of knowledge for the benefit of society. From time to time the senate must submit to the council reports on the work of the senate, such recommendations on matters of importance to the university as it may deem expedient and recommendations on matters referred to it by the council. Being the main organs of governance of the university, the senate and the council have to work in close collaboration.

To facilitate the performance of its functions, the senate is empowered to appoint committees of the senate consisting of members of the senate or of members of the senate as well as other persons. It may delegate any of its powers and functions to any such committee. Such delegation does not imply that the senate is divested of any power or function which it has assigned to any committee. For this reason the senate at its first meeting after the decision in question may alter or set aside such decision.

At most universities the act or statute or both make provision for the establishment of an executive committee which is vested with all the powers of the senate if the senate is not

in session. The executive committee usually consists of the rector, the deans of the faculties, the representatives of the council on the senate, and one or more other members of the senate appointed by the senate. The role of the executive committee is to make recommendations to the senate or to take emergency decisions on behalf of the senate with subsequent reporting duties to the senate.

Most acts provide that the council and the senate can establish joint committees of the council and the senate for such purposes as the council may determine. Such committees must consist of members appointed by the council and the senate, respectively, from among their members. The council or senate may delegate any of its powers or functions to such a committee. Such delegation, however, will not have the effect of divesting them of any power or function so delegated to such a committee and they may alter or set aside any decision of such a committee at the first subsequent meeting of the council or the senate as the case may be.

The senate consists of people who are experts and experienced in university education. This qualifies them to take appropriate decisions on curricula, syllabi and examinations. They are also able to assess and monitor the academic standards of the university. The fact that many of the professors who are members of the senate are also members of an international community of scholars, by virtue of being involved in research and in exchange programmes and by virtue of exposure to other universities in the country and abroad,

makes them eminently qualified to do this job effectively. Some universities make use of external examiners to ensure the maintenance of academic standards and that university autonomy does not lead to isolation and the lowering of standards.

The professors are the main people responsible for the generation of new knowledge through research. They are therefore the beneficiaries of the protection afforded by academic freedom. It stands to reason that they should be the foremost defenders of such freedom and jealously guard it. In theory that is so, but in practice the situation may be different as particular universities may tend to have a particular character which even professors may want to retain. This means that a professor who does not share this view may not be popular. The fact that individual academics are entitled to academic freedom means that a university senate is not entitled to debar any academic from propagating any theory or view on the grounds that it is not acceptable to it or to society in general. Because the university would be bound by the bill of rights, the individual academic can assert his academic freedom against the university as well.⁸⁴

4.3.6 The Convocation

Generally the convocation consists of the graduates of the university concerned. The purpose thereof is no doubt to maintain a link between the university and its graduates so that they can make some meaningful contribution towards the further development of the university. The contribution may

take the form of participation in the decision making of the university or in financial contributions towards the projects of the university. Former students are in an ideal position to advise the university authorities on where they fall short. They themselves know the set-up of the university after having been students there. Practical experience may contribute to their offering sound and mature advice.

In addition to the graduates of the university various acts provide for the membership of the rector, the vice-rectors, the teaching staff of the university and in some cases other officials of the university such as the registrar and the librarian. Many acts provide that persons who had been members of convocation in terms of previous acts should be members. Similarly, people who are graduates of the university college that was the predecessor of the university concerned are entitled to membership. Graduates are often free to indicate that they are unwilling to be members.

Most acts empower the convocation to discuss any matter relating to the university and to express its opinion thereon as well as on matters referred to it by the council. In some universities, as already pointed out, the convocation elects the chancellor of the university. Most of them elect representatives of the convocation on the university council. Through its representation on the council, the convocation may influence council decisions including those that may have an impact on university autonomy and academic freedom.

4.3.7 Faculties and departments

All universities are divided into faculties and departments. A faculty may be defined as a conglomeration of related academic departments. Academic departments are administrative units which control the teaching of an academic subject or related subjects.⁸⁵ The acts of the various universities make provision for various faculties.

In terms of the Universities Act⁸⁶ the prior written approval of the minister is needed for the creation of a new faculty or sub-division thereof or a department, except where such faculty or department is fully funded from outside. In the past the Universities Advisory Council advised the minister on the creation of faculties or departments at universities. This was so because that decision had financial implications for the government through increased subsidy. Although this imposed a limitation on the autonomy of a university, this limitation was considered legitimate. Moreover, the fact that the decision has to be taken on the advice of a buffer body was aimed at ensuring that the decision was as far as possible, objective and justifiable. This would prevent improper motives influencing the decision.

Most university acts or statutes, or both, provide for the establishment of governing bodies of the faculties, namely, the faculty boards. They are usually designated as committees of the senate, and generally consist of the professors of the departments in the faculty, and such other lecturers and

members as the council may determine on the recommendation of the senate.

According to most statutes the dean of the faculty is the chairman of the faculty board. In his absence the meeting of the faculty board may elect its own chairman. The dean is in general control of the faculty. He may therefore be regarded as the general manager of the faculty. In this capacity he influences the teaching and research in the faculty. It is important to bear in mind that the object of university autonomy and academic freedom is the generation and dissemination of knowledge through research and teaching. The decisions of the faculty boards have therefore an impact on these.

As a committee of the senate, the functions of the faculty board are regulated by the general provisions regarding such committees. Moreover, many statutes enumerate certain specific functions of the faculty board which include the making of recommendations to the senate on syllabi, courses of study and examinations, and the submission to the senate of the names of persons who have complied with the requirements prescribed for degrees, diplomas and certificates of that faculty. This ensures that the decisions of the senate are well considered and informed.

At the head of each department is a head of the department who is generally a professor. He can be regarded as the manager of the department concerned. By virtue of this he is a member of

the faculty board and of the senate. The head of the department occupies an important leadership position in the middle management of the university. He is a key figure in the execution of the university's policy. Not only does he serve as a liaison between the senate and the faculty board on the one hand and lecturers and students on the other, when it comes to the execution of the decisions and the implementation of policy, but he also occupies a key position in the communication of the wishes, ideas and aspirations of the lecturers and students in his department to the faculty board and the senate. There is therefore no doubt that the head of the department is the academic leader in the department. The academic department is the basic unit of the university. This is where most of the activities take place. In an era where productivity at the university is emphasised, it is clear that the head of the department has a pivotal role to play. The functions he has to perform are multifarious and comprehensive. He should teach, do research, do community service, be involved in continuing education and manage the academic department.⁸⁷ This further strengthens university autonomy as in the departments are the beneficiaries of university autonomy and academic freedom.

4.3.8 Staff of the University

It is the prerogative of the council to determine the staff establishment of the university. The council has power to appoint any person as a member of the teaching, administrative, clerical or other staff of the university, or

to promote, transfer, second or discharge any such member. If it transfers or discharges a member of staff, it must observe the principles of natural justice.

The staff of the university can broadly be divided into the academic, administrative and clerical staff. The academic staff falls within various faculties. These are the people who are largely protected by university autonomy and academic freedom. All university acts provide that such staff is appointed by the council after consultation with the senate or a committee of the senate appointed for that purpose by the senate. As the work of the university is to generate and disseminate knowledge through teaching and research, it has to appoint staff to do this. The other staff has to provide support services so that the work of teaching and research is done effectively. They may also be responsible for carrying out the decisions of the main organs of the university. All these decisions are ultimately aimed at ensuring that the university, through its academics, can effectively do its work of the generation and transmission of knowledge for the benefit of society.

The Universities Act provides generally that the conditions of service of the members of the teaching and administrative staff of a university must be prescribed by the council concerned.⁸⁸ These conditions are aimed at creating optimum conditions under which the staff have to do their work. They are also intended to ensure that academic and other staff perform their duties according to certain norms and standards.

These conditions should not stifle academic freedom in teaching and research which constitute the main goals of a university. That is why the council has to promote or discipline staff. Those who do their work effectively have to be rewarded and those who do not do it effectively have to be denied such reward. If a member who has been permanently appointed to the staff is discharged from office, he has the right of appeal to the minister. Notice of such appeal must be given to the council concerned and to the minister within fourteen days after the person has received notice of discharge.⁸⁹ The aim of such an appeal is to prevent the council from imposing a sentence that may be harsher than the offence committed. The fact that the minister can veto the decision of the council is a further indication that the autonomy of the university is limited.

In appointing staff each university council is entitled, in terms of its autonomy, to stipulate whatever requirements it deems appropriate. These requirements, however, have to be academic and not arbitrary. This is in accordance with one of the core pillars of academic freedom in the broad sense, namely, to determine for itself on academic grounds only who to teach. Although the council is free to prescribe any requirements it deems appropriate, it cannot prescribe requirements which are discriminatory on the grounds of sex, gender, race, religion or any other irrelevant consideration. Section 8 of the interim Constitution provides for equality before the law and for the equal protection of the law and it also proscribes invidious discrimination. Provision is,

however, made for affirmative action which includes measures designed to achieve adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms. Although affirmative action is quite controversial, it is nonetheless topical, and it impinges on the autonomy of a university in its appointment policy.⁹⁰ Failure to apply affirmative action cannot, however, lead to the decision of a university being successfully challenged as long as the university can prove that in addition to race, the person did not qualify in terms of academic criteria to be appointed. Despite its autonomy a university is also not supposed to discriminate against its employees for exercising rights conferred by the labour legislation. This includes prejudicing an employee or person seeking employment for being a member of a trade union⁹¹. Unlike previous labour legislation, the present one does not exclude universities from its operation⁹².

4.3.9 Students

As indicated above, students are regarded as a further component of a university. From the Middle Ages it has been recognized that a university exists for students. Without them it is not a university. It may be a research institute or something else. "While it has always been agreed that we could not have a university without students, there have been quite different opinions - and never more so than in the past two decades - about the role of the student in the university."⁹³

As further indicated above, most universities provide for representation of students in the various decision-making bodies of the university. Others are still investigating the feasibility thereof. The effect of student representation may be symbolical, but it is necessary to dispel any suspicion on the part of students as to what the university organs do.

The fundamental question is what the role of the student is in the autonomy of the university. The legal position of a student in a university has always been debatable. According to one approach a student is regarded as an apprentice who works closely with a master with the purpose of becoming a master. Alternatively a student is also seen as a ward of the university placed in the custody of the university by the parents. The university is then responsible for his welfare and moral and intellectual training. A student has also been viewed as a client or customer who seeks the services of professors to satisfy his needs. A further view sees a student as a member of the university community with rights and obligations like all other members. The truth of the matter is that the status of a student has all elements of these.⁹⁴

A contract which a student concludes with the university gives rise to certain rights and obligations. He acquires a variety of rights including a right to tuition and he must pay the fees of the university and be subject to the rules and regulations of the university.⁹⁵ Although the traditional role of a student in the university was that of a child learner, the idea of a student being under the guardianship of the

university is almost obsolete.⁹⁶ The fact that a student has a contract with the university may be evidence of this. The student's contractual relationship with the university, is not a simple one. Because of the position of a university, the relationship between the university and a student is regulated by administrative law. That is why the principles of natural justice are applicable in disputes between the student and the university,⁹⁷ which is not the case with normal contracts. In this way a university cannot do just as it pleases with a student. It cannot use its autonomy as justification for treating its student anyhow. This is further evidence that the autonomy of a university is limited and that it is for a specific purpose. As pointed out earlier, students are also entitled to academic freedom.

Universities are generally free to stipulate what type of students to admit. The fourth leg of academic freedom in the form of institutional autonomy entitles the university, through its appropriate organ and in particular the council, to determine who should be admitted as students. This decision should be based on academic grounds only. As a general rule students with the requisite intellectual ability and development are admitted to the university. University education is both costly and demanding. It is costly to the student and to the taxpayer; it demands a lot of dedication and discipline on the part of the student. For this reason it is essential that a person who comes to the university should have the potential to pursue university studies successfully. A person's potential for success at university may be judged,

among other things, by his ability to obtain matriculation exemption.

As pointed out earlier, when universities were established during the Middle Ages there were no admission requirements as we have them today. If a person could speak Latin, he could be enrolled at university. At Bologna, for instance, a student could register by writing his name on the matricula. This was a list of the names of the members of the university. At Oxford and Paris, where only masters formed part of the university as a corporate entity, there was no such matricula. If a student matriculated at Bologna, that is where he put his name on the matricula, he had to make an oath of allegiance to the university and had to pay the fee prescribed for registration.

In South Africa when universities were established, the joint matriculation board was created. It had the function of controlling the entrance examination which admitted students to the South African universities. This board performed this function until it was decided that the Committee of University Principals (CUP) should assume this function. The joint matriculation board was reconstituted as a sub-committee of the CUP.*

Some universities stipulate a specific symbol at matriculation for a student to be admitted to university studies. Moreover, a council may, as a prerequisite to admission to a particular university course, prescribe that a student should have

attained a specified standard in specified subjects at the matriculation examination or its equivalent.⁹⁹ It may be provided that the student must be a graduate of a university or must have been admitted to the status of a graduate. This will be the case if a student applies for post-graduate study. For this reason many university statutes contain provisions on the requirements of a prior degree and provisions relating to the recognition of degrees obtained in other faculties or in other universities.¹⁰⁰

The reason behind this is to ensure that only students who are capable of performing well are admitted to the university. Students who have lower matric symbols are often regarded as students at risk.¹⁰¹ If the students do not perform well, the university stands to lose subsidy. Government subsidy is indispensable for the university's performance of its functions and attainment of its objectives. The use of academic performance to determine subsidy on the part of the government may generally be regarded as unfair because it is well known that in the past it was never government policy to have black students on an equal footing with white students. Bantu education was designed for the purpose of creating an educational gap between black and white students.¹⁰² It may therefore seem unfair to use performance to determine subsidy which prejudices historically black universities.

It is often said that the matriculation results for black students are hopelessly unreliable as a yardstick for determining a student's potential. There is, however, no magic

formula for determining beforehand what the student's potential will be. Various tests have been used, but none is beyond reproach. The matriculation results appear to have been the only workable standard. There are, however, current attempts to devise strategies for determining student potential other than matriculation exemption.

Although universities are free to prescribe admission criteria, the prescription of these stringent admission criteria may, however, be criticised on the ground that it provides for unwarranted restriction of the right of access to tertiary education. If these are stipulated by historically white universities, they may be interpreted as a strategy for excluding black students who are often regarded as deficient in essential study skills and who are considered to be disadvantaged. An unfortunate inference to be drawn from this may be that this is a form of subtle discrimination against black students who once again are regarded as a problem. Admittedly the right to education, is not an unlimited one. In the South African Law Commission's proposed bill of rights the right to education was limited to the primary school level.¹⁰³ As universities are entitled to exclude students if they consider it to be in the interests of the university,¹⁰⁴ it might be contended that this exclusion is based on the protection of the interests of the university. The exclusion based on failure to comply with admission criteria does not, however, appear to fall within this category. No doubt universities regard themselves as being entitled to stipulate these admission criteria. This practice might be challenged in

terms of the bill of rights. The fact that the university has had the power to determine on academic grounds who should be admitted as students has been regarded as an essential ingredient of university autonomy. That other considerations than academic merit can play a role may be construed to mean that university autonomy is not unlimited.

The interim Constitution provides for the right to basic education and to equal access to educational institutions.¹⁰⁵ Although this provision guarantees the right to basic education, it does not guarantee the right to university education. University education cannot be regarded as synonymous with basic education. This provision is complicated by the fact that it guarantees not only the right to basic education but also equal access to educational institutions. Educational institutions are not specified but the provision generalizes on them. It might therefore be contended that educational institutions include institutions of higher learning like universities and technikons. Prescribing admission requirements which exclude some who want to be admitted to universities might be regarded as unconstitutional. It is, however, impracticable to admit everyone.

It could also be argued that the phrase "equal access to educational institutions" relates to educational institutions providing basic education. But if the earlier view is upheld, namely that all educational institutions are intended, then the exclusion may still be regarded as unconstitutional. It

may further be contended that in accordance with the concept of university autonomy and academic freedom a university is entitled to decide on who should be its students. Such a decision is not meant to discriminate unfairly against certain people, but it is aimed at protecting its academic standards. But if the exclusion coincides with race, it could be regarded as discriminatory and therefore unconstitutional.

Some universities are suggesting new ways of determining potential for success in university studies. These strategies provide an alternative to matriculation or conditional exemption owing to problems encountered in black education. These alternative strategies are still being considered by the Committee of University Principals.¹⁰⁶ The purpose thereof is to facilitate access to tertiary education.

Owing to the problems in black education, many universities have introduced academic support programmes in order to assist students with their study skills. The purpose of this is to prevent a university from lowering its standards so that what is emphasized is not the competence of the student on entry but at the exit point. At some universities they have introduced academic development programmes. The purpose thereof is to facilitate access to tertiary education for the poor and historically disadvantaged sectors of South African society.¹⁰⁷

Although some universities have academic support programmes, they may not be properly structured within departments, but

may be fragmented and may not be offered by experienced teachers but rather by junior and inexperienced ones. As a result their impact may not be felt. But if black students who have been disadvantaged by bantu education should be enabled to compete effectively and to have equal access to university education with their white counterparts, affirmative programmes should be provided for them. This entails not only restructuring primary and secondary education, but also providing effective programmes that will develop their study skills. These programmes should also address the fact that for many of these students English and Afrikaans which are generally media of instruction at universities are not their first languages. Moreover, many of these students are disadvantaged financially and this means that bursaries, scholarships and loans should be made available to them as part of a composite programme to enable especially black students to have equal access to university education.¹⁰⁸

The organizational structure and powers and functions of the university ensure that it can take and implement decisions effectively and expeditiously. These also ensure that decisions are taken by people who have the knowledge and expertise and who are conversant with the situation with which they are dealing. This further strengthens autonomy in that outside interference is rendered nugatory. There are, however, checks against the arbitrary exercise of autonomy by the institution. Members of the academic staff may challenge the university if what it purports to do is in conflict with

their academic freedom. The autonomy is nonetheless essential for academic freedom.

4.4 EXTERNAL CONTROL

Although universities are generally autonomous, they are subject to some external control. This external control is attributable to the fact that universities in South Africa in general are subsidised by the government. Certain decisions taken by the universities are therefore subject to the approval of the minister. In taking some of the decisions the minister is assisted or advised by certain committees. This ensures that the decision taken by the minister is not an arbitrary but an informed and objective one.

4.4.1 Powers of the minister

The Minister of National Education has wide powers in relation to universities. Most of these powers are indirect in that for a number of acts by a university the approval of the minister is required. His approval is for instance required for the framing of joint statutes and regulations by the Committee of University Principals¹⁰⁹ and the framing of the statutes and regulations by university councils¹¹⁰. This acts as a further check on the various matters that are ordinarily regulated by these regulations and statutes such as the election, period of office, powers and functions of the various university office-bearers, the procedure and quorum at meetings of university organs, the designation of degrees, the conferment

of degrees and honorary degrees, disciplinary provisions and to the related matters. The Universities Act and other university acts confer certain specific powers on the minister. These include:

- (a) the appointment of the chairman and members of the university advisory council and the determination of their conditions of service;¹¹¹
- (b) the handling of appeals from university staff members who have been discharged;¹¹²
- (c) the approval for the creation of faculties and departments at universities and for the incurring of expenditure under certain circumstances;¹¹³
- (d) the making of regulations, binding all universities, on a wide variety of matters;¹¹⁴
- (e) the granting of loans and subsidies to universities;¹¹⁵
- (f) the withholding of loans and subsidies to universities;¹¹⁶
- (g) the prescription of the time and manner in which the university councils must report to him on the proceedings and management of the university concerned as well as on its financial affairs;¹¹⁷ and
- (h) the approval for the alienation or hypothecation of its immovable property by the university.¹¹⁸

Other than in the exercise of these powers the minister has no authority or is not supposed to interfere in the internal management of a university. Such interference could be challenged on the basis of institutional autonomy. In a few

cases the Minister of National Education has done things which could be interpreted as interference in the internal management of the university¹¹⁹. The problem with such intervention is that, unless solicited and however well-intentioned, it tends to be selective and therefore to reveal political motives rather than a genuine desire to assist the institution concerned. Unwarranted political intervention in the internal affairs of a university is obviously not to the benefit of such institution and may tend to compromise its autonomy.

That the powers exercised by the minister may be liable to abuse and may have an impact on university autonomy and academic freedom may be seen from the case of the University of Cape Town and another v Ministers of Education and Culture (House of Assembly and House of Representatives) and others.¹²⁰

In this case the respondent ministers purported to stipulate conditions, in terms of section 25 of the Universities Act, which had no bearing on higher education but fell within the scope of the maintenance of law and order in general. Section 25 makes provision for the granting of subsidies to universities subject to conditions determined by the minister and with due regard to the requirements in relation to the general requirements of higher education. Section 27 stipulates, inter alia, that upon failure by the university council to comply with certain conditions, the relevant minister may withhold all or part of that university's subsidy. In terms of the provisions of section 25 the respondent ministers imposed certain conditions upon all

universities with effect from 19 October 1987. The university councils were commanded to take steps aimed at preventing and punishing certain conduct of staff and students at these universities. The minister had to be notified of any incident of unrest or disruption or occurrence to which the preventive measures were directed and to report on the disciplinary steps taken or intended to be taken to prevent similar incidents in future.

These were challenged on the grounds that they were ultra vires the provisions of s25; that they were also regarded as so vague that they did not convey with any reasonable certainty what the universities were required to do in order to avoid non-compliance; and that they entailed unreasonably oppressive or gratuitous interference in the applicant universities' rights. The court held that as these conditions were imposed solely for purposes of maintaining law and order, they were ultra vires and invalid. Moreover, the conditions were so uncertain and entailed unreasonably gratuitous interference in the rights of the universities. This demonstrates that even though the minister has power to stipulate conditions for the granting of subsidies this cannot be done arbitrarily. The courts will interpret such conditions strictly in order to forestall the unnecessary restriction of university autonomy. The conditions must be necessary and they must relate to the effective provision of higher education. Moreover, the conditions must be clear and be capable of being understood and being implemented without

unnecessary hardship to the institution. If they are vague or unreasonable they may be struck down as being invalid.

The fact that universities in South Africa are subsidised by the government, severely restricts their autonomy. Although the courts may be generally relied upon to ensure that the conditions stipulated by the minister in granting subsidies are not arbitrary, this does not deprive the minister of the power to prescribe such conditions. How the conditions are interpreted may depend on the court that is seized of the matter. A court that is too sympathetic to the government may give the government a greater latitude to interfere with university autonomy.

Although it has previously been averred that the saying that he who pays the piper calls the tune has to be applied with caution to universities, there is no doubt that there are those who feel that the government has the power to prescribe whatever conditions it deems appropriate to the universities by virtue of subsidising them. Some would even go so far as to assert that universities that are subsidised by the government have no autonomy at all. Although such views are obviously unacceptable, they demonstrate the precarious nature of university autonomy. An interventionist government can infringe such autonomy. The fact that academic freedom is protected by the Constitution obviously implies that the university can challenge such intervention. The decision to challenge such intervention may be a difficult one to take especially if it is against a democratically elected

government. The establishment of private universities could be the answer to this problem but, as has been shown above, even in the case of private universities, university autonomy and academic freedom may not be beyond threat from powerful benefactors. It is the universities themselves that must remain vigilant and assert their right.

4.4.2 Committee of University Principals

The Universities Act provides for the establishment of the Committee of University Principals. It consists of the rector of each university together with additional advisory members appointed by the council of each university if the joint statutes prescribe to that effect.¹²¹ If the post of rector is vacant, a university may be represented at a committee meeting by another person appointed by the council for that purpose.¹²² Should the rector be unable to attend a meeting, he may appoint a member of the university to represent him at the meeting.¹²³

The functions of the Committee of University Principals are those allocated to it under the Universities Act or the joint statute. It also has to advise the minister on matters which are of common interest to the universities or which are referred to it by the minister or the secretary for higher education.¹²⁴ The fact that the CUP has to advise the minister implies that it has an important role to play. It may strengthen the autonomy of universities in that in advising the minister the CUP may serve as a watchdog of the autonomy

of universities. The functions vested in it by the act are to administer and award certain bursaries, scholarships and prizes,¹²⁵ and to frame joint statutes and regulations¹²⁶. The joint statute further provides that the committee determines what annual contribution is to be paid by each university council towards the general expenses of the committee¹²⁷.

The position and role of the CUP has been under scrutiny now that the whole of higher education has been investigated. The National Commission on Higher Education has come up with recommendations that various bodies including the CUP, CTP AUT and SERTEC be replaced by two bodies, namely, the Higher Education Forum and the Higher Education Council. This reduces the number of statutory bodies from four to two. This means that the CUP will no longer be a statutory body¹²⁸. According to the proposed bill on universities and technikons submitted to the NCHE by the CUP, in addition to the existing functions, the CUP has suggested that the CUP should be competent to represent, promote and perform such other acts as will promote or advance the interests of the university or technikon sectors. The NCHE has, however, recommended a different higher education structure which will include the Higher Education Forum and Higher Education Council¹²⁹.

4.5 LIMITATIONS TO UNIVERSITY AUTONOMY

Despite many statutory and other legal limitations, universities in South Africa enjoy a reasonable measure of autonomy and academic freedom. There is no unlimited autonomy

anywhere in the world, especially because many universities depend on the government for their subsidies¹³⁰. Once a university is subsidized by the government, there is an implicit expectation that it will owe some loyalty to the government. This loyalty means that the university should be subject to and obey the laws of the country and not necessarily that the government should dictate to the university what to do in its internal affairs or to the academic staff what views to hold. In practice, however, the government may be inclined to favour those universities that support it and its policies and to be sensitive to the views of those universities that are critical of its policies and practices. If there is no check against its use of power, the government would tend to suppress the views of those universities or academics that are critical of its policies because they may be seen as embarrassing the government. In the absence of critical scrutiny, corruption and arbitrariness tend to thrive. University autonomy and academic freedom are there to ensure that this does not happen and that both universities and academics act as free agents of change and renewal.

The interim Constitution provides for the limitation of fundamental rights. Section 33 stipulates that these rights, including university autonomy and academic freedom, may be limited by a law of general application if this limitation would be permissible in an open and democratic society based on freedom and equality. Before that limitation can be regarded as permissible, it must be proved that it is

reasonable and justifiable in an open and democratic society based on freedom and equality. In respect of certain civil and political rights including academic freedom, it is also a requirement that the limitation should be necessary. The limitation should also not violate the essential nature of the right¹³¹.

Besides the constitutional limitation of university autonomy mentioned above, there are other forms of limitation of university autonomy which demonstrate, as has been stated, that university autonomy is not absolute. It has to be balanced with the other rights provided for in the Constitution. Thus if a university metes out discriminatory treatment on the basis of race, gender or sex in violation of the equality provision of section 8(1), the individual so affected by discrimination can challenge that in court. If the conduct of the university in relation to a staff member is challenged in court, the university cannot raise the defence of autonomy. Similarly, if a university takes a decision that adversely affects the interest of a staff member, it cannot act arbitrarily on the pretext of autonomy, but it has to observe the principles of administrative justice¹³². This includes giving reasons for its decision if demanded. A university cannot refuse to disclose reasons for its decision on the grounds of autonomy. Although the university is autonomous, such autonomy is autonomy within the law and it has to be exercised in fairness with due regard to the interests of others.

Although a university is an autonomous institution, it is important to point out that a university is dependent on the government for its existence. In South Africa a university has to be established by an act of parliament¹³³. For this reason no person or institution is entitled to purport to award degrees or diplomas without being recognized as a university by the government. It is a criminal offence to purport to be a university, or to purport to award degrees or diplomas or to offer courses offered by a university, without being recognized as such by the government¹³⁴. This demonstrates a decisive dependence of a university on state recognition.

4.6 THREATS TO UNIVERSITY AUTONOMY

Apart from the constitutional and other limitations to university autonomy just mentioned, there are other threats to institutional autonomy. These threats may take various forms, constitutional, statutory, social or political. They are distinguishable from limitations in that they may not be operative like limitations, but remain a potential danger to institutional autonomy. They may also not be properly controlled.

A disturbing provision in the interim Constitution is the one under transitional arrangements. Section 247(2) provides that the national government and provincial government are not entitled to alter the rights, powers and functions of controlling bodies of universities and technikons under the

laws existing before the coming into operation of the Constitution unless agreement has been reached with such bodies and this emanates from genuine negotiations. If, however, agreement is not reached as stated, the national government and the provincial governments are competent to alter the rights, powers and functions of the controlling bodies of universities and technikons, although interested bodies can always have recourse to the courts to challenge such intervention in terms of the bill of rights¹³⁵.

These provisions, as they were initially drafted, caused consternation among universities and were regarded as a threat of infringement of university autonomy. Even if they are not applied, they hang above the necks of universities like the proverbial sword of Damocles. There was strong reaction to this from university principals and senior academics. The provisions were perceived as a pretext to give the government the power to interfere with the senates and councils of universities, probably with the purpose of packing them with its supporters. But reference to the rights, powers and functions does not include interference with or alteration of the composition of such bodies or their abolition¹³⁶. It merely means tampering with their competencies. Those who objected to this provision felt that the provisions of the bill of rights were sufficient to deal with issues of discrimination. This threat of government intervention is obviously unwarranted and it has been regarded as reminiscent of the negative intervention of the National Party government into the

universities in the past,¹²⁷ which would obviously not be in the best interests of universities.

Despite these protests, the said provisions were retained in the interim Constitution albeit in a watered-down form in that while they give the national government power to interfere with the powers and functions of the structures of governance for universities, universities are entitled to challenge such act in terms of the bill of rights. For this reason it is unlikely that the government will unnecessarily meddle in the domestic affairs of universities especially in view of the fact that before the government interferes there must be bona fide negotiations. Moreover, whatever the government intends doing should not be in conflict with the provisions of the constitution¹²⁸.

What is meant by bona fide negotiations is not easy to define. It has been suggested that the test whether negotiations are bona fide can be determined by asking the question whether the provisions of section 24 of the interim Constitution concerning administrative justice have been complied with¹²⁹. This means that the government would have to inform the university or technikon concerned that it proposes to alter the powers and functions of the governing body of the said institution. There must be discussions with the governing body concerned on the necessity or reasonableness of the proposed changes and these changes should not be in conflict with the essential function of the university or technikon.

Another threat to university autonomy is the provision on public administration in the final Constitution¹⁴⁰. In terms of the Constitution, the public administration is subjected to a number of principles which may be regarded as being incompatible with the idea of university autonomy. This may be a threat to institutional autonomy in that although in practice these may not be strictly applied to universities, they nonetheless can be applied if universities are regarded as organs of state. If they are applied, they would restrict institutional autonomy in that legislation may be adopted which may ensure the promotion of the values of accountability, transparency and responsiveness to public needs which may necessitate the public to participate in policy making. The only saving factor is that this provision will always be treated as subservient to the provisions of the bill of rights.

A further threat to university autonomy is that posed by the provisions of section 5 of the South African Qualifications Authority Act¹⁴¹. Section 5(2), inter alia, provides that one of the functions of the South African Qualifications Authority (SAQA) is to pursue the objectives of the National Qualifications Framework provided for in section 2 of the Act. These objectives are, inter alia, to create an integrated national framework for learning achievements; to facilitate access to, and mobility and progression within education, training and career paths; to enhance the quality of education and training; to accelerate the redress of past unfair discrimination in education, training and employment

opportunities; and thereby to contribute to the full personal development of the nation at large.

These objectives are in themselves laudable. The only threat is that this external body, the South African Qualifications Authority, is empowered to pursue the objectives of the National Qualifications Framework mentioned above and to execute the functions mentioned in section 5(1), inter alia, "with due regard for the respective competence of Parliament and the provincial legislature... and the rights, powers and functions of the governing bodies of a university or universities and a technikon or technikons as provided in any Act of Parliament". The effect of the phrase "with due regard" is uncertain. It does not necessarily mean that it will be bound to respect those powers and functions, but if one bears in mind the provisions of section 247(2) of the interim Constitution, it does not seem as if this threat is serious. Moreover, that provision will always be interpreted subject to the bill of rights which entrenches academic freedom. But the incorporation of higher education qualification programmes into the national qualifications framework will entail a degree of curtailment of institutional autonomy.

In addition to constitutional and statutory limitations, there are various other social and political threats to university autonomy to which universities are today exposed. These are precipitated by the social transformation that is taking place in the country. The university is called upon to descend from

the ivory tower and to be active in the solution of many of the social problems in society. These problems include poverty, unemployment, urbanisation and illiteracy. Universities are also required to turn themselves into people's universities¹⁴². In addition to these, the issue of access to tertiary education, especially on the part of black people largely as a result of poor secondary-school education, the language problem and the Western-orientated curricula require attention¹⁴³.

There is also a growing call for the democratization of university structures of governance with the purpose of enabling students and junior staff to have a greater say in the governance of universities. The call for democratisation of universities is part of a broader mission to introduce democratic governance in all social institutions. The underlying reason is that now that the political situation in South Africa has been democratized, the rest of society including universities, should follow that example¹⁴⁴. Attempts by the government to introduce stricter applications of democracy in universities, however, could be resisted or challenged as unconstitutional in the sense that they cannot be regarded as justifiable or reasonable especially if they limit the number of academics as against students on all bodies that take academic decisions. This may constitute an unwarranted limitation of university autonomy in that students lack both the knowledge and expertise to take informed decisions on these matters. This does not necessarily mean that students may not make a contribution in that regard. All

it means is that their views cannot be decisive and have to be subject to those of teachers, otherwise it would make no difference to know and not to know¹⁴⁵.

A university as an academic institution places the highest premium on knowledge and expertise. That is why when appointing academic and administrative staff, a university has to consider knowledge and expertise as a precondition. Democracy, on the other hand, may not emphasize this. Consequently democracy may not be the best way of governing a university. Democracy has been defined as "any form of governance in which the ultimate power of decision belongs to and is divided equally amongst members (or the full members) of the relevant institution"¹⁴⁶.

Democracy is regarded as an appropriate form of governance if "the main purpose of the institution in question is to serve certain interests of its members, providing that they have an equal claim to consideration and may be presumed the best judges - and therefore equal judges - of the relevant interests"¹⁴⁷. This is the case in the political arena where we regard ourselves as the best judge. The problem is that when reference is made to democracy in university governance it may mean a variety of things. Sometimes what may be required is consultation on certain issues. At other times there may be a need for a negotiated settlement of a certain conflict and at yet other times "plain equal representation on the political model" may be the goal¹⁴⁸.

Consultation and negotiation may play an important role in certain institutions because these practices may be "valuable and effective when focused on important points of principle, policy and potential conflict, for they are apt not only to promote co-operation and cohesion, but also to increase the range of possible alternatives which are considered"¹⁴⁹. But these cannot be regarded as democratic in the sense described above.

Democracy may also be regarded as valuable when an institution does not exist to serve the interests of its members as long as its members are the equal and best judges of the interests the institution is supposed to serve and they are committed to serving those interests. For this reason members of an academic department are regarded as falling within this category because they "might be highly motivated to pursue relevant interests of their students and their discipline because of the possible adverse effects on their careers if they do not do so". Consequently, democracy could be appropriate in an academic department if all its members are more or less equally competent to judge whether the department is meeting the relevant interests. This may, however, not be the case in many academic departments in South Africa which may be "dominated by inexperienced and poorly qualified junior members". In such a case democracy may not be appropriate although it may be necessary to consult both junior members and students¹⁵⁰.

The problem of democracy at university in general is made more difficult by the membership of the university which is regarded as being "extremely muddy". While in the country the members of the relevant institution are its adult citizens who should have equal votes, at a university this may not be clear. In the words of Pendlebury:

"No doubt the academic staff of a university (including the Vice-Chancellor and other academic leaders) have a claim to membership, but the case becomes progressively less obvious when we consider semi-academic support staff (such as librarians, laboratory technicians and computer experts), students, senior non-academic administrators, lower level administrators and maintenance and cleaning staff"¹⁵¹.

It is quite clear that these groups should not have an equal say in the governance of the university "not only because they are unequal in judgement with respect to its main purposes, but also because their commitment to those purposes is unequal and in many cases extremely weak"¹⁵². This obviously does not mean that academics have exclusive knowledge on higher education issues and the others have nothing to contribute. Senior students may have a contribution to make, but in most cases they will not be so qualified to make a contribution until they have completed their studies and are no longer students. Moreover, students cannot be expected to have the same kind of commitment to academic standards as academics.

This therefore demonstrates that they cannot have the same say in university governance as academics although it is necessary to consult them and to have them represented in the university structures of governance¹⁵³.

The issue of democratisation is regarded as a threat to university autonomy because it is extremely popular, especially in black society, and any university which is critical of it as being inapplicable to university governance in its purest form is liable to attack as being resistant to transformation. Once a university is attacked on the grounds that it is conservative and opposed to transformation, this tends to eclipse whatever good the university is doing. In order not to be seen as conservative and resistant to transformation, universities may simply give in to the pressure for democratisation. The consequences of such uncritical democratisation may be disastrous.

Many of the issues and challenges that face universities may necessitate state intervention in the affairs of the university by way of rationalisation, financing and transformation. Transformation in itself is a positive phenomenon which should be encouraged. The main problem with transformation is that it is more difficult to define or to unpack. Transformation simply means change, or rather fundamental change of any institution. In South Africa it is mostly used in relation to institutions of higher learning¹⁵⁴. There is a tendency to define it according to a person's

predilections. This makes transformation idiosyncratic and less objective.

The fact that both democratization and transformation are advocated implies that transformation is not necessarily treated as a generic term for both. From popular and scholarly discourse it would appear that transformation entails an accelerated programme of affirmative action which is aimed at ensuring representative governing bodies for institutions of higher learning. They should be representative in terms of race and gender¹⁵⁶. While this may be commendable in that it may demonstrate that past discriminatory practices have been discarded and therefore engender confidence in the new dispensation, what may be less appealing are the methods used to achieve this objective or the pace at which it is done. Moreover, the pressure may not be coming from universities themselves but from outside, although students may have a considerable impact on transformation as well.

Over the years students have contributed in no small measure to the transformation of tertiary education and this is what may motivate them to continue to exert pressure on universities. They have clamoured for greater access and consequently the relaxation of admission criteria. They have also agitated for democratization of tertiary institutions¹⁵⁶. What has been disturbing is their method of doing this. They have made use of student power¹⁵⁷ which has entailed resorting to class boycotts, sit-ins in administration buildings,

destruction of property, the trashing of campuses and to hostage taking.

Recently, there has been a stronger call for affirmative action. There may be no quarrel with affirmative action as it is provided for in the interim Constitution¹⁵⁸. What is important is that this should not be imposed by the government¹⁵⁹ or outside people on universities. Even if the government were to introduce affirmative action by ordinary legislation, as the present provision in the Constitution does not create a right, this would still be subservient to the provisions of a bill of rights. The constitutional right of academic freedom must be weighed up against and override affirmative action legislation¹⁶⁰.

Although it may be understandable that the government might want to see more demographic representation in student and staff numbers, it is not recommended that this should be done in a rash manner as it could lead to other problems. Such pressure from the government may compromise university autonomy in that universities may not be allowed the opportunity to plan and to consider policies before they are implemented. Moreover, the university may be forced either to appoint or not to appoint a particular person not because of his qualifications and competence or lack of these, but because of his or her colour. This would be a sad reversal to a new form of apartheid. Some policies which are dictated upon by politicians may be short sighted even if they may be appealing to certain sections of the population. This is

exactly what the National Party government did in its policy of apartheid. Universities were compelled by legislation to restrict student admission by race and colour with disastrous effects. We now have the thankless task of reversing the effects of the past policies and this is costing the country dearly in terms of human and financial resources. There is no doubt that when the government did this, it thought it was doing the right thing and that this was in the national interest.

It could be contended that it is highly improper or even irresponsible to compare the policies of the present democratic government with the discredited apartheid policies of the past. A rejoinder to this would be that university autonomy and academic freedom are so important that they should not be sacrificed for whatever political motive to a transient government. Academic freedom in the sense of institutional autonomy implies that even an elected government sometimes has to defer to the rights of the individual institution. Thus even the argument that a democratically elected government cannot be obstructed by an unelected group of individuals or institutions does not hold water. If we uphold academic freedom, the government should recommend and not be prescriptive about such transformation.

It should also be remembered that the National Party government of the past was sincere in its policies. It thought it had the answer to the political problems of the country and had the mandate to solve them. But, as we now

know, it was sincerely wrong. If direct government intervention in the past was wrong, it should be wrong today whatever the motive. This is not to render inadvertent support to discrimination which may be the target of those who advocate transformation. Any discriminatory practice can always be challenged in terms of the bill of rights¹⁶¹. What is not supported is ill-conceived action on the part of the government which may do the universities great harm. What should also be emphasized is that transformation is a process and contrary to the views of many, not a cataclysmic act.

What cannot be accepted is the destructive way that students sometimes adopt in forcing universities and technikons to transform. The destruction of property, the disruption of academic activities and the holding of administrators hostage are clearly criminal activities that do not belong to universities. They not only threaten university autonomy but they clearly create a state of lawlessness which cannot be tolerated in a decent society. These criminal acts should be dealt with sternly. While freedom of every individual should be protected, "the freedom of the just man", as Denning once put it, "is worth little to him if he can be preyed upon by the murderer or thief"¹⁶². Powers to arrest and detain may be necessary and can reinforce and guarantee freedom if properly used.

It could be argued that if the government is not allowed to intervene, it could make universities a law unto themselves. They might therefore resist transformation. Moreover, the

argument may further go, they may not have the will and the ability to transform because some of them may have vested interests in the status quo. After all no leopard can change its spots. This could mean that autonomy could be used or abused to obstruct transformation. Furthermore, it could be doubtful whether universities are the best judges of whether or not they are sufficiently transformed.

As an answer to this contention, it is necessary to reassert that university autonomy is regarded as good in itself. That university autonomy is a good, does not mean that it is perfect. Moreover, what is advocated is not absolute autonomy. What is supported is autonomy relating to the core functions of the university. It would be a contradiction in terms to assert on the one hand that autonomy is a good thing and on the other that it is not good. In any case, even the abuse of university autonomy may be a lesser evil than government intervention into the internal affairs of the university. Abuse here is used for want of a better term to describe the defence of autonomy to slow down the process of change because any attempts to stifle change cannot succeed.

It is not possible for the university to be totally impervious to transformation because members of the university themselves may be divided on this issue. Division may tend to encourage debate. The debate on transformation may therefore continue, and when this debate is continuing this may take the process of transformation a step further. What should also be emphasized is that transformation as such is not opposed; on

the contrary it is supported. But transformation should be principled; it should be orderly and should not disrupt the main activities of the university or frustrate the attainment of its objectives. It should be aimed at improving the situation and not degenerate into reverse discrimination or anarchy. Moreover, it should take place with the full participation and analysis of the university community. It should not just be imposed on universities.

The position of those who are not satisfied with the pace of change among tertiary institutions may be entirely understandable. They may be impatient with the situation of apparent change without real change. Another problem with transformation is that it may be interpreted by some as a change to control the universities more than to genuinely improve their quality and performance. The call for democratisation may be construed as a way of packing the structures of governance with people who are sympathetic or who belong to the majority party in the government which would ensure that the government maintains effective control over universities. This may be construed from certain universities that are regarded as "progressive". If transformation is meant to achieve this, then it is a threat to academic freedom as well as institutional autonomy.

A subtle threat to university autonomy may come from those who believe that now that we have a democratic government in South Africa, university autonomy is no longer important because the democratic government will not be a threat to university

autonomy. In any case the government may be trusted to do the right thing. In this sense, what is important to emphasize is not university autonomy but more co-operation and a sense of partnership between the government and the university. According to that line of reasoning what the universities should emphasize is not autonomy but much more participation in the Reconstruction and Development Programme (RDP). In a sense this is the line of thought followed by the National Commission on Higher Education¹⁶³.

In response to this type of contention, it should be pointed out that university autonomy does not entail hostility to the government. Autonomy implies that the university should remain critical of the policies of the government including the RDP. But this should be constructive criticism for renewal and effective reconstruction. Moreover, autonomy is not emphasized only vis-a-vis undemocratic governments. It is also emphasized vis-a-vis democratically elected governments because even a democratically elected government can abuse power and threaten university autonomy. Moreover, autonomy is much more compatible with democracy. The university can participate in the RDP and still remain critical of it or the government policy. Obviously the university should maintain a neutral stand and only allow its members to take particular positions on this. In response to the blind faith in a democratically elected government, one can only say, in the words of Cowen: "When entrusting power to human hands, it is essential not to believe in the sweet reasonableness of man"¹⁶⁴. History teaches us this.

It has also been argued that some of the universities that are now strong supporters of autonomy did not support autonomy during the era of apartheid, and that they were much more prepared to support the erstwhile government's policy whilst neglecting university autonomy. This may render their support of university autonomy spurious in that it is not based on genuine conviction, but may rather be a reaction to transformation and to the fact that we now have a "black" majority government. Undoubtedly that may be true. Whatever the merits of this argument, it is always good to remember that it was even good for the prodigal son to come back home. In any case those universities which wrongly supported the government policies of the past did the government a disservice. Moreover, the truth remains the truth and the correct statement remains correct irrespective of who asserts it and irrespective of the motive. Even those universities that are not supporting autonomy these days are not doing it without motive or they may not be doing it with altruistic motives. It may be a question of enlightened self interest. There is obviously nothing wrong with enlightened self-interest provided you are going to allow room for others to have their own enlightened self-interest. Authoritarianism thrives only where one group feels that it has the right to prescribe to others what to do and those being prescribed to have to accept the prescription without a whimper.

The very fact that those who were earlier opposed to university autonomy for political reasons, may now be supporting the concept, may be evidence that those who

supported it in the past were correct after all. This should strengthen their support rather than weaken it. What may weaken the support for university autonomy may be the fact that once again universities may, for political reasons, be divided and may not speak with one voice on this important issue.

Once again it is essential to reiterate that university autonomy should be used for good ends and not be abused. If it is abused, the government could have a pretext for intervening into the internal management of the universities. As already stated, government intervention may be a greater evil. Moreover, university autonomy should not be regarded as providing immunity to universities against criticism or as a shield against accountability. University autonomy should go along with responsibility and accountability. It should also not be an obstruction to transformation, but transformation should not be imposed from above. It should take place with the full and active participation of university stakeholders. Moreover, it should be aimed at enabling universities to attain their roles and goals more effectively rather than simply to foster a particular ideology.

Although some campuses may have established transformation fora to discuss the whole issue of transformation, there may not be unanimity on the role and powers of such fora. Some students may be of the opinion that transformation fora, owing to their being representative of all the major stakeholders, may be entitled to take decisions binding even on the organs

of governance of the university like the council and the senate. This is a misconception since transformation fora are not statutory bodies. They only have to make recommendations to these bodies. They are in the same position as committees formed by the senate or the council to attend to particular issues.

It may be necessary to point out that some of the views on transformation are simplistic. They create the false impression that once a university is transformed, it will not experience any turbulence but would be completely peaceful. This view is not borne out by the facts. Even universities that have transformed will still experience a certain measure of turbulence especially during this era of transition. Not everything has become new and the old is still coexisting uncomfortably with the new. We still have the legacy of the past. One of the problems of our universities is that many black students come from a poor background and cannot afford to pay fees. This is exacerbated by the culture of entitlement that was created in the past and that is still so pervasive in our society. It is further compounded by the expectations that were created before the election of the present government that there would be free tertiary education.

This is why students have been insisting on a moratorium on "financial exclusions" in the hope that those universities which have huge student debts will write them off. Such universities have no authority to write off these debts. They

may, however, have difficulty in recovering them. This makes their financial position all the more precarious. Some of these universities, especially historically black universities, have student debts running into millions of rands. Although the government has introduced the student loan scheme, this scheme does not help all students. Moreover, it is not unconditional, but has good performance as a precondition. Many of the historically black universities face this problem more acutely because of the poor secondary education that black students have acquired which has ill prepared them for rigorous university studies. As a result, they may not qualify for financial assistance. This may further weaken their performance. Yet they may be unwilling to leave the institutions, hence the call for a moratorium on "financial exclusions".

When university administrators insist on students to pay before registration, or be excluded, students have resisted this to the extent of boycotting classes and disrupting academic activities. They have used the confrontational approach of the past instead of negotiating in good faith. Moreover, the attitude of the students has demonstrated that transformation cannot take place overnight. What is more, it has demonstrated that we need not only structural transformation but also mental or attitudinal transformation.

Universities can play an important role in bringing about proper transformation through rational debate and analysis of the situation. If they exercise their autonomy effectively

they can challenge some of the simplistic views on transformation and thus spearhead effective transformation. In any case universities are in a better position to deal with this because they are affected by the outcome. It is also important to point out that even a transformed council cannot always take popular decisions. Transformation of councils and other structures of governance is important for purposes of legitimacy, but it is not a panacea for all the ills of universities.

Although government intervention in the internal affairs and management of universities is not supported, the government may have to intervene into universities to restore law and order if there is lawlessness and students are posing a threat to property, life and limb. As has been said, while transformation is supported, certain methods of bringing about such transformation may be insupportable. The philosophy of the ends justifying the means has long been discredited and does not belong to universities.

4.7 MANAGEMENT STYLE OF UNIVERSITIES

Although it has been said that true democracy may be inappropriate for universities, universities follow a certain management style that is aimed at striking a balance between democratisation and efficiency. They make use of the committee system. Although the committee system has certain disadvantages, it also has decided advantages. Among the advantages may be mentioned the fact that it facilitates

participatory decision-making and the consequent acceptance of decisions by members of staff. It may be regarded as democratic in the sense that members have an input in the decisions that affect them although, as it was pointed out above, this is not really democracy. This ensures legitimacy. Moreover, it ensures co-operation, co-ordination and the striking of compromises in the making of decisions that affect the university. It also tends to limit the abuse of power and facilitates collective decision-making¹⁶⁵. Although there are officers with power, these are restrained by the element of accountability to these committees.

Among the disadvantages of the committee system may be mentioned the fact that it entails interminable delays in the taking of decisions. This is costly in terms of time and money. This is so because individuals should be allowed to express their views on the matter at issue. Another disadvantage of the committee system is that owing to differing opinions the decision that is taken may be an attempt to reach a compromise. As a result it may not be the best decision. Moreover, the situation may be exacerbated by the control of a committee by a small minority. Committees do not execute their decisions. These have to be implemented by administrative officers. Consequently committees are not strictly accountable for the implementation of decisions. Further delays occur¹⁶⁶. On the balance, however, advantages of the committee system outweigh disadvantages especially at a university because generally academics are sensitive to the use of power. They would like to feel that they are not under

the authority of a dictator but have collective responsibility for the taking of decisions that affect them. This may be further evidence that they jealously guard their academic freedom.

From the above, it is quite clear that South African universities have a unitary system of governance with a distinct academic and administrative structure in which democratic and hierarchical principles apply¹⁶⁷. This system should ensure both academic freedom without sacrificing responsibility and accountability.

4.8 CONCLUSION

The principle of university autonomy is buttressed by the fact that the organizational structure of universities is aimed at facilitating self-governance by the university. Any unwarranted interference by the government can be challenged by the university not only as a violation of the principle of autonomy or academic freedom, but also as being ultra vires. There are certain defined areas where the Minister of Education has some control over the operation of universities. This, however, leaves sufficient autonomy for universities to conduct their internal affairs without undue interference. Any attempt to interfere with these by legislation can be challenged as an infringement of university autonomy which is directly and indirectly guaranteed by the Constitution.

The idea of university autonomy is based on the assumption that those employed and managing the affairs of universities are best qualified by training and experience to run the affairs of universities. It further prevents the abuse of power by politicians which may adversely affect the role of the university in society. Although members of universities are not necessarily altruistic, politicians tend to be less so because politicians tend to be more concerned with retaining power. One of the ways of ensuring the retention of power is to silence criticism especially from universities.

University autonomy is essential for the protection of academic freedom and academic freedom is essential if the university is to attain its objective of pursuing knowledge and truth without interference to the benefit of society. As even an autonomous university can unnecessarily restrict academic freedom of its individual academics, it is commendable that academic freedom is expressly guaranteed by the interim Constitution¹⁶⁸. If the academic freedom of an individual academic is infringed by either the university or the government that academic may be entitled to appeal to the courts for redress. Needless to say the university is entitled to protect its institutional autonomy from interference by the government.

The fact that academic freedom is protected in the bill of rights means that it enjoys preferential treatment and is secure against whatever threats it may be exposed to. Whoever threatens it or violates it may be challenged in court. The

entrenchment of academic freedom means that it belongs to that category of rights that are regarded as fundamental. Not only are they protected against unwarranted infringement, but they are also put beyond the reach of simple majorities in parliament. They cannot be affected by ordinary legislation, but they can only be amended by a cumbersome procedure which requires a two thirds majority. Academic freedom has also a material aspect; it safeguards the pursuit of truth and the maintenance of societal values.

Although the Constitution protects academic freedom in institutions of higher learning, it is not certain what is going to happen in practice. Little can be construed from the views of the courts at the moment. For this reason it is necessary to make a comparative study of what has happened in other countries. This may assist our courts in dealing with similar cases in future.

FOOTNOTES:

1. H Schwartz "Economic and Social Rights" 1992/3 The American University Journal of International Law and Policy 551.
2. J D van der Vyver "Parliamentary Sovereignty, Fundamental Freedoms and a Bill of Rights" 1982 SALJ 583; see also J D van der Vyver "The Bill-of-Rights Issue" 1985 TRW 13; C R M Dlamini "A Court-enforced Bill of Rights for South Africa?" 1988 Journal of Contemporary African Studies 81.
3. Section of the interim constitution.
4. L M du Plessis "Whither Capital Punishment and Abortion under South Africa's Transitional Constitution?" 1994 SACJ 146ff.
5. Art 5(3) of the German Basic Law; see D P Kommers The Constitutional Jurisprudence of the Federal Republic of Germany (1989) 426.
6. Art 21(b) of the Constitution of the Republic of Namibia.
7. This type of reasoning was evident when the CUP discussed the draft constitution clause on academic freedom at its meeting at the Eskom Conference Centre in January 1996.
8. E F J Malherbe "Die Onderwysbepalings van die 1993 Grondwet" 1995 TSAR 8.
9. Malherbe (1995) 8-9.
10. South African Law Commission Final Report on Group and Human Rights (1994) 49.

11. See article 27 of the Universal Declaration of Human Rights of 1948; article XIII of the American Declaration on the Rights and Duties of Man; article 15 of the International Covenant on Economic, Social and Cultural Rights; article 17(2) of the African Charter on Human and People's Rights of 1979.
12. The Constitution of the Republic of South Africa, 1996.
13. S4(1).
14. S233(1) (xii).
15. Cachalia et al 19.
16. F Venter "Die Staat en die Universiteitswese in Suid-Afrika: Nuwe Wedersydse Grondwetlike Verantwoordelikhede, Regte en Verpligtinge" 1995. THRHR 385ff; cf.
17. Boloro and Others v University of Bophuthatswana and Others 1995 (8) BCLR1018 (B) (also reported at 1995 (4) SA 97(B).
18. Directory, Advertising and Cost Cutters CC v Minister of Posts, Telecommunications and Broadcasting and Others (1996) 2 AUSA 83(T).
19. CCT 8/95.
20. For a discussion of this see J E Nowak & R D Rotunda Constitutional Law 4 ed (1991) 457 ff.
21. Venter 389; EFJ Malherbe "Die Onderwysbepalings van die 1993 Grondwet" 1995 THRHR 10.
22. J D van der Vyver "The Private Sphere in Constitutional Litigation" 1994 THRHR 378 at 392.
23. D Davis M Chaskalson and J de Waal "Democracy and Constitutionalism : the Role of Constitutional

Interpretation" in D van Wyk et al Rights and Constitutionalism : The New South African Legal Order (1994) 1 ff; CRM Dlamini "Parliamentary Sovereignty, a Bill of Rights and Judicial Review" 1989 De Rebus 865 ff; N Smith "Constitutional Academic Freedom" 1995 SALJ 682.

24. Bray 221-222.
25. Bray 223-224.
26. Bray 224. Owing to shrinking subsidies to universities, there is a drive to rationalise and consequently to retrench staff.
27. Bray *ibid*.
28. Bray 225
29. Bray 226.
30. For a discussion of this see Chapter II.
31. Bray 266; for a discussion of some of the reasons behind student revolts see C R M Dlamini The Administrative Law of a Typical South African University Unpublished LLD thesis University of the Western Cape (1994) 353 ff.
32. Bray 266-268.
33. Bray 268-269; Dlamini 347 ff.
34. Bray 270; for a discussion of this and the relevant case law see Dlamini The Administrative Law Chapters 2 and 5.
35. Bray 27.
36. s33 of the Interim Constitution.
37. Ntantsiso and Another v Minister of Law and Order 1995 (1) SACLR 119(E); S v Sefadi 1995 (1) SACLR 89 (D); Majavu v S 1995 (2) SACLR 46 (CkGD); Phato v Attorney General, Eastern Cape and Another; Commissioner of South

African Police Services v Attorney General, Eastern Cape and Others 1995 (2) SACLIR 104 (E).

38. Malherbe (1995) 9.
39. Bray 182.
40. R A Dahl Dilemmas of Pluralist Democracy : Autonomy vs Control (1982) 1ff.
41. P G Kielmansegg "The University and Democracy" in J W Chapman (ed) The Western University on Trial (1983) 46ff.
42. Smith 681.
43. Bray 182; see also Malherbe 23-25; Kaul Governance of Universities: Autonomy of the University Community (1988) 228.
44. Van Wyk de Vries Commission Report 60.
45. "Non-Western societies and higher education" 1992 The Encyclopaedia of Higher Education vol 2 969; see also A B Cobban "Universities: 1100-1500" 1992 The Encyclopaedia of Higher Education vol 2 1245.
46. For a general discussion of this see LAWSA; Bray 153 ff; Dlamini 272 ff on which the following discussion is based.
47. Van Wyk de Vries Commission Report 21-23.
48. In most universities, the principal or rector is ex officio vice-chancellor - S4(b) of the University of Zululand Act 43 of 1969. Others have both the position of vice-chancellor and principal and the principal may be eligible for election as vice-chancellor - s6 of the University of Stellenbosch (Private) Amendment Act 107 of 1992; s3 (1) (b) - (c) of the University of the

Witwatersrand, Johannesburg, (Private) Act 15 of 1959 provides that the vice-chancellor shall be *ex-officio* principal.

49. see eg s8(1) of the University of Pretoria (Private) Act 106 of 1990; s6A of the University of Cape Town Act 38 of 1959; s3(c) of the University of the Witwatersrand, Johannesburg, (Private) Act 15 of 1959 refers to both deputy vice-chancellor and vice-principal.
50. s3(1) (h) of the University of the Witwatersrand, Johannesburg, (Private) Act 15 of 1959 and s3(1) (h) of the University of Natal (Private) Act 7 of 1960 add president of the convocation.
51. s3(1) (eA) of the University of Natal (Private) Act 7 of 1960 provides for emeritus professors.
52. Some universities simply refer to the staff or academic staff of the university - see s3(1) (i) of the University of Natal (Private) Act 7 of 1960; s5(g) of the University of Pretoria (Private) Act 106 of 1990. Other universities mention faculties and departments of the university as components of the university - see eg s3 (1) (f) of the University of Natal (Private) Act 7 of 1960. The University of the Witwatersrand, Johannesburg, (Private) Act 15 of 1959 s3(1) (i) provides for "members of the academic staff" and in s3(1) (j) adds "such deans of faculties (if any) who are not members of the academic staff".
53. Some universities add the students' representative council: see eg s3(1) (m) of the University of the Witwatersrand, Johannesburg, (Private) Act 15 of 1959.

54. Some universities include the registrar or registrars and the administrative staff: see eg s5(9) of the Rand Afrikaans University Act 51 of 1966; s4(h) of the University of Zululand Act 43 of 1969. Other universities do not have registrars but vice-rectors only - eg the University of the Orange Free State.
55. W Taylor "Leadership: University Vice-chancellors" 1992 The Encyclopaedia of Higher Education vol 2 104.
56. C J Potgieter Die Administrasie van die Universiteit van Fort Hare en die Universiteit van Wes-Kaapland: 'n Vergelykende Studie unpublished MPA dissertation, University of Stellenbosch (1979) 25 ff.
57. Potgieter 27.
58. Potgieter 28-29.
59. 1941 AD 125.
60. Potgieter 31.
61. Potgieter 32.
62. Potgieter 37.
63. See eg s7(1)(c) of the University of Cape Town Act 38 of 1959; s9(1)(b) of the University of Pretoria (Private) Act 106 of 1990.
64. See eg 7(1)(e) of the University of Cape Town Act 38 of 1959; s9(1)(f) of the University of the Witwatersrand, Johannesburg, (Private) Act 15 of 1959.
65. See eg s9(1)(d) of the University of the Witwatersrand, Johannesburg (Private) Act 15 of 1959; s7(1)(d) of the University of Cape Town Act 38 of 1959.
66. See eg 59(1)(g) of the University of Pretoria (Private) Act 106 of 1990; some statutes stipulate who is to be

regarded as a donor - see para 19 of the University of Stellenbosch statute.

67. See eg s9(1)(e)-(f) of the University of Pretoria (Private) Act 106 of 1990 which provides that the mayor for the time being of Pretoria or his nominee, and two members of the municipal council of Pretoria nominated by the council; s7(1)(e)-(h) of the Rhodes University (Private) Act 15 of 1949 provides for one representative each of the city councils of Grahamstown, Port Elizabeth and East London plus not more than three persons representing other municipalities defined in the statute and elected in the manner prescribed by the statute; para 9 of the Rhodes University statute specifies these municipalities and para 14(3) prescribes the manner of election.
68. s8(1)(c) of the University of South Africa Act 19 of 1959 provides for the appointment of two principals of other universities appointed by the committee of university principals. This is a relic of the historical role of that university as a federal body; s57(1)(g)-(k) of the University of the Orange Free State (Private) Act 21 of 1949 provides for the representation on its council of the Nederduits Gereformeerde Kerk of the OFS, the teachers' association of the OFS, the Helpmekaar of the OFS, the Oranje-vrouevereniging and the provincial council of the OFS; see also s7(1)(j)-(l) of the Rhodes University (Private) Act 15 of 1949; s9(1)(g)-(k) for instance provides for one person elected to represent high schools in the school board districts of

Witwatersrand-Central, Witwatersrand-West, Witwatersrand-East, Heidelberg and Vereeniging in which the medium of instruction of the majority of the pupils are Afrikaans; it also provides for three persons elected to represent the congregations of such churches in the area as are recognised for this purpose by the minister and where services are in his opinion conducted mainly in Afrikaans; one person elected to represent the Afrikaans cultural societies in the area which are affiliated to the "Federasie van Afrikaanse Kultuurverenigings"; one person elected to represent the Afrikaanse Sakekamers and one person elected to represent the branches of the 'Suid-Afrikaanse Vrouefederasie', the women's organizations of the 'Nederduits Gereformeerde Kerk' the "Nederduitsch Hervormde Kerk" and the "Gereformeerde Kerke", the "Vrou- en Moeder-beweging" or the "Afrikaanse Taal- en Kultuurvereniging", the "Maria van Riebeeck-klub" in the area and other women's societies and women's clubs in the said area recognized by the minister for the purpose.

69. See eg s9(1)(1) of the University of the Witwatersrand, Johannesburg, (Private) Act 15 of 1959 which provides for three students appointed by the students' representative council; other universities have students as observer or assessor members; a few do not have student representation - personal communication.
70. See eg s8(1)(aA) of the University of Zululand Act 43 of 1969.

71. See eg s7(1)(m) of the Rhodes University (Private) Act 15 of 1949; s8(1)(j)-(m) of the University of Natal (Private) Act 7 of 1960.
72. G P J du Toit Universiteitsrade in Suid-Afrika unpublished MA dissertation University of the Orange Free State (1973) 32 ff.
73. S15 of the interim constitution.
74. Du Toit 71 ff.
75. Cowen 70.
76. See eg s9(1)(b) of the University of Stellenbosch (Private) Amendment Act 107 of 1992; s8(1)(b) of the University of Cape Town Act 38 of 1959.
77. See eg 10(1)(e) of the University of Pretoria (Private) Act 106 of 1990 which excludes members of council who are already members of the senate (i.e. the principal, vice-principal and senate representatives).
78. s10(1)(d) of the University of the Witwatersrand, Johannesburg, (Private) Act 15 of 1959 excludes honorary professors; s81(1)(c) of the Rhodes University (Private) Act 15 of 1949 includes research professors but excludes associate professors.
79. s10(1)(d) of the University of the Witwatersrand, Johannesburg, (Private) Act 15 of 1959 stipulates that these are not professors. s10(1)(f) of this act also includes deans of faculties who are not members of the senate in some other capacity.
80. See eg s10(e)(iii) of the University of Zululand Act 43 of 1969.

81. s10(1)(d) of the Rand Afrikaans University which also adds the university's two registrars; s9(1)(e) of the University of Natal (Private) Act 7 of 1960 specifies "the librarians, not exceeding two in number, of the University".
82. See eg s9(1)(d) of the University of Natal (Private) Act 7 of 1960.
83. See eg s10(1)(cB) of the University of Zululand Act 43 of 1969.
84. Smith 683.
85. LAWSA 250; Berg 125.
86. s14.
87. C A Kapp Die akademiese leiersfunksie van die departementshoof aan Suid-Afrikaanse universiteite - 'n Konseptualisering vanuit die tersiêre didaktiek unpublished D Ed degree University of Stellenbosch (1983) 9 ff; I Moses "Leadership: deans and heads of departments" 1992 The Encyclopaedia of Higher Education vol 2 1390 ff; see also A Winteler "The academic department as environment for teaching and learning" 1981 Higher Education 25 ff.
88. s13 of the Universities Act 61 of 1955.
89. Proviso to s13 of Act 61 of 1955.
90. On affirmative action in general see Dlamini The Administrative Law 329 ff.
91. s5 of the Labour Relations Act 66 of 1995.
92. s2 of the Labour Relations Act 66 of 1995.
93. M G Ross The University: The Anatomy of Academics (1976) 67.

94. Ross *ibid.*
95. Schoeman v Fourie 1941 AD 125.
96. Ross 260 ff.
97. R v Senate of the University of Aston [1969] 2 ALL ER 964; cf Glynn v Keel University [1971] 2 ALL ER 89.
98. "Matriculation Examination" 1992 CUP Newsletter vol 5 No 3 3; M H Trümpelmann The Joint Matriculation Board (1991).
99. S10(1)(a) of Act 61 of 1955.
100. LAWSA 255.
101. On students at risk see P G Parsons "The student at risk" 1993 SAJHE 24 ff.
102. On this see M Robertson Human rights for South Africans (1991) 190 ff.
103. Clause 21 of the draft bill.
104. s11 of Act 61 of 1955.
105. s32 of the interim constitution.
106. These universities include the University of Natal, the University of the Orange Free State and the University of Durban-Westville.
107. On this see M Walker and N Badsha "Academic development: the 1990's" 1993 SAJHE 59 ff; see also Gerwel "Who should go to university? University admissions in national perspective" unpublished paper.
108. The National Commission on Higher Education is considering the establishment of a national loan and bursary scheme.
109. s18 of the Universities Act 61 of 1955.
110. s17(2) of Act 61 of 1955.

111. s2(1).
112. s13.
113. s14(a).
114. s28.
115. ss20, 25.
116. s27.
117. s26.
118. LAWSA 240.
119. A typical example is his intervention in the Makgoba issue at Wits.
120. 1988 (3) SA 203 (A).
121. s6(1) of Act 61 of 1955.
122. s6(2).
123. s6(3).
124. s7.
125. s12.
126. s18.
127. GN R822 of 25 May 1962 reg 5; LAWSA 241.
128. NCHE 191
129. NCHE 186ff.
130. Malherbe 377; A M Bickel "The Aims of Education and the Proper Standard of the University" in P Seabury (ed) Universities in the Western World (1976) 6.
131. See in general S Woolman "Riding the Push-me Pull-you : Constructing a Test that Reconciles the Conflicting Interests which Animate the Limitation Clause" 1994 SAJHR 60.
132. s24 of the interim Constitution.
133. s1 of the University Act 61 of 1955.

134. s28 bis of Act 61 of 1955.
135. s247(3).
136. Malherbe (1995) 11-12.
137. "Varsities Face New State Threat" 5 December 1993 Sunday Times 4.
138. Malherbe (1995) 12.
139. Malherbe (1995) *ibid.*
140. S195 of the final constitution.
141. Act 58 of 1995.
142. Khutsong 91; see also E J Meehan "The University and the Community" 1993 SAJHE 89ff.
143. Khutsong 91; Malherbe (1993) 378.
144. Pauw 102; Malherbe (1993) *ibid.*; Smith 686.
145. Smith 688.
146. M Pendlebury "Concerning the Value, Scope and Limits of Democracy" 1995 Theoria 40; see also Dahl 6.
147. Pendlebury 44.
148. Smith 686.
149. Pendlebury 41.
150. Pendlebury 46; Smith 687.
151. 47; see also Smith 687.
152. Pendlebury 47; Smith 687.
153. Pendlebury *ibid.*; Smith *ibid.*
154. Smith 688; C R M Dlamini "The Transformation of South African Universities" 1995 SAJHE 39.
155. J Moulder "Universities and Africanisation" 1995 SAJHE 7.
156. Dlamini (1995) 40.

157. B O'Connell "Education and Transformation : A View from the Ground" in E Unterhalter et al (eds) Apartheid Education and Popular Struggles (1991) 5 ff.
158. S8(3)(a).
159. Smith 689.
160. Smith 690.
161. S8.
162. Freedom Under the Law (1949) 5.
163. NCHE Discussion Document 92-93.
164. D V Cowen The Foundations of Freedom 118.
165. Bergh 48 ff; Bray 170 ff.
166. Bergh 50ff.
167. Bray 170 ff.
168. SS14 and 15(1).

CHAPTER 5

UNIVERSITY AUTONOMY AND ACADEMIC FREEDOM:

A COMPARATIVE PERSPECTIVE

5.1 INTRODUCTION

A discussion of university autonomy and academic freedom in South Africa would be incomplete without a comparative analysis of what has happened in other countries. South Africa is not an island and may have something to learn from the experiences of other countries. These lessons may either be positive or negative.

From positive lessons we learn what we have to do and for negative lessons we learn what we should not do. Those who do not learn from the mistakes of others are condemned to repeat them with the same disastrous consequences. Another reason for looking at the experiences of other countries is that what we shall be dealing with in South Africa is nothing new. It is something that other countries have dealt with. It may therefore not be necessary to re-invent the wheel but it would be enriching to benefit from the experience of other countries. Even our interim Constitution stipulates that in interpreting the provisions on fundamental rights, the courts should, *inter alia*, have regard to comparable foreign jurisprudence¹.

This does not mean that we have to follow everything that has happened in other countries, but that given the same circum-

stances we have to consider quite seriously what has happened there. While the comparative perspective may be jurisprudentially illuminating and enriching, it does not mean that within the confines of this thesis it will be possible to examine the experiences of all countries of the world. A few selected ones will be considered. These include Britain, the United States, Germany and a few African countries. The choice of these countries is based on the fact that they exemplify different constitutional dispensations. Britain does not have a written constitution whereas the USA and Germany have written and rigid constitutions. While the African countries have written constitutions, it may be illuminating to see what factors have influenced academic freedom there.

5.2 BRITAIN

5.2.1 University autonomy in general

In an earlier chapter the concept of university autonomy was discussed in some detail. It would therefore be unnecessary to do it again here. University autonomy in Britain existed by virtue of tradition and not because of any constitutional provision protecting it. Although as it was pointed out above², that the concept of autonomy had its origins in the medieval universities, various models developed from this. One can identify the Kantian model, Napoleonic model and the British and German models³. The British model recognized the universities as property-owning corporations of scholars,

supported by the state but largely responsible for the running of their affairs. Academic autonomy therefore did not derive from the action of the state defining a "reserve area" of non-intervention, but rather from the absence of a concept of the role of the state which itself emphasised its legitimacy. Although the British and German models shared the idea of a facilitatory state, British autonomy largely rested on individual and institutional autonomy, both of which were in turn based on the university charter and the collegial style of self-governance. The charter secured institutional autonomy and the "zone of negotiations" between the university and the government was not based on any detailed code of regulations, but rested on the "establishment and maintenance of trust and confidence" between the parties⁴.

The British system was therefore based on a "gentlemen's agreement" which is derived from the vagaries of an unwritten constitution. The fact that university autonomy was based on tradition or convention did not necessarily imply that it was ineffective. Conventions can sometimes be more effective than provisions in written constitutions. Van der Vyver once remarked in relation to the conventional restraints which limited the doctrine of parliamentary sovereignty as follows: "Those restraints find expression in a conventional pattern of exemplary conduct, focused upon the rights and interests of the citizen, and which has not so much been upheld on account of legal compulsion as having been maintained by reason of profound traditionalism and the proverbial Englishman's pride"⁵.

Although there is some element of truth in this statement, it is not the whole truth. Neave has warned that: "This, as recent British experience and the visit of George Bernard Shaw, ought to remind us, is risky. 'The English gentleman always plays fair. Until he loses. And then he changes the rules of the game'. And this the less charitable might say, is precisely what, over the past few years, he has been busily doing in the name of the national interest"⁶. This may be one of the reasons why some have doubted whether it is wise to continue to place confidence in unwritten conventions in Britain. For this reason some have advocated the adoption of a bill of rights⁷.

Although reference has been made to university autonomy in British history as if it is fixed and immutable, it does not mean that this concept is static. On the contrary, it has undergone various shifts as a result of a variety of economic and political factors. In order to put the matter in proper perspective it will be necessary to sketch a brief historical background to the evolution of autonomy in Britain.

5.2.2. Historical development of university autonomy

Early British universities were established as religious institutions, which were under the direct control of the church. Early academics were primarily ecclesiastics, and it was from this profession of life-long service that the academic profession originated. When they were later emancipated from the church's influence, universities evolved

into self-governing institutions. They were therefore not under the direct control of the state. It was only since World War II that the state gained a great measure of control over British higher education⁸. But in the mid-nineteenth century, for instance, the universities experienced more danger from religious than from state pressure. At that time both Oxford and Cambridge were engaged in a struggle for religious freedom. The struggle, however, involved university independence more than academic freedom⁹.

When it successfully emerged from the struggle to liberate itself from religious control, the British university became a public institution with a lay governing board. To ensure independence, the charters of all universities were drafted to establish autonomous self-governing institutions. Although a relatively small group governed the modern universities neither the vice-chancellor nor the lay governing board dominated¹⁰.

In the early twentieth century British universities experienced considerable financial needs. When they observed the subordination of the German universities to the state during World War I, the British academics were reluctant to appeal to the Board of Education, a state political department, because they feared that they might lose their autonomy. Instead, they established the University Grants Committee (UGC) in 1919. The positions of the UGC were filled by prominent university members. Under this new arrangement, the Treasury made block grants to the UGC, which then

allocated these, free from supervision or control by the Treasury as to how the money was spent. In this way, Treasury funds were not controlled by civil servants who were not versed in education, and the universities autonomy was therefore protected. In later years, especially after World War II, the UGC gained considerable power and influence, and the prized university autonomy began slowly to be eroded". "Academic freedom, at one time blithely taken for granted, was perceived as threatened"¹².

This demonstrated that university autonomy was always exposed to threats. As Brook puts it, these threats did not come "from malevolent schemers, whom it would be a pleasure to oppose, but from well-disposed persons with a genuine interest in education, who would never in so many words declare themselves as enemies of academic freedom, but who happen to value other things more highly and would consequently be willing to sacrifice the freedom of universities in pursuit of what they believe to be noble ends. The threat to academic freedom comes both from outside the university and from within"¹³.

The greatest single threat to academic freedom in the form of institutional autonomy has been regarded as the dependence of the university on the state for a large proportion of its income. In the past the threat was regarded as largely potential because the UGC served to a large extent as a buffer between the government and the universities. It was therefore felt that if the UGC was replaced by a body less anxious to

preserve the autonomy of the separate universities than the UGC this would spell the death of university autonomy¹⁴.

As stated earlier, one of the interesting features of the relationship between the government and universities was its flexibility which was no doubt one of the advantages of an unwritten constitution. As long as mutual "trust and confidence" lasted, the flexibility went far in conferring upon the British university system an adaptability to growth and change which other universities, burdened by the formalities of administrative procedures noted and some emulated. But similarly, the absence of any formal administrative or constitutional definition of academic autonomy was its Achilles heel because there was no way of defending established procedures in the "zone of negotiation" should the government "like Shaw's gentleman, decide to change the rules of the game". Nonetheless the outstanding feature of the British model of autonomy is that it survived for so long based simply on the unspoken convention, understanding and agreement reached within the "zone of negotiation". A second feature was that the "zone of negotiation" was itself an "extension into central government of that style of collegiality and relative informality which existed at the level of the individual establishment"¹⁵.

As already said, this model of autonomy did not remain static. In continental Europe, though not in Britain, the expansion of higher education contributed immensely to the redefinition of the nature of academic autonomy. From the latter part of the

1960's established models, were revised, often in great haste. From that moment on, the idea of autonomy took on an instability and a political centrality that it had not had before. The emergence of these policies resulted in the "redrawing of the boundary between the university and the state"¹⁶.

The implications of this change and adaptability have an impact on the nature of academic autonomy. For this reason Neave feels that the idea of academic autonomy needs to be replaced with that of "boundary". His motivation is that autonomy carries with it certain overtones which stress continuity in the relationship between university and state. "It implies a certain enduring consensus as to those areas in which the state, ... chose not to intervene. It also carries with it a certain fixity". But any observer of higher education in western Europe of over the past decades would notice the break with the previous practice. What has emerged is a situation of conflict over the part that the university has to play in society, between "socially" or "economically relevant" or "economically necessary" fields of study. There has also been conflict on the part of the internal redefinition of management and governance, over who should participate in the affairs of the university. The concept of boundary has therefore been regarded as dynamic in that it undergoes considerable shifts "sometimes in the direction of closer external oversight by government, sometimes in the direction of enhanced internal participation"¹⁷.

The growing needs of an industrialised Britain necessitated a sound legal political and financial structure and led to the position of the state vis-a-vis the university being strengthened. This resulted in the nationalisation of higher education¹⁸. It soon became clear that the uniform university sector of higher education had become out of touch with reality and that a binary system which could address both academic teaching and technical training had to be implemented. As compared with the technical sector, universities were rather tardy to adapt and the subsequent years were turbulent and marked by student riots, increased state control and severe cuts in university grants. This led to intensive rationalisation programmes which in turn resulted in the improved utilisation of human and physical resources and stricter co-ordinated control by the state. In 1988 the Education Reform Act brought about far-reaching changes to the higher education system and increased statutory control over the university-state relationship¹⁹.

The Secretary of State for Education and Science is responsible for the whole education system. He has to submit his annual report on education to parliament. In terms of the Education Reform Act of 1988, he now has direct and indirect legal and administrative control over the universities. The Department of Education and Science is now more actively involved in policy-making which was previously left in the hands of universities themselves. In terms of the Act, there has been a considerable shift in the balance of power and there is greater emphasis on market-oriented decision-making.

It is unlikely that the department's powers over higher education will diminish. The likelihood is that higher education will develop as an egalitarian system based largely on function and the institutional initiative and diversity will be promoted. This could result in stronger mechanisms of institutional self-governance and the gradual phasing out of the binary policy²⁰.

Before the passing of the 1988 Act, the government had never exercised direct legal control over the universities, except via the general legislation relating to control over finance and advice via the UGC. When the 1988 Act was passed, it dealt with education in general and university education in particular²¹.

5.2.3 The Education Reform Act

There are basically three main topics which have an impact on the relationship between the university and the government. These are the replacement of the UGC by the University Funding Council (UFC); the establishment of University Commissioners (UC) to modify university statutes; and the exclusion of the jurisdiction of the visitor in employment contracts.

When the government's White Paper on Higher Education - Meeting the Challenge²² and the Education Reform Bill were both published in 1987, they received extensive publicity because of the intensive lobbying on higher education both inside and outside parliament. Sections 131 and 134 of the Act deal with

the establishment and the functions of the UFC and its appointment by the secretary of state. Its main function is to administer funds made available to the universities by the secretary of state for the provision of education and research and the facilities needed for such education and research²³. The secretary of state has a discretion to assign supplementary functions on the UFC which will be regarded as ordinary functions²⁴.

Sections 202 to 208 of the Act deal with the powers and duties of the UC²⁵. The UC is empowered to oversee and modify university statutes and matters relating to academic tenure. In this way it serves as a watchdog over the universities. In performing its functions it has to ensure that academic staff have their academic freedom within the law, inter alia, to question and test certain facts, put forward new ideas and controversial and unpopular opinions without fear of jeopardising or losing their position or privileges at the institution. It has also to enable qualifying institutions to provide education, promote learning and engage in research efficiently and economically and apply the principles of fairness and justice.

In terms of section 203, the UC has certain duties that derive from its power of modifying university statutes. In terms of these modifications, governing bodies are now entitled to dismiss academic staff on good cause shown. No dismissal may take place unless sufficient reasons have been given²⁶.

Section 206 of the Act excludes the jurisdiction of the visitor in disputes concerning the appointment or employment or termination of employment of academic staff where full protection is now provided by the general laws. Most universities in England and Wales provide in their royal charters for a visitor with jurisdiction to supervise and govern the foundation on behalf of the founder²⁷. The visitor has no jurisdiction in any matter governed by the general laws of the realm. Although his exclusive jurisdiction over the members of and matters dealing with the domestic laws of the corporation is recognized, it is subject to review by the supreme court on the grounds of illegality, irrationality and procedural irregularity²⁸. Although visitorial jurisdiction has been ousted, where the disputes were referred to the visitor before the date on which modifications were made by the UC to the university statutes, or where such modifications now make provision for hearing and determining appeals and grievances by the visitor, then the visitor's jurisdiction will remain²⁹.

5.2.4 Other persons/bodies in the university-government relationship

There are other persons and bodies that have an influence on the autonomy of universities in Britain. These bodies include the Charity Commissioners (CC), the National Audit Office, research and professional bodies, the Committee of Vice-Chancellors and Principals and the Association of University Teachers. It will not be necessary nor feasible to

have a detailed discussion of these. Only a few cursory remarks will suffice.

The need for the appointment of CC's stemmed from the fact that charitable endowments were not always used for the purposes intended by the founders, and the crown as supreme guardian could not grant protection via the chancery courts. In terms of the Charities Act of 1960, universities in England and Wales are classified under "excepted" and "exempted" charities, and although they do not have to register, the CC's have certain general powers over charities. These universities are also subject to the court's jurisdiction regarding an application to alter or modify the original purpose of their charitable gifts in terms of the cy-pres principle. The CC's also have powers to control the institution of legal proceedings in charity proceedings by universities falling within the "excepted" category³⁰.

Originally universities as autonomous institutions were not accountable to the treasury or the Controller and Auditor General for grants received from the state. During the sixties, however, owing to increased needs for manpower and under the influence of political pressure, universities became more dependent on state funding. This gave the government a powerful tool of control over them. This state of affairs led, inter alia, to the termination of the UGC's relationship with the treasury and the transfer of supervision to the Department of Education and Science. The accounts of the UGC

(now UFC) and universities since then became open to inspection by the Auditor-General.

Various state-aided research councils were established over the years to advise the Department of Education and Science on the financing of worthwhile research proposals and the award of research fellowships and to encourage the development of research associations in private industry and research facilities in university departments. The councils later acquired a critical role in co-ordinating government aid to university research³.

In 1987 the Advisory Board for Research Councils published its report stating that there was not enough money to finance full-time research at all universities. It proposed a "three-tier" system for university teaching, research and funding. The department, on the other hand, preferred a simpler division into research-led and teaching-led universities. As no agreement has been reached on this issue, the future organisation of research in British universities is uncertain. The government and the Treasury seemingly support a total transfer of responsibility for research funding from the UFC to the research councils. They admit, however, that it would interfere with the close relationship between teaching and research in the university³.

Professional bodies have been formed to represent various professions. There is little information on the influence of these bodies over universities. The relationship between

professional bodies and universities varies quite considerably. It would appear, however, that these bodies are exerting increasing pressure over universities because their main concern is to ensure that universities produce competent members of their profession. In exchange, professions give professional advice and invest considerable sums of money in the training of professional people³⁴.

Another body that has some influence on the autonomy of universities is the Committee of Vice-Chancellors and Principals (CUCP). The CUCP was formed after World War I. Although it acquired a central and influential reputation as the body that spoke and listened on behalf of the universities, this role was questioned in the late sixties. After collective action had been taken, however, the CUCP emerged in a role of leadership which completely altered its ethos³⁵.

Although the CUCP has, over the years been sometimes accused of not being united on university matters, it has grown into a united body which speaks with authority on the university and publishes its reports when common interest dictates³⁶. When the new UFC was established under the supervision of the secretary of state, the CUCP acquired its new role of protecting the universities from political pressure and the doctrinaire policies of the government³⁷. It has a leading role in preparing universities for their new role in higher education and has also acquired a public relations role³⁸.

The Association of University Teachers (AUT) was established after World War I to promote collaboration among British academics and to act as their collective mouthpiece³⁹. It has taken a lead in promoting and protecting the public image of academic teachers as a professional group and has assumed the role of watchdog against government interference in university teaching. When there were drastic cuts in university finance and rationalisation, during the eighties, it again fought against increasing state control over the universities and the methods used in the process. It also played a major role in the debate about control by the secretary of state over the universities via the UFC and in the promotion of academic freedom and the university's unlimited right to dismiss staff during and after the passing of the 1988 Act⁴⁰. As a result of the increasing political interference in university education and the change in the position of the academic to that of employee, the AUT has in addition to its professional role, also played the role of a trade union. It has, however, been severely criticised for its political affiliations which have caused splits in the organization, its ambivalent relationship with the CUCP and its inability to produce the collective view of academics on the goals of the university⁴¹.

5.2.5 The structure and governance of the university

It has been said earlier that what has contributed to the autonomy of universities, is the structure of governance of its university provided for in the charter. The governance structure of British universities is broadly similar and

generally known so that it is not necessary to narrate it here⁴.

5.2.6 Redefining academic autonomy

There is no doubt that before the 1970's many European universities enjoyed a great measure of autonomy. This situation, however, changed dramatically in the late 1970's and 1980's when the state and its agencies began to play a more prominent role in higher education by imposing limits on university autonomy⁴. This also led to the revision of the mechanisms of co-ordination to accommodate the new administrative, managerial and financial realities of mass higher education when the state stepped in to strengthen its formal powers of co-ordination within the external frame⁴. This phenomenon demonstrates the shifting of the boundary of government control into areas which had previously fallen within the "zone of negotiation".

During the early 1980's, the relationship between university and the government with its increased administrative overlay, was influenced by the move to enhance "country participation" in university affairs. Although the practice of community involvement in itself should not have restricted academic autonomy it, however, led to the increase in the number of stakeholders and gave credence to the view that the university is a public service rather than a community of scholars. This in turn brought about a subtle alteration in the public perception of academic autonomy and precipitated the external

redefinition not only of the stakeholders and their influence in deciding on academic priorities, but also a redefinition of what is regarded as "legitimate" academic autonomy⁴⁵. In this new approach lies not only the conflict between public and utilitarianism and private disciplinary identity, but the real danger that the defence of the private concept of autonomy is perceived negatively as the simple restatement of corporate self-interest⁴⁶.

The administrative overlay enhanced by community involvement started at regional and local level, but soon spread to national level and gave rise to the establishment of national bodies within the scope of the appropriate ministries as instruments of public purpose⁴⁷. In the British system, in which institutional autonomy has been almost complete over the years, any increases in central control meant a decrease in the degree of autonomy. The question of the extent to which these instruments of public purpose changed the British idea of university autonomy, is found in the way whereby central government brought the higher education system and the labour market into closer co-operation.

When bodies like the UFC and the PCFC were established, it became clear that the kind of public service the universities were expected to perform was no longer negotiable. This meant that the main task of the university was being redefined in terms of a commitment to one predominant sector of the national community (namely industry and national productivity) and autonomy itself (self-governance or a particular degree of

self-governance) became negotiable, depending on the time-scale of strategic planning. In this way the autonomy or degree of self-governance that universities now have is "conditional"⁴⁸.

The change in the concept of autonomy took place quite rapidly in Britain (over a period of two decades) and without the complexities of redefining the nature of academic autonomy internally or in terms of regionalisation, as happened elsewhere in Europe. In terms of the notion of "facilitator state", the British central government underwrote the financial needs of the university sector, leaving the questions of quality, maintenance, governance, degree validation and staff appointments in the hands of the individual institutions. Since 1981, however, a reversal in the purpose of the "zone of negotiation" took place. Instead of this zone being an extension of the university into central government, it became a "zone of penetration" of central government into the university world. This situation provided the vehicle for the settling of an increasing number of norms (i.e. subject viability, differential resource allocation, efficiency or the creation of internal cost/accountability structures). Although "conditional" autonomy has not directly attacked autonomy and its exercise at institutional level, the overall impact is that autonomy can be exercised only on condition that the individual institution or department meets national or established norms which are continually negotiated in the light of public policy⁴⁹.

The empirical development of academic behaviour in the dual concept of academic autonomy in its public (public authorities) and private (inside academic circles) interpretation requires further attention, since the former has removed a great deal of "legitimacy" from traditionally based arguments in favour of "autonomy". In this sense the aim of "conditional" autonomy is to shift the conditions governing competition from those defined according to internal norms of the academia, to the external norms of the treasury and financial experts, thereby increasing the public visibility of the process of competition.

There are undoubtedly various interpretations of autonomy. In most western European countries, however, it is not defined by academics, but by government. "Autonomy exists as a state of tension between various interests (those of the external and the academic community) and between knowledge as an element of exploration". In the UK the term "conditional" autonomy describes the role of a highly interventionary state in higher education, a situation which has developed rapidly since there were few constitutional devices to prevent it. Various changes have been brought about by the Education Reform Act of 1988, which now provides a legislative framework for all higher education sectors, but the extent to which university autonomy will remain a "reserve domain" remains to be seen³⁰.

5.2.7 Academic freedom

There is no constitutional provision for the protection of academic freedom in Britain. Just like university autonomy, it merely existed by virtue of tradition. For a long time academic freedom was never a major concern to British academics for a variety of reasons. A genuinely tolerant public opinion, and a far-reaching self-government by academics in their own institutions ensured that those who exercised their academic freedom and who expressed their beliefs and deviated from the norm did not place themselves at risk. As one British scholar once observed; "where there appeared to be no danger to academic freedom, there was no need to insist on permanence of academic appointment to protect that freedom".⁵¹

This situation changed when there was greater government intervention into the university affairs. For a long time academic freedom was taken for granted⁵². It was only in the eighties that attention was poignantly paid to the definition of academic freedom. In 1987 CVCP defined it in their lobbying against the Education Reform Bill: "not as protection for life but as the freedom within the law for academic staff to question and to test received wisdom and to put forward new and controversial or unpopular opinions without placing individuals in jeopardy of losing their jobs"⁵³.

In the Education Reform Act of 1988, academic freedom is described in section 202 as follows:

- "(a) to ensure that the academic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at their institutions;
- (b) to enable qualifying institutions to provide education, promote learning and engage in research efficiently and economically; and
- (c) to apply the principles of justice and fairness".

Although it has been said that academic freedom has been used in support of many conflicting causes⁴⁴, there is no doubt that the purpose thereof is to enable both the academic and the student to do their job effectively. The academic has to teach and do research. In the course of this he has to express certain views which may not be popular but which may nonetheless be valid. He should pursue the truth without any fear of reprisals. Equally a student has to learn and in the process ask questions and express certain views. He should not be punished for asking those questions and expressing those views⁴⁵. In the exercise of his academic freedom, each individual academic has to have due regard to the rights of others, because academic freedom has to be weighed against the competing rights. Moreover, as an ordinary citizen an

academic is entitled to other civil liberties to which other citizens are entitled⁵⁶.

5.2.7.1 Academic freedom and tenure

When members of the academic staff are appointed, they assume a particular status as members of the academic community. Once they have completed a period of probation, they acquire tenure which is a form of vocational security to protect their intellectual activity and from being subjected to undue external and institutional pressure.

Historically academic tenure was never at issue in Great Britain and there was no public debate about tenure among British academics. It was simply accepted as a matter of course⁵⁸.

When British universities became strapped for cash, the government perceived tenure as an obstacle to flexibility especially when the government was attempting to respond to the needs of higher education, while reducing university funding. When attempting to implement spending cuts in higher education, the Conservative Government since 1981 put considerable pressure on universities to abandon tenure. This pressure gained momentum in 1986 when the Secretary of State for Education and Science expressed to the vice-chancellors his hope that all new academic appointments would be made without tenure. The Treasury also informed the CNCP that

while the Treasury would be willing to agree to more money for staff salaries, it would not accept tenure⁵⁹.

Academic tenure was also criticized on the grounds that it discriminated against the majority of academics without tenure. Academic tenure has, however, been defended on the basis that the academic is an office-bearer rather than an employee, and that academic freedom can only flourish in conditions where there is freedom of speech and of thought. For this reason universities must be exempt from some of the requirements of close public accountability. This has, however, altered considerably as a result of increased state intervention, financial pressure, competition and performance evaluation⁶⁰.

5.2.7.2 The Education Reform Act and the abolition of tenure

Even apart from government pressure some universities started to abandon tenure because of reduced funding and the concomitant financial constraints. Even before parliament started to draft and to debate the 1988 Education Reform Act, therefore, many academics especially those recently appointed, did not have jobs guaranteed for life by tenure. Although in the minds of the government there was a clear connection between tenure and the financial security and flexibility of British universities, which connection was deemed to justify the abolition of tenure, some felt that the government's motivation was unclear. The feeling was that this probably had more to do with a mistaken belief that tenure is a

privilege that could no longer be afforded rather than arising from a conscious and deliberate disregard for the fundamental principles at stake⁶¹.

During the second reading of the Education Reform Bill before the House of Commons, the Secretary of State for Education and Science stated that traditional tenure arrangements "severely circumscribe the flexibility and responsiveness of universities. The Bill proposes that all universities should be able to appoint new permanent staff without offering tenure. Independent commissioners will revise university charters to give effect to this and to safeguard academic freedom"⁶². Universities were therefore enjoined to abolish tenure for incoming staff. Tenure was also abolished for those receiving promotions who were already enjoying tenure⁶³.

Since the passing of the 1988 Act, no new academic appointment has tenure and academic staff may now be dismissed on good cause. The UC amended university statutes to allow for the dismissal of academic staff on the grounds of redundancy or on good cause and they also had to deal with disciplinary procedures, complaints and grievances and procedures for hearing appeals against disciplinary decisions and dismissals. In modifying these statutes they were bound by section 202(2) of the Act to uphold academic freedom as set out above, including the basic common-law right to fair treatment.

Under the Education Reform act, good cause in section 203(6) is related to the conduct, capability or qualifications for

performing the work for which the academic was employed or appointed. The Act expressly provides that "capability" refers to "skill, aptitude, health or any other physical or mental quality"⁶⁵. "Qualifications" refers to any "degree, diploma or other academic, technical or professional qualification" relevant to the office or position in question⁶⁶. "Conduct", on the other hand, is not further explained in the Act itself. Instead, the annotation to the statute suggests looking to a particular university's charter and statutes in which, in most cases, the recognized definition of "conduct" is expressly mentioned. Although the Act provides a general understanding of the ingredients of good cause, parties to disputes will find no precise definition for conduct, capability and qualifications because of the paucity of case law in the area. The reason behind this is that traditionally the visitor possessed exclusive jurisdiction to settle disputes between members of the university⁶⁷.

5.2.7.3 Academic freedom debates and the amendment

When the government first introduced the Education Reform Bill, academic freedom was the main issue, and tenure as its protector, became the centre of the debate. The government, on the one hand, led by the Secretary of State for Education and Science, contended that tenure was not necessary to preserve academic freedom. Academic freedom, as it claimed, would not be protected by "jobs for life" under the practice

of tenure, but by the due processes and provisions established by the Commissioners at each university⁶⁸.

Those who supported tenure, on the other hand, took a different view as a result of a university system that was increasingly dependent on government funding. They argued that the abolition of tenure would mean the death of academic freedom as academics fearing the loss of funding or even dismissal, would be forced to stick to "safe" subjects and orthodox lines of research. This would have the effect of narrowing the debate and the best universities would be severely affected by this and this is where the best and innovative research was done. Moreover, it was further contended, university research could become limited to those projects proposed by the UFC and heads of department would only be able to assign lecturers to specific research projects. The abolition of tenure would therefore allow dismissals for failure to comply with research assignments⁶⁹.

These contentions fell on deaf ears and the government refused to abandon its plan to abolish tenure and the focus of the debate shifted. An amendment specifically protecting academic freedom became the centre of attention. This amendment, which was eventually adopted, was sponsored by Lord Jenkins of Hillhead. Although the government appeared to recognize the validity and importance of academic freedom, it resisted an amendment specifically protecting academic freedom for two reasons. Firstly, it believed that explicit protection was unnecessary because Britain, as a free country, already

allowed academics, like any citizen, to express themselves in any way they chose. Secondly, academic freedom would be too difficult to define precisely in a manner that would cover all conceivable circumstances. The courts would have to interpret it thus making it a justiciable issue for the first time. These arguments, were indeed specious. In essence the government was opposed to any amendment protecting academic freedom because tenure having been abolished, should not be smuggled in again through the back door disguised as the statutory protection of academic freedom. The government was confident that the procedural provisions that the Commissioners would establish in the light of the principles of justice and fairness under section 202(2)(c) would be sufficient to protect academic freedom⁷⁰. It is, however, strange why the government had confidence in those procedures and not in the way academic freedom had been protected before.

Ultimately, an amendment proposed by Lord Jenkins of Hillhead was approved and included as section 202 (2)(a) of the Education Reform Act. It instructs the Commissioners to "ensure that academic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at their institutions". Although the amendment does not expressly state that it is speaking of academic freedom, its passage apparently pacified many of those concerned about the protection of academic freedom⁷¹.

This brief exposition amply demonstrates that even in Britain it is no longer possible to rely on the common law for the protection of certain fundamental rights. It is for this reason that some have advocated the adoption of a bill of rights even for Britain⁷². There are, however, various mechanisms with the Education Reform Act which may be invoked to further protect academic freedom against violations which may pass through the amendment. These include the disciplinary, dismissal and grievance procedures designed by Commissioners, recourse to the courts and the requirement that any modification of the disciplinary, dismissal and grievance procedures, as well as the provisions allowing dismissal for redundancy and good cause, be approved by the Privy Council⁷³.

5.2.7.4 Academic freedom and responsibility

From the above discussion it is clear that academic freedom in Britain is still regarded as important. Like the concept of university autonomy, however, it cannot be regarded as fixed and immutable. There appears to be a greater shift from academic freedom to the emphasis of accountability. The critical question is how to strike a balance between the two.

Academic freedom therefore does not mean that academics should not be expected to account for how they expend the enormous financial resources that are put into university education. What they should not be subjected to is how they do their teaching and research and what they should teach or research.

It has therefore been stated that as a quid pro quo academic freedom demands responsibility or accountability. Academic responsibility requires utmost responsibility to other academics, students and the institution and should be encouraged through positive development, encouragement and acceptance of the procedures for safeguarding academic freedom⁷³.

External responsibility may either be formal or informal. In a broad sense, responsibility is owed to society which is the major funder of higher education and its primary beneficiary. Much tension has been experienced in this area over the years and in particular the demands of academic freedom as against the demands of the funder for accountability. What is debatable, however, is where the boundary should be drawn between the funder and funded and to what extent higher education should be accountable to the government or whether such responsibility should be direct or mediated through some intermediary.

In more recent years, the boundaries have shifted and the government requires a greater degree of accountability. Whether or not the increased accountability which is now being demanded is reasonable or is itself an infringement of academic freedom is quite debatable. What is important to emphasise is that accountability, if properly handled, can and should be positive, useful and encouraging⁷⁴.

The words of Brook are apposite:

"If university teachers retire into their ivory towers, they will find that they have lost the freedom that they have taken for granted. The best safeguards of academic freedom are: first, the conviction on the part of university teachers that it is worth preserving; second, their ability to convince laymen, whether in the government or the general public, that they are competent to control their own affairs; third, their willingness, in the last resort, to give up their posts if freedom is denied to them; and lastly, the ability to do their job so well that this willingness is a threat that will carry weight"⁷⁵.

5.3 UNITED STATES OF AMERICA

5.3.1 The evolution of constitutional academic freedom

There is no doubt that academic freedom is regarded as an important feature of universities and colleges in the United States of America⁷⁶, although not everyone shares this belief and enthusiasm because academic freedom for the ordinary person seems to be an esoteric concern of university personnel⁷⁷. There is, however, no express constitutional provision for the protection of academic freedom in the USA. In a few cases the Supreme Court has dubbed academic freedom a special concern of the first amendment which protects free

speech and assembly (Sweezy and Keyishian Bakke). The primary concern of the first amendment is the protection of free speech and assembly. This has resulted in the judicial incorporation of academic freedom into the first amendment. Despite this incorporation there has been no satisfactory definition, justification or doctrinal explanation of academic freedom as a special concern of the first amendment. For this reason it has been said: "Lacking definition or guiding principle, the doctrine floats in the law, picking up decisions as a hull does barnacles"⁷⁸.

The rationale for this is that the definition of academic freedom in the USA developed as a response to actual historical circumstances, hence its schizophrenic nature. The definition of academic freedom produced by the American Association of University Professors (AAUP) arose from the threats to which professors were exposed from university boards of trustees⁷⁹. Threats to universities from the state in the 1940's and 1950's as a result of the scare of communism led to the case that prompted the Supreme Court to regard academic freedom as a first amendment right⁸⁰. This was the era of McCarthyism where universities were supposed to require their staff to take loyalty oaths that they had not been members of subversive organizations⁸¹.

Although both professional and constitutional definitions of academic freedom emphasised the value of critical inquiry of universities, each definition focused on the peculiar contemporary threats to this value. The AAUP definition stressed the protection of the individual professors against

any trustees, whereas the constitutional definition emphasized the protection of the entire university community against state intervention³².

The Supreme Court, however, never explained systematically the legal and theoretical foundation for its incorporation of academic freedom into the first amendment. Academic freedom is more than a desirable policy promoted by the AAUP. For this reason core first amendment values such as critical inquiry, the search for knowledge and the toleration of dissent support constitutionalizing some, even though not all, of the speech covered by the professional definition of academic freedom. This is the definition offered by the AAUP. These first amendment values justify protecting both the professional speech of academics and the autonomy of universities to make decisions on educational policy. In order to engage in critical inquiry, professors need some measure of independence from their university employers, and universities need some measure of independence from the state. To assert constitutional protection for professors and universities is therefore not simply a type of special treatment meant to lift the job-related concerns of a particular profession or the institutional interests of a particular enterprise. On the contrary, constitutional academic freedom promotes first amendment values of general concern to all citizens in a democracy³³.

First amendment academic freedom can be regarded doctrinally as an aspect of a developing but insufficiently appreciated

judicial trend to construe the first amendment in institutional context⁸⁴. There are three areas that are protected by this. These include claims of professors against faculty colleagues, administrators or trustees; claims by professors against the state; and claims by universities against the state. State action necessary to invoke the first amendment exists in all three at public universities. At private universities state action exists in claims by professors and universities against the state. Claims by professors at private institutions against faculty colleagues, administrators, or trustees cannot raise first amendment issues because no state action is involved. A private university can assert institutional academic freedom as a defence to judicial review of faculty claims that the university violated its contractual commitments of academic freedom⁸⁵.

Public universities may invoke the first amendment to assert independence from the states that created them and simultaneously are themselves state institutions constrained by the first amendment⁸⁶. The 1915 Declaration by the AAUP emphasized that the university should be an intellectual experiment station, where new ideas could germinate and where their fruit though still distasteful to the community as a whole could be allowed to ripen until finally, perchance, it became a part of the accepted intellectual food of the nation or the world. Although the 1915 Declaration focused on trustees, it also identified the threat posed by legislators to academic freedom in state universities. The 1915

Declaration foresaw the possibility that legislators might try to use the state's purse strings to manipulate the academic inquiries of professors, especially where scholarly views deviated from strong public opinions or from established government policies. While the interference of trustees with academic freedom would typically derive from opposition of businessmen to the more liberal social and economic views of professors, state and public pressure would inevitably threaten conservative professors who disagreed with a political programme of reform. Whatever the ideological source of these pressures on academic freedom, the 1915 Declaration emphasized that the university should be an "inviolable refuge" for independent scholarly investigation"⁸⁷.

5.3.2 **Towards a definition of constitutional academic freedom**

Even the Supreme Court decisions that mentioned academic freedom in the 1950's did not focus on its meaning. The views expressed in those cases were based on traditional constitutional doctrines involving political expression, due process and the privilege against self-incrimination. Some of the opinions identified academic freedom as a distinctive right within the first amendment and applied the concept to both individuals and institutions"⁸⁸. In Adler v Board of Education"⁸⁹ although the court upheld the constitutionality of a section of the New York Civil Service Law, implemented by the so-called "Feinberg Law", certain statements were made by some of the Justices which concerned academic freedom. The

sections concerned provided for the disqualification and removal from the public school system of teachers and other employees who advocated the overthrow of the government by unlawful means or who belonged to organizations which had such a purpose. In his majority opinion Justice Menton had to say:

"A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted"⁹⁰.

Justice Douglas wrote a dissenting opinion with which Justice Black concurred. In his opinion Douglas J was the first Supreme Court Justice to expressly recognize academic freedom as a constitutional right. In his words he said inter alia:

"The Constitution guarantees freedom of thought and expression to everyone in our society. All are entitled to it; and none needs it more than the teacher.

The public school is in most respects the cradle of our democracy... the impact of this

kind of censorship in the public schools system illustrates the high purpose of the First Amendment in freeing speech and thought from censorship...

The very threat of such a procedure is certain to raise havoc with academic freedom... Fearing condemnation, (the teacher) will tend to shrink from any association that stirs controversy. In that manner freedom of expression will be stifled...

There can be no real academic freedom in that environment. Where suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect...

This system of spying and surveillance with its accompanying reports and trials cannot go hand in hand with academic freedom. It produces standardized thought, not the pursuit of truth. Yet it was the pursuit of truth that the First Amendment was designed to protect... We need to be bold and adventuresome in our thinking to survive... The framers knew the danger of dogmatism; they also knew the strength that comes when the mind is free, when ideas may be pursued

wherever they lead. We forget these teachings of the First Amendment when we sustain this law"⁹¹.

Sweezy v New Hampshire⁹² was the first Supreme Court case that incorporated academic freedom within the first amendment and where the recognition of academic freedom as a constitutional right moved from dissenting and concurring opinions into acceptance by a majority of six members of the Supreme Court. In this case Sweezy had refused to disclose the topic of his guest lecture at the University of New Hampshire as being an infringement of his first amendment academic freedom. In his plurality opinion Warren C J attempted to articulate the concept of institutional academic freedom in the following words.

"The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot

flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die"⁹³.

This extract emphasizes two social benefits of academic freedom. Critical inquiry within universities is essential to the preservation of a democratic society and, as a somewhat independent matter, promotes discoveries and understanding necessary for civilization.

Frankfurter J in his concurring opinion reiterated both themes. He circumscribed the value of academic freedom in the following elegant words:

Progress in the natural sciences is remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of the hypothesis and speculation. The more so is this true in the pursuit of understanding in the groping endeavours of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized

dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good - if understanding be an essential need of society - inquiries into these problems, speculation about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling"⁹⁴.

He further referred to democratic values and stressed "the dependence of a free society on free universities" (at 262) and "focused primarily on knowledge and understanding in the full range of academic disciplines as social goods in themselves". He warned that any government intrusion into the intellectual life of a university, would jeopardize these important functions of professors in universities. According to him the dependence of a free society on free universities, necessitated the existence of "the four essential freedoms of a university - to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study"⁹⁵. This statement quoted from South African universities became the most important statement on academic freedom in the USA and was quoted with approval in many subsequent cases.

To fit academic freedom within the rubric of the first amendment is an extremely difficult task as it is not mentioned in the first amendment. It is highly unlikely that those who debated and ratified the first amendment considered academic freedom as before the Civil War, "most institutions of higher education were denomination colleges, the problem of academic freedom as we now understand it was hardly posed"⁹⁶. These colleges were what the 1915 Declaration labelled as "proprietary", concerned with conserving truth rather than with searching for it. They did not allow intellectual freedom, and their faculties typically did not seek it. Notions of academic freedom, to the extent that they existed at all, were associated with institutional autonomy from the democratic vulgarity of the broader society. Only with the emergence of the modern research university in the late nineteenth century did a comprehensive theory of academic freedom, expressed most thoroughly in the 1915 Declaration, emerge in the US. It took an educational revolution following the Civil War to produce the commitment to critical inquiry central to the modern rationale for academic freedom, and which may also be related to general free speech theories contained within the first amendment⁹⁷.

Accommodating academic freedom within the first amendment has meant a special first amendment right unique to professors and universities whereas the free speech guaranteed by the first amendment is generally thought to apply equally to all citizens. In these historical and legal circumstances, it would not have been surprising if the Supreme Court had

refused to recognize a discrete, though unenumerated, first amendment right of academic freedom. Even those who defend the extension of first amendment protection to academic freedom would have had difficulty criticizing the Court had it declined to do so⁹⁸. This is one of the reasons why the AAUP did not submit an amicus brief in Sweezy. It was divided on this issue as it reasonably concluded that the Court was not likely to address the constitutional implications of academic freedom for the first time. Moreover, it was also worried that there would be a judicial appropriation of a concept the AAUP had largely defined and successfully advocated throughout the academic world. Even a favourable definition of academic freedom under the first amendment would, it further thought, be subject to further judicial interpretation. What the Court gave, many within the AAUP contended, it could also take away. It was also considered that constitutional recognition of academic freedom could prompt many within the university community to abandon any continuing independent effort to define and refine this crucial concept. The constitutional meaning of academic freedom, many feared, could displace rather than complement the one enunciated in the 1915 Declaration and accepted in the institutional negotiations of many universities⁹⁹. Principles of academic freedom not incorporated into the first amendment could thereby be completely abandoned. For those reasons many within the AAUP were concerned that academic freedom would be weakened rather than strengthened by judicial constitutionalization¹⁰⁰.

When the Supreme Court identified academic freedom as a first amendment right in Sweezy, it rendered nugatory most of the AAUP's reservations whether to advocate this position. Subsequent cases have reinforced the incorporation of academic freedom into the first amendment "mostly through additional rhetorical flourishes"¹⁰¹. Some Supreme Court decisions have attempted to draw a parallel between the 1915 Declaration and the basic themes of general first amendment theory.

There are further three peculiarities with the Sweezy decision. The court had never before suggested that academic freedom was protected by the first amendment. Despite this fact neither of the concurring opinions acknowledged that the Court was creating new law. To compensate for this the justices resorted to vehement rhetoric in praising the right. The stance that academic freedom had always been a functional part of the system of freedom of expression may be regarded as an attempt to justify itself by a court that considered itself vulnerable in attempting to curb abusive legislative investigations. For this reason the court pretended to be proceeding upon long-established and agreed-upon norms. Even press reports which commented on the controversial decisions delivered on "Red Monday" (Sweezy was handed down on the same day as the other six cases which made it difficult for Congress, administrative agencies and state legislatures to expose and to penalize allegedly subversive persons) failed to note that a new constitutional right of academic freedom had been born¹⁰².

Secondly, Frankfurter J's opinion looked to non-legal sources to describe the content of the right of academic freedom. This was to be expected as the Court's decision had no legal precursors or precedent. The words "academic freedom" had no meaning apart from their usage in academic contexts. But Frankfurter J did not comment on the different meanings words could have in different professional social contexts. Moreover, the opinions followed the established first amendment practice that the rights claimed by Sweezy were personal to him as a limitation on state power. Frankfurter J, however, repeatedly addressed the right of the university itself rather than those of faculty members as individuals. Although the distinction was not pertinent here, because the culprit was the state itself, the confusion is nonetheless critical because academic freedom had traditionally been understood as a personal right of the faculty member against university administrators and trustees¹⁰³.

Thirdly, although Frankfurter J drew the content of academic freedom from available non-legal sources, both he and Warren C J, extolled academic freedom by emphasizing the social utility of free universities. They contended that continued progress in the social sciences requires freedom of inquiry and discussion, that impairment of this progress would jeopardize democratic government and civilization, and therefore, that government should not meddle in academic affairs. Although the persuasiveness of this reasoning may be regarded as lying at the core of the justification for the constitutional status of academic freedom, the problem is that democratic government

in the United States was established and even had to thrive for one hundred years before departments of social sciences were established at any American universities. The assertion of the social utility of academic freedom therefore reflects "the faith of an intellectual elite in the centrality of neutral reason to the success of the liberal state"¹⁰⁴.

5.3.3 The aftermath of Sweezy

Although Sweezy clothed the new constitutional right of academic freedom with a lot of "triumphant rhetoric", it left an ambiguous description of the relationship between academic custom and positive legal right. It was perhaps for this reason that in the case of Barenblatt v United States¹⁰⁵ the Supreme Court two years later did not follow the Sweezy case. On the contrary, it confirmed the conviction of an academic for criminal contempt in refusing to answer congressional questions concerning communist activities among graduate students at the University of Michigan. Harlan J's opinion while asserting that the Court would "always be on the alert against intrusion by Congress into the constitutionally protected domain"¹⁰⁶ nonetheless stressed that a university is not a "constitutional sanctuary from inquiry into matters that may otherwise be within the constitutional legislative domain..."

Because Barenblatt substantially upheld the investigation of the House Un-American Activities Committee into campus communism, it could be regarded as a defeat for academic

freedom. But the impact of Barenblatt on the development of the constitutional right of academic freedom has been considered to be negligible¹⁰⁷. Harlan J was at pains to make a distinction between attempts by Congress to control teaching in the universities through investigations, which would infringe academic freedom, and efforts by Congress to discover traces of the international conspiracy on campuses, which fell outside academic freedom. The Court justified Congress' investigation on the grounds that the Communist Party was dedicated to the violent overthrow of constitutional government and by its particular focus on political organization.

The Court next discussed academic freedom as a first amendment right in the case of Keyishian v Board of Regents of the State of New York¹⁰⁸. This case was based on a refusal to sign a certificate that a person was not a Communist or had never been a Communist. It struck down the application of New York's Feinberg Law to professors of the State University of New York on the grounds that it was vague and too widely stated. This law consisted of a series of statutes and regulations which were intended to bar "subversive" persons from employment. The Court read certain sections of the law which outlawed advocacy of forceful overthrow of the government to embrace potentially sympathetic classroom treatment of Marxist or other revolutionary works or ideas. The provision was regarded as being unconstitutionally vague because of a professor's fear of the law would distort his selection and treatment of the subject. The Court stressed

that regulations affecting academic freedom should be sufficiently clear so as not to discourage the exercise of constitutional rights.

Brennan J resorted to stirring rhetoric in praising academic freedom in the following words:

"Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools'... The classroom is peculiarly the 'marketplace of ideas'. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection'"¹⁰⁹

There was also reference to the Sweezy quote¹¹⁰. In this passage the Court made a more passionate claim for the social utility of academic freedom than it did in Sweezy. By regarding academic freedom as being of "transcendent" value to every member of society, the Court did not posit any direct

benefit to the average citizen from academic freedom, such as higher wages or longer life, but rather considered it valuable in that it acculturated future political leaders to a critical attitude toward authoritarian dogma and to tolerance of dissent. The rhetoric further implies that the elements of free inquiry, discussion, dissent and consensus are not necessarily important because they lead to truth, although this may also be so, but because they express an invaluable sense of what kind of society Americans desire¹¹.

By regarding the classroom as "peculiarly the marketplace of ideas", the Court appears to have exaggerated somewhat as it falsely suggested that teaching normally involves a free exchange of ideas among equals which may not be so. As Byrne puts it: "Necessary functions of modern universities include the preservation of ideas, the advancement of knowledge to which the public is indifferent and the education of students in the elite standards of criticism and sophisticated means of investigation. Moreover, the careless application of the 'marketplace' metaphor overlooks delicate issues concerning the professor's limited autonomy in the selection of content for a particular course"¹².

The use by the Court of rhetoric to define the content of academic freedom has been criticised in that it has exacerbated the ambiguity already created by basing the decision of the case upon vagueness. The Court insisted that the first amendment does not "tolerate laws that cast a pall of orthodoxy over the classroom". This creates the impression

that laws are bad when they discourage free and unconstrained teaching, and not when they directly prohibit it which is not the case¹³.

A further criticism is that the Court's rhetoric praised academic freedom as an institutional right to be free from orthodoxy prescribed by the government and focussed on the classroom, perceived metaphorically as the process of institutionalized scholarship and teaching, rather than on the rights of any individual teacher or student. The benefits to democracy were regarded as emanating from a system of education not seriously threatened by isolated injustices. The "orthodoxies" feared are not those of academics themselves, but rather those imposed by non-academic officials seeking to advance their views on various policies which are regarded as the only kinds of interference in the "free market" of teaching with which the Court was concerned. This was a departure from tradition where academic freedom had always signified an individual right against interference by lay persons¹⁴.

The passages in Sweezy and Keyishian remain the Court's fullest exposition of constitutional academic freedom. Like the 1915 Declaration, they emphasized the social importance of critical inquiry in universities in promoting knowledge and serving democratic values. Similar metaphors were used in the 1915 Declaration and in the judicial opinions. These include descriptions such as that the university is an "intellectual experiment station" (in the Declaration) or that it is "a

marketplace of ideas" (Keyishian). As Rabban puts it: "Indeed, just as the 1915 Declaration stressed that universities should allow 'ideas distasteful to the community as a whole' to 'germinate' and perhaps ultimately to become generally accepted, Justice Holmes, who created the marketplace metaphor for the first amendment involved by the Court in Keyishian stressed that society should allow 'the expression of opinions that we loathe' because 'the best test of truth is the power of the thought to get itself accepted in the competition of the market'"¹⁵.

The early Supreme Court opinions on academic freedom left many questions unanswered. They never clarified the relationships among the "special" constitutional rights of academic freedom the Court read into the first amendment, the concept of academic freedom expressed in the 1915 Declaration and broadly accepted within American universities and the general first amendment right of free speech. Although there were significant parallels, these three concepts also differed"¹⁶.

The Supreme Court's cursory discussions of academic freedom, whatever their analytical shortcomings and lingering ambiguities, reveal sufficient parallels between academic freedom and the first amendment generally to justify, even if not to require, the Court's constitutionalization of academic freedom as "a special concern of the First Amendment". But there are significant differences between free speech and academic freedom"¹⁷.

The requirement of scholarly independence for the proper performance of academic work entitles the professor to more freedom from control by his employer than that enjoyed by the ordinary employee. Justification for academic freedom may be found in that it does not make sense to expect professors to engage in critical inquiry and simultaneously to allow punishment for its exercise. First amendment freedom should therefore preclude an administrator or trustee at a public university from forcing a professor to investigate a particular topic or to reach specified conclusions. Constitutional academic freedom might conceivably even protect professors at both public and private universities from laws that would apply to other citizens. Among American universities there has been the preoccupation with the question whether the academic freedom of professors should also encompass extramural speech of professors outside their sphere of expertise¹⁸.

Constitutionalizing academic freedom, however, seems much less like elitist favouritism for a particular profession when it is appropriately viewed as, but one example of the general proposition that first amendment principles vary with institutional context¹⁹. It has been regretted that in retrospect, the term academic freedom, with its many and evolving connotations within the university community, became constitutionalized. This is because conceptual confusion would inevitably result when the same term has different meanings in constitutional and academic discourse. The difficulties in distinguishing constitutional academic freedom

from general free speech principles are exacerbated by the additional problem of untangling constitutional from professional definitions of academic freedom. For this reason it has been argued that it would have been wiser for the Court to have developed a separate term, such as 'academic speech' to refer to distinctive first amendment rights in the university context. Academic freedom, however, has acquired constitutional significances. Rather than abandon this usage after more than a generation, it makes more sense to focus on how constitutional academic freedom, which can legitimately be considered an example of applying the first amendment in institutional context, overlaps with and differs from both professional definitions of academic freedom and general free speech doctrines¹²⁰.

The two cases of Sweezy and Keyishian represent the Supreme Court's exhaustion of the development of a university member's academic freedom. Despite their analytical shortcomings, they contributed substantially to the virtual extinction of overt efforts by non-academic government officials to prescribe political orthodoxy in university teaching and research. As a result few politicians today seek political capital by attacking academics for their political opinions. Those who do only give their victims lawsuits that usually strengthen their academic positions against more subtle or justifiable assault. This does not mean that ideological factors and prejudice no longer play any part in academic appointments. It only means that the rules of the game are now those of the academy¹²¹.

5.3.4 The limits of judicial intervention

Although it has been said that the case of Sweezy created a constitutional right of academic freedom and although it has been said that this right effectively put paid to the government intervention into internal state university affairs, this right has not been unlimited. Initially there was a belief that the Supreme Court would eventually provide extensive protection for the academic judgments of individuals against interference by university administrators. Admittedly in a few early cases lower federal courts protected teachers against sanctions for using unpopular books in teaching¹²². Courts soon jettisoned the approach of shielding teachers from the sanction of administrators and gave administrators a greater latitude to deal with methods by teachers which they regarded as unacceptable. Even though courts may agree in principle that a teacher's behaviour is constitutionally protected, they often hold that antagonism to the protected behaviour of the teacher was not the effective cause for a teacher's dismissal¹²³.

In line with this reasoning the courts have held the view that administrators are entitled to exercise extensive control over curricular judgments as long as they do not penalize a professor only for his political views. While this may be so in theory, in practice it may be difficult to determine whether an academic is dismissed or denied appointment for his political views or for something else. For this reason some have held the view that the constitutional right to academic

freedom in the classroom proclaimed in Sweezy is only a myth¹²⁴.

A case which illustrates what the cases of Sweezy and Keyishian have been able to achieve and not to achieve is that of Ollman v Toll¹²⁵. In this case a search committee at the University of Maryland recommended to the administration that Bertell Ollman, a Marxist professor then at New York University, be appointed as the new chairman of the Department of Government and Politics. As a result of this a great political controversy arose which raised many sensitive issues, including the wisdom of appointing a radical Marxist chairman, of an ideologically divided department, the respective powers of appointment of the search committee, the department and the president and the influence of outside political pressure. The governor and several legislators were against the appointment of a Marxist. Newspapers and professional organizations expressed themselves against refusal to appoint someone because he was a Marxist. The university largely depended on the public support in its effort to improve its academic programmes. After a lot of discussion, the president declined to appoint Professor Ollman. He contended that he was not the right person to develop the potential of the department. He disclaimed any reliance on Ollman's political beliefs and promised to withstand outside pressure.

Professor Ollman sued the president for violating his constitutional right of academic freedom. Although Professor

Ollman was strongly supported by various organs of liberal opinion and was represented pro bono publico by one of the premier law firms, the suit failed. The district court accepted the president's testimony that Ollman's beliefs were not a "substantial or motivating" factor in refusing to appoint him. On that basis the court held that the plaintiff's constitutional rights had not been violated. In spite of the outcome of the lawsuit, the AAUP had previously censured the university for the infringement of academic freedom in its handling of the appointment. For this reason Maryland remained the most prominent university on the AAUP censure list until it was removed in 1988¹²⁶.

The Ollman case demonstrates that the right to academic freedom has limitations. In order to succeed Professor Ollman had to prove that antagonism by public officials to his political belief was "a substantial or motivating factor" in President Toll's decision not to appoint him. This he could not prove and consequently he did not succeed to prove that the refusal to appoint him was a violation of his first amendment right to academic freedom. Constitutional academic freedom requires academic decision-makers to justify their decisions on properly academic grounds. University administrators, like other public officials, are not entitled to penalize employees solely on the grounds of their political beliefs or affiliation. For this reason, in Ollman, the president carefully explained his decision solely on the academic merits of appointing Ollman and disclaimed any reliance on his political beliefs. There is no doubt that it

is possible to give neutral reasons for decisions taken on political grounds. Although those justifications can be tested, these tests are not an indefeasible bulwark. They can be frustrated. Nevertheless, they serve as a deterrent to a number of university officials who might be tempted to violate the academic freedom of many professors¹²⁷.

While courts are willing to test the validity of certain justifications for the appointment or non-appointment of certain academics, courts are not qualified to make decisions on the reasonableness of the merits of academic personnel decisions to determine that they were made wholly without a taint of ideological bias. The extent to which decisions are influenced by political ideology is a matter of dispute¹²⁸. Courts are sometimes ill-equipped to resolve these disputes. This does not mean that the courts cannot competently decide easy cases which patently violate academic freedom. Such cases, however, are rare. Constitutional academic freedom cannot be violated by any personnel decision based upon professional competence and taken by peers in good faith¹²⁹.

Some courts have been concerned that appropriate judicial deference to academic decision making "has been pressed beyond all reasonable limits". They have consequently cautioned against a policy of judicial "self-abnegation where colleges are concerned" which has been considered to be "abdication" of responsibility to enforce laws protecting individual rights. They have emphasized that academic freedom does not include the freedom to engage in discrimination in employment or to

violate the free speech protected by the first amendment¹³⁰. Even courts that do not express concern look into the factual background of academic decisions to determine whether a stated academic judgment was a pretext¹³¹.

Given the complexity of academic disputes, it would be difficult for a court to separate legitimate from illegitimate academic decision-making. The court would lack a guiding principle which would enable it to determine which academic grounds are compatible with the first amendment and which are not. This is so because the only real and acceptable purpose for constitutional academic freedom is to protect academic values and practices from conformity to general social demands. To impose on academic values, principles deduced from the first amendment generally, such as those of "compelling state interest" or "public forum", would impose on academics popular standards of evaluation and acceptable discourse which would be totally incompatible with academic freedom. It has also been stressed that judges themselves are public officials whom academic freedom strives to exclude from interfering in academic affairs. It is therefore highly likely that judicial views of civil liberty may infringe academic principles just as much as legislative or executive views of national security¹³².

Rabban, on the other hand, disagrees strongly with the view that judicial review of disputes between professors and universities poses an intolerable threat of state interference with academic freedom and there is some merit in his view. He

points out that Title VII and first amendment cases at universities have shown that judges can respect academic expertise and values while determining whether stated academic grounds are pretexts for illegal or unconstitutional university decision. He, however, concedes that judges should not review debates conducted in good faith within universities about the merits of unpopular and unconventional ideas¹³³.

If courts are confronted with claims by faculty members that other academics, usually administrators and heads of department, have violated their rights to academic freedom, all they should establish is whether the administrators rejected the candidate in good faith on academic grounds. They should not go further to assess whether the stated academic grounds are adequate, because no standards of adequacy have been or could be established by academic custom that are sufficiently accessible to provide a legal standard or test¹³⁴. For this reason the courts are limiting their inquiries to satisfying themselves that decisions are truly academic in character and that they do not violate some independent legal norm such as that against racial discrimination. In student cases the Supreme Court has held that due process does not require a hearing before a student is dismissed from a university for academic reasons¹³⁵, although a hearing is required before a student is dismissed for disciplinary reasons¹³⁶. The court has contended that academic judgments are more subjective and evaluative than disciplinary judgments. The court has also held that the dismissal of a student from a state university on academic

grounds does not violate substantive due process if made on bona fide academic grounds¹³⁷. "Even though these cases neither explore very incisively the checkered nature of academic decisions nor admit the difficulty when constitutional values clash with one another, they do provide the doctrinal basis for a judicial refusal to review most internal academic freedom disputes"¹³⁸.

As has been said, it is not advisable that courts should subject academic justifications to the usual first amendment tests such as demanding that such rationales be sufficiently "compelling" to overcome the academic member's presumptive right of free expression as such an approach may tend to import norms from political society into the academic context. Although the government should not penalize citizens for the content of their speech, this is not so with scholarly writings or speech. Scholars are generally criticized for their academic views and they may even be penalized for these through denial of tenure or through receiving smaller rises than others. But the important point is that this should be done by other academics in terms of the academic rules of the game. The academic decisions by academic officers are often based on negative evaluations of a professor's views. Denial of this would mean a denial of the structural principle of collective scholarship on which the university is based. For this reason academics have evolved a system of academic freedom that preserves substantial professional liberty for individual scholars without promoting intellectual anarchy. It has consequently been said that academic freedom

"encompasses the tensions inherent in individuality and conformity, imagination and coherence, change and hierarchy"¹³⁹.

5.3.5 The supreme court and institutional academic freedom

That an individual scholar should enjoy academic freedom is understandable, but that the academic institution should also enjoy the first amendment right of academic freedom has been for some difficult to grasp. The concept of institutional academic freedom has been regarded as difficult for many to accept because it does not appear to be rooted in the traditions of the Constitution or of education. What has been more puzzling for some is how both parties could rely on academic freedom in a dispute between a university and a professor. For them it seems incongruous that both the university and the individual can be protected by the same concept of academic freedom¹⁴⁰.

Prior to the Sweezy case academic freedom was concerned with the position of the individual academic and not with the position of the institution¹⁴¹. Institutional academic freedom was therefore a creation of the Supreme Court and started with the case of Sweezy. The inquiry of the New Hampshire attorney general in the Sweezy case was admittedly a threat to both Sweezy and the University of New Hampshire as an institution as this was also acknowledged by the opinions of the justices. Both Warren C J and Frankfurter J stressed the systemic values of academic freedom. Frankfurter J even wrote as if the

university were the real party to the case, and not Sweezy, to whom he referred at one point as "the witness" instead of petitioner¹⁴². Academic freedom is described by Frankfurter J not as a limitation on the grounds or procedures by which academics may be sanctioned but as "the exclusion of governmental intervention in the intellectual life of a university"¹⁴³.

Frankfurter J's long quotation from the plea for free universities in South Africa refers primarily to institutional freedom. This is evident from the now famous invocation of the "four essential freedoms of a university - to determine for itself on academic grounds who may teach, what may be taught and who may be admitted to study"¹⁴⁴. There is no doubt that Frankfurter J was more concerned with the threat of McCarthyism to the autonomy of universities, rather than with a violation of any individual professor's rights. Yet McCarthyism presented a real threat to institutional autonomy and Frankfurter's concern with threats to institutional values was therefore pertinent¹⁴⁵.

The right to institutional autonomy was further emphasized by Justice Powell in Regents of the University of California v Bakke¹⁴⁶, Powell J held that although the fourteenth amendment and Title VII prohibited any state instrumentality from penalizing any applicant on account of his race, the first amendment right of academic freedom gave a state university power to take race or national origin into account in admitting students when doing so in pursuit of the academic

goal of a diverse student body. He relied on the fourth of Frankfurter J's "four essential freedoms", namely, the right of the university to determine for itself on academic grounds who may be admitted to study. He clearly connected racial diversity with the grounds on which the court in Sweezy praised academic freedom. As he put it: "The atmosphere of 'speculation, experiment and creation - so essential to the quality of higher education - is widely believed to be promoted by a diverse student body"¹⁴⁷. His accommodation between constitutional interests in non-discrimination generally and the university's right to create a racially diverse student body led to a rejection of racial quotas in admission but an acceptance of admission criteria that make race one factor among many to be taken into account.

According to the tradition of academic freedom racial diversity was never part of the values upholding it. To the drafters of the AAUP's 1915 Statement, to benefit a scholar because of his race would have been as repulsive in principle as to penalize him. According to them scholars could identify the best scholars by using criteria as neutral and as divorced from social prejudices and aspirations as science itself. Moreover, they had little to say about the rights of students, who they considered to be of little significance to the search for truth. They would also have been puzzled by the suggestion that the search for truth at university would have been enhanced by ethnic diversity because they held the view that truth would be discovered by the disinterested pursuit of the scientific method by trained professionals with high

intelligence. Race or ethnic origin had nothing to do with the satisfaction of these professional criteria¹⁴⁸.

This does not mean that racial diversity is of no benefit. A racially diverse student body may serve more directly the academic values of humanism and democracy by contributing to the development of a mature cosmopolitan outlook on the part of the student by challenging easy ethnocentricity. This contributes to development of the value of nurturing the student to responsible adulthood. This is in accordance with the modern view that the college should strive to develop a citizen who is capable of living harmoniously with people of different backgrounds by understanding that the perspective of each is limited but valid¹⁴⁹.

The value of Bakke to the development of the constitutional right of academic freedom has been regarded as limited and ambiguous in that in justifying a university's right to give weight to the fact that an applicant is not white, Powell J rejected the appropriateness of a university promoting social mobility for racial minorities and consequently affirmative action, but endorsed the universities' desire for a diverse student body. Bakke therefore established a constitutional right of academic freedom to develop a policy that is essentially irrelevant to the tradition of academic freedom and the research values from which it stems¹⁵⁰.

The right of institutional academic freedom was taken a step further in Widmar v Vincent¹⁵¹ where the Supreme Court declared

unconstitutional a regulation of the University of Missouri which prohibited student religious groups from holding prayer meetings on school property which was otherwise generally available to student organizations. This the university had done because it had erroneously believed that the establishment clause required such a prohibition. Stevens J questioned the court's statement that the University required a compelling interest to justify content-based discrimination against the students' religious speech. He contended that to require a university to justify the regulation with a compelling interest might interfere with the university's academic freedom to distinguish between academically valuable and relatively worthless speech. He further stated that substantive decisions of university administrators deserve to be protected as academic freedom because they are necessary and appropriate in creating the atmosphere of a university.

The view of Stevens J has been regarded as recognizing that academic speech requires social support, that the efforts of scholars to advance knowledge and train the youth require social structures which support these goals. Through its administration, a university makes choices about admissions, hiring and expenditures which shape its educational character and mission. The core academic administrative decisions of determining who may teach, what may be taught, how it shall be taught and who may be admitted to study cannot be interfered with by civil authorities without impairing the unique virtues of academic speech. Stevens J found this administrative liberty to be limited by the principle that the university

cannot punish a speaker on the grounds that it disagrees with his viewpoint¹⁵².

In Regents of the University of Michigan v Ewing¹⁵³ the Supreme Court accepted that the university is entitled to take academic administrative decisions into which the courts will not interfere. The court rejected a claim by a medical school student that his dismissal from medical school for academic reasons violated substantive due process because it represented an arbitrary departure from a past policy of leniency. As Stevens J put it:

"When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgement. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgement" ¹⁵⁴.

Stevens J based this refusal to meddle with academic decisions both on lack of judicial standards and on academic freedom: "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making by the academy itself"¹⁵⁵. The Court found that academic freedom provided the necessary justification for

interpreting a constitutional provision as not restricting the discretion of academic decision-makers.

Although it has been said that institutional academic freedom is not based on constitutional or educational tradition and that there is no precedent on which the Sweezy case and others relied for the creation of this right, it does not mean that there is no historical justification for institutional academic freedom. As discussed earlier, European universities of the Middle Ages enjoyed extensive autonomy from both church and state¹⁵⁶. The corporate autonomy which they had resulted in free teaching and scholarship. American colleges and universities were practically free from government control especially since the de-establishment of the state churches in the beginning of the nineteenth century. Throughout the balance of the nineteenth century, and until the Second World War, private universities received virtually no state or federal support and were not subjected to many governmentally-imposed legal duties. Even some state universities were placed beyond the control of the political branches of state government by constitutional enactments and judicial interpretation. The autonomy of universities was therefore legally protected. During the nineteenth century, American law came to recognize two legal bases for university autonomy. These are the common-law idea of academic abstention and state constitutional status for state universities¹⁵⁷.

5.3.6 Academic abstention

Academic abstention refers to the traditional refusal of courts to extend common law rules of liability to colleges where doing so would interfere with the college administration's performance of its core functions in good faith. The practical effect and rationale of judicial abnegation are demonstrated in the early and influential case of People ex rel. Pratt v Wheaton College¹⁵⁶ where a student suspended for belonging to a secret society, sought to be reinstated by the courts. After noting the reasonableness of a rule prohibiting secret societies, the court explained the proper relationship between courts and colleges:

"But whether the rule be judicious or not, it violates neither good morals nor the law of the land and is therefore clearly within the power of the college authorities to make and enforce. A discretionary power has been given them to regulate the discipline of their college in such a manner as they deem proper, and so long as their rules violate neither divine or human law, we have no more authority to interfere than we have to control the domestic discipline of a father in his family"¹⁵⁹.

The recognition of authority over internal affairs and the exclusion of judicial intervention in internal university

matters go together. They amount to a substantial degree of common-law autonomy. Although such common-law autonomy could not prevail against statutes, the fact that few statutes affecting universities existed made this an insignificant limitation. Most cases that involved some idea of academic abstention involve complaints by students against college discipline or application of academic standards. Academic abstention was also invoked in earlier cases where members of faculty complained about dismissal even where they claimed a violation of their academic freedom. Although these cases are regarded as belonging to "a dark age of faculty dependence", they also represent a positive freedom against state control. Now that most universities voluntarily defend the academic freedom of their faculties, these cases assume greater importance¹⁶⁰.

Although there is no coherent rationale for cases concerning academic abstention, one rationale is that the breadth of the responsibility which a university bears in disciplining students in loco parentis requires broad powers. Although this rationale is no longer regarded as relevant, there are other two rationales that seem more relevant to contemporary higher education. According to one of these, the courts perceive the college or university as a separate realm which pursues values different from those of society as a whole. In this way it is seen as striving for collegial, pedagogical or disciplinary models of personal relations that avoid competition. The courts have felt that offering a legal remedy for a complaint in those cases will vitiate the

consensus of value or procedure within the institution. Judges have also felt that they are not competent to evaluate the merits of academic decisions¹⁶¹.

Although the common-law notion of academic abstention may seem anachronistic in this modern age, there is no doubt that the judicial attitudes embodied therein still persist in similar forms. A number of cases demonstrate the judicial deference to preserving the discretion of academics that is not seen in cases not involving academics. The Supreme Court has repeatedly warned federal judges against interfering with the discretion of academics either on substantive or procedural grounds where they make bona fide academic decisions¹⁶². Courts have also limited constitutional rights to preserve academic values. For this reason universities have been regarded as proceeding on assumptions different from society as a whole and that an insistence by courts or conforming to legal standards or procedures is likely to destroy something that is valuable in higher education. The constitutional right of institutional academic freedom appears to be a collateral descendent of the common-law idea of academic abstention¹⁶³. Institutional academic freedom can therefore be regarded as academic abstention elevated to constitutional status¹⁶⁴.

5.3.7 State constitutional law

The second source for constitutional academic freedom is found in state constitutional provisions which endow state

universities with the status of being separate branches of government. These provisions can be found in several state constitutions. The states which have attempted and to some extent succeeded in conferring constitutional status on one or more of their universities are Michigan, Minnesota, California, Colorado, Idaho, Georgia and Oklahoma. Less successful in their attempts because the apparent constitutional status is heavily qualified by court decisions attorneys generals' opinions, or long-established practice are Alabama, Arizona and Nevada¹⁶⁵. The provisions granting constitutional status either expressly or impliedly limit the power of the state legislature from interfering with the internal decision-making process of the university even though the university is supported by state appropriations. For this reason state courts in various states have held state statutes unconstitutional because they reflect attempts by state legislatures to interfere with academic decision making¹⁶⁶. Rabban¹⁶⁷ disputes that the fact that a few states have constitutionally provided for university autonomy should be regarded as suggesting that similar protection should be read into the first amendment¹⁶⁸.

The State of Michigan was the first to enact the constitutional provision for the separate government of its state universities in 1850¹⁶⁹. The courts gave extensive interpretation to the provision. The current provision gives the elected Board of Regents of the University of Michigan "general supervision of its institution and the control and direction of all expenditures from the institution's funds"¹⁷⁰.

The courts in Michigan have consistently construed the provision as prohibiting all attempts by the legislature to interfere with the academic management of the university. This gave the university more autonomy. Consequently the courts have declared unconstitutional legislative efforts to compel appointments to faculty positions¹⁷¹, to control the location of departments¹⁷², to determine the percentage of out-of-state students¹⁷³, to penalize student radicals and to require divestiture of securities related to South Africa¹⁷⁴. Even attempts by the legislature to tie substantive conditions to specific appropriations have been set aside when found to interfere with general operations of the University¹⁷⁵. The courts have, however, upheld statutes regulating the financial practices of the universities and its relations with employees where neither of the regulations significantly affected academic values¹⁷⁶. In this way the courts have construed the grant of authority to the regents as "a flexible prohibition against legislature meddling, permitting the courts to determine whether a statute interferes with the university's autonomy over core academic issues"¹⁷⁷.

Although some states provide for the autonomy, the rationale for provisions such as that of Michigan's is to improve the quality of the state university by protecting it from political interference and manipulation. When Michigan constitutionalized institutional autonomy in 1850, it did that against "a history of frustrating failure to establish respectable state universities in America". A Michigan legislative report of 1840 stated "thus has State after State,

in this American Union, endowed universities, and then, by repeated contradiction and over legislation, torn them to pieces with the same facility as they would do the statute book, and for the same reason, because they have the right"¹⁷⁸. It proved quite difficult for people to control a learned and intellectually elite institution without destroying values that they as a group could not comprehend or share. The legislature was perceived as managing the university for practical political ends, rather than for long-term scholarly and educational objectives. "The solution adopted - the election for eight year terms of officials responsible only for university governance - was an ingenious innovation, accommodating conflicting values and fostering a university known and admired throughout the world"¹⁷⁹.

This solution made use of the traditional American constitutional device of separation of powers. The Michigan constitution gives power for different purposes to both the regents and the legislature. Although their powers may to some extent overlap, the regents have certain core powers over their internal academic administration of the university which the legislature cannot usurp. The courts have enforced this division in order to protect the values for which the division was made, "even in the absence of an express judicial role in restraining legislative intrusions". In this way the courts protect those academic values that the legislature might be expected to violate¹⁸⁰. Not all the states have, of course, been as successful as Michigan in having the status they

sought to confer by the constitution upon their universities recognized by the courts and commentators as autonomous¹⁸¹.

The tradition of constitutional autonomy for state universities seems to have contributed to the development of the federal right of institutional academic freedom. It is regarded as affirming the persistence of the view, "inherent in academic abstention, that civil authorities ought to respect the special needs and values of universities, even when erected and supported by the state"¹⁸². Institutional autonomy has also been considered as assisting to explain why federal courts seek to protect administrative decisions not related directly to speech or exchange of ideas. These state constitutional provisions recognize that political control over academic administration may forestall the attainment of educational and scholarly excellence. Protecting these administrative actions on the basis of separation of powers makes this seem less anomalous. The state constitutional law also explains why federal courts have not doubted that the federal right of academic freedom protects state as well as private universities. Both have traditionally enjoyed autonomy from political interference¹⁸³.

Seen in this light, academic abstention and constitutional autonomy can be regarded as precursors of the modern federal constitutional protection of institutional autonomy. This modern development has been regarded as an adaptation of traditional legal rules and judicial attitudes to the contemporary legal environment. "In this legal environment,

universities are subject both to numerous civil norms from which they formerly were exempt and to extensive statutory and administrative regulation"¹⁸⁴. From 1945, universities have educated a far higher percentage of the American population for participation in an increasingly complex society and economy. This has been increasingly funded by federal and state governments which in turn have sought to ensure university assistance in fulfilling social and economic goals. Statutes and regulations concerning hiring, advancement, admissions, financial aid, student records and many other operations have been enacted. Courts have insisted that some civil rights of individual members be respected by public universities. These have greatly complicated relations between political officials and universities, "drawing the latter out of their prior social position"¹⁸⁵.

Constitutional academic freedom can therefore be regarded as a principle which precludes regulation from proceeding so far as to deprive the university of control over its academic destiny. This principle has been developed by courts which have also explained why they restrain themselves from imposing far-reaching constitutional or common-law duties on the university. "As such it represents academic abstention raised to a constitutional level. There, it generates force comparable to other constitutional norms, such as due process"¹⁸⁶. The principle can also be directed to legislatures and administrative agencies, and it prohibits them from reducing the university "to a passive instrument of political or utilitarian calculation". For this reason courts have

embedded institutional autonomy into the federal constitution through judicial construction, "providing to qualifying universities rights against the federal governments long enjoyed against state government by universities with state constitutional status".

To recognize this legal development is important for clarifying the right of academic freedom. For this reason it has been contended that the Supreme Court's move to protect the institution as a whole should not be viewed as a perversion of rights, "based upon an erroneous development of Frankfurter's language in his Sweezy concurrence. Nor does it represent confusion between property and free speech rights". Constitutionalizing academic freedom has not been regarded as involving the absorption of a non-legal norm developed by faculty activists, but rather as an adaptation of the traditional legal supports of the college to preserve intellectual independence for the modern university. Academic abstention and institutional autonomy have been regarded as persisting because they are the legal structures universities have developed that most fully recognize the distinctiveness of higher education. When confronted by laws that threatened this distinctiveness by insisting that the university enter completely into the mainstream of democratic culture, courts have turned to familiar legal structures originally developed in order to prevent political demands from engulfing academic values¹⁸⁷.

5.3.8 Institutional academic freedom and the first amendment

Despite the preceding account it could still be contended that the whole development has been mistaken and illegitimate¹⁸⁸. This is entirely understandable as it cannot even be claimed that the founders intended to provide any constitutional status for higher education. Even if universities should be granted constitutional status, there is still a need to explain why this may be achieved legitimately through judicial interpretation. It could also be disputed that universities merit protection from democratic decision making or that they espouse values not sufficiently represented in the political process¹⁸⁹.

Notwithstanding these objections it has been contended correctly, it is submitted, that constitutional protection of academic freedom is justified. This protection is regarded as compatible with the first amendment because it protects academic values that are compatible with first amendment values. The university is regarded as the pre-eminent institution in society where knowledge and understanding are pursued with detachment or disinterestedness¹⁹⁰. The reasoning behind this is that disinterested scholarship and research are both good in themselves and benefit society. The disinterested search for knowledge promotes a type of discourse that is careful, critical and ambitious; society needs this. The method of discourse is both a good in itself and a benefit to society. While it may be regarded as

pleasant to participate in discussion that is intelligent, human and to the point, a more important consideration is that scholarly discourse creates the most favourable environment where thinkers may formulate ideas that are distinguishable from popular opinion or fashionable error. Moreover, disinterested and expert thought is also crucial to society as a whole because it provides "a standard by which to gauge how trivial, debased and false is much public discussion of affairs"¹⁹¹. It is imperative to gain perspective on the mass of "information that pours from the print and electronic media, drivel that so often merely flatters the ignorance and cupidity of its audience"¹⁹². As Byrne states it "it is important to keep vital the possibility of free intellectual excellence lest we become lost to technically-proficient barbarism"¹⁹³.

Another value is that the university seeks to instil in those who enter adulthood an ability for mature and independent judgment. The ingredients of this liberal education, which are often revised and challenged, inform the student of the knowledge valued from the past, convey the methodological elements of critical thought and promote the ability to think independently and creatively. Liberal education is good in itself, is both pleasant and virtuous, and necessary to provide competent leadership in a complex, technocratic and democratic society¹⁹⁴.

While a university is also responsible for training young people of different intellectual abilities and social backgrounds to be competent workers and good citizens, and

also conducting research that supports an economically-beneficial rate of technological growth, it is, however, the engagement of learning in the arts and sciences which requires unrestricted debate over issues that gives life to higher education both in scholarship and in teaching. Moreover, the nature and value of liberal studies justifies constitutional limits on legislative control while those of practical studies do not. Liberal studies have been regarded as central to the American idea of the free individual. They have also been regarded as necessary for the exchange of ideas which are protected by the first amendment and they are always subject to threats from majorities. The vision of a democratic people, freely and prudently choosing their institutions is indispensable to both liberal and classical explanations of the virtues of the American Constitution¹⁹⁵.

Liberal education has also been regarded as being responsible for teaching students how to adjust to the clash of opposing views by developing an individual perspective based on a just appreciation of facts. Some aspects of this analysis can be found in Brennan J's opinion in the Keyishian case where he stated that "(t)he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, (rather) than through any kind of authoritative selection"¹⁹⁶. Civic and educational aims have a common purpose which is to enhance the citizens' capacity to exercise reason and judgment freely. The critical and informed discourse of a free university might be regarded as a "transcendent value"¹⁹⁷ which provides a

symbol of reasoned exchange that stands slightly above the contentions of political life¹⁹⁸.

The free exchange of ideas which the first amendment supports has to result in insight and understanding of issues rather than in "manipulative persuasion or interpretive ranting". The development of a field of knowledge through reasoned debate and the advancement of a student to a critical perspective are among the most important and fruitful forms of expressive activities. This may be the reason behind Brennan J's statement that the "classroom is peculiarly the marketplace of ideas"¹⁹⁹.

It is not the legislative majorities that can effectively protect liberal studies, largely because scholarship and liberal education are a pursuit of a minority which has an inclination to sacrifice immediate material gains for the pursuit of knowledge. Constitutional academic freedom can only be advanced by judges because they are well qualified by background, insulated from political and economic pressures and acquainted with constitutional norms to perceive the special values of a university and to protect them from legislation. The judicial elaboration of academic abstention has demonstrated that judges have a high regard for higher education. They have also shown themselves willing to accommodate civic constitutional norms, such as due process, with legitimate needs of academic institutions. It was also the judiciary that developed constitutional academic freedom. The preservation of the fundamental academic values of

disinterested inquiry, reasoned and critical discourse and liberal education has been regarded as justifying a constitutional right of academic freedom. These objectives give intellectual and educational expression to the vision of human reason implicit in the Constitution. The emphasis on liberal studies has also been regarded as providing limits to the scope of constitutional protection. For this reason it has been suggested that constitutional academic freedom should not protect institutions that resemble universities but which do not pursue genuine liberal studies and universities that do not respect the academic freedom of professors or the essential intellectual freedom of students. The reasoning behind this is that they so deviate from the values that justify institutional academic freedom that they should lose their immunity from judicial review. This would therefore reduce fears that institutional academic freedom would cloak extensive violations of professors' academic freedom by institutions inclined towards intellectual orthodoxy²⁰⁰. Yet this may be easier said than done as universities continue to violate individual academic freedom and many of these violations take place at universities that ordinarily respect individual academic freedom²⁰¹.

These limitations have been regarded as capable of reducing, although not eliminating, the tension between institutional autonomy and faculty autonomy. It is nonetheless important to consider some of the possible tensions between individual and institutional academic freedom.

5.3.9 Individual versus institutional academic freedom

Initially "individual" and "institutional" definitions of academic freedom seemed complementary and no tension was perceived between the two. The AAUP's first Supreme Court brief on academic freedom emphasized that university autonomy is a necessary condition for the academic freedom of professors²⁰². The growth of litigation by students and professors against universities since 1960 has demonstrated the tension between individual and institutional academic freedom. Administrators and trustees have frequently raised the defence of institutional academic freedom "not as an additional layer of protection for professors against the state, but as a bar to judicial review of claims against universities by professors alleging institutional violations of individual academic freedom²⁰³."

There is no doubt that the Court's new exposition of academic freedom in the form of institutional autonomy contains some anomalies. The reason for this is that the traditional notion of academic freedom entails the protection of an individual scholar from institutional interference, whereas constitutional academic freedom as evolved by the Supreme Court protects principally and expressly a first amendment right of the university itself from government interference in the performance of core educational functions. A further problem is that the first amendment does not expressly protect institutional decision making which is so indirectly related to expression as student admissions or faculty hiring. It may

be difficult to point out what speech a university is making as an institution apart from that of individual academics, students and administrators²⁰⁴.

Although the Sweezy case constitutionalized academic freedom on the basis of first amendment values of critical inquiry and the search for knowledge to protect the independence of both professors and universities from state intervention, a distinctive conception of institutional academic freedom remained largely latent throughout the McCarthy-era cases. This was due to the fact that these cases involved state actions against individual lecturers and professors and not direct conflicts between individuals and universities. In more recent times, universities have invoked an institutional right of academic freedom to defend themselves both against the state and against students, professors and members of the general public. These cases have led to the courts' reconsidering the institutional component of academic freedom²⁰⁵.

The opinions of the courts did not concentrate on institutional academic freedom until 1978 when Powell J in Regents of the University of California v Bakke²⁰⁶ reiterated that "academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment". He stated that "'the four essential freedoms' of a university", identified in the South African statement quoted at length by Frankfurter J in Sweezy constitute academic freedom. According to the statement a

university must be able "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught and who may be admitted to study". This statement was quoted from Sweezy again in Widmar v Vincent²⁰⁷. These freedoms seem to embrace appointment, promotion, tenuring and termination of academic staff as well as curriculum, pedagogy and student admissions. By recognizing a university's constitutional academic freedom to select a diverse student body within the limits of the fourteenth amendment, Powell J's opinion in Bakke reinforced the inclusion of student admissions within institutional academic freedom²⁰⁸.

In the Widmar case Powell J may have suggested a fifth freedom, "the right of the University to make academic judgements as to how best to allocate scarce resources"²⁰⁹. Because the availability of financial resources obviously influences hiring practices, curriculum, pedagogy and admission policies, Powell J thoughtfully injected into the discussion the reality that the range of managerial decisions for any one institution depends upon its resources²¹⁰. In doing this he demonstrated that the concept of institutional academic freedom is elastic and can include more elements concerned with the management of a university. Despite the earlier developments, a few later cases have demonstrated the tensions that exist between individual and institutional academic freedom.

The cases of Princeton University v Schmid²¹¹ and of University of Pennsylvania v Equal Employment Opportunity Commission²¹²

illustrate the conflicts that sometimes arise between individual and institutional academic freedom. It will be necessary to analyse these cases in some detail and to determine their significance.

The case of Schmid arose when Schmid, a member of the United States Labour Party who had no affiliation with the university, distributed and sold on the campus material dealing with the party and the mayoral campaign in nearby Newark contrary to the Princeton regulations which prohibited any person without a university connection or sponsorship from entering the campus to solicit support or contributions. For this Schmid was arrested and convicted of trespass. The case generated an important debate about the meaning of institutional academic freedom.

The Supreme Court of New Jersey overturned Schmid's conviction. In doing this it relied on the free speech provision of the state constitution. It held that the free speech rights in the New Jersey Constitution are enforceable against private as well as public bodies. The court also recognized that the New Jersey Constitution protects ownership of private property. It therefore considered its task as that of balancing Princeton's property rights against Schmid's expressive rights.

In analyzing these competing interests, the court referred to Princeton's own regulations which emphasized the importance of free inquiry and free speech in achieving the university's

declared purpose of promoting knowledge. The court found that Schmid's presence on campus was entirely consonant with the University's expressed educational mission. While the court was prepared to concede that needs, implicating academic freedom and development, justify an educational institution in controlling those who seek entry into its domain, and require substantive judicial deference to university autonomy and self-governance, it reversed Schmid's conviction because Princeton's regulations contained no reasonable standards relating to limitations on expressive freedoms to legitimate educational goals.

On appeal to the United States Supreme Court, Princeton complained that its academic freedom protected by the first amendment was violated when the Supreme Court of New Jersey arrogated to itself the ancient right of a university community to determine how its educational philosophy may best be implemented. A private university's choice of educational philosophy, as Princeton further contended, however broad, orthodox, or eccentric, is rendered immune to state interference by the first amendment academic freedom. It insisted that no governmental body is constitutionally entitled to determine whether a private university has acted in accordance with its educational objectives. While Princeton conceded that the university cannot claim its academic freedom as a shield against state rules concerning health, safety and similar matters, it also immediately added correspondingly that the state cannot use its police powers to

control in any way the intellectual activities of the university.

Princeton further asserted that first amendment academic freedom provides greater protection to private than public universities. While the educational judgments of public universities, like those of private universities, are protected against interference from other entities, public universities, are also subject to the constraints on all government action imposed by the prohibition in the first and fourteenth amendments against the state's adoption of a particular religious or ideological viewpoint. Princeton maintained that private universities, by contrast, are absolutely unrestrained in their choice of educational philosophy. As it further contended, the interrelation of expressive and property rights, meant that control by universities over their property helped to provide an educational atmosphere conducive to learning and to the interchange of ideas between faculty and students.

Princeton briefly mentioned that the first amendment protects the free speech of professors at public universities from state interference. It added in a footnote that academic freedom is especially important to those who teach as well as to the institutions at which they teach, be they public or private. It continued to make clear its own commitment to the freedom of its faculty and students to pursue knowledge in their own way without interference by governmental or other authority.

The argument by Princeton University to the United States Supreme Court elicited strong objections from many of its faculty members especially those with a professional interest in constitutional law. Faculty members persuaded the administration not to proceed with the prosecution of Schmid, and contended that the decision to prosecute, rather than involving purely a matter of administrative discretion, posed a policy issue in which the entire university community should be involved²¹³.

Many professors were concerned that the broad immunity from judicial scrutiny claimed by Princeton would give any private university unreviewable discretion to restrict the academic freedom of its faculty. This distorted concept of academic freedom advocated by Princeton was criticized by faculty members as posing a far greater threat to intellectual life in universities than either Schmid's activities or the decision of the Supreme Court of New Jersey. This could lead to boards of trustees simply asserting that faculty ideas are incompatible with the university's educational purposes. Other faculty members feared that private universities invoke institutional academic freedom to preclude judicial review of administrative decisions to dismiss a professor doing controversial research, to determine the content of courses, to revise the grades assigned by faculty to students, and to revoke tenure without cause. Professors criticized Princeton for confusing its own institutional autonomy with the faculty's academic freedom and stated that to grant the immunity sought by the university would violate the

fundamental principle that no person or institution is above the law²¹⁴.

The AAUP was similarly critical of Princeton in its amicus brief to the Supreme Court. It contended that Princeton's novel and sweeping claims which combined institutional autonomy and academic freedom, if accepted, would effectively insulate private universities from any government scrutiny. It stressed that although academic freedom and institutional autonomy are related, they are essentially different concepts. Academic freedom, the AAUP continued, is a scholar's right to be free of institutional or governmental control in professional utterance, whereas institutional autonomy can be derived from academic freedom in the sense that university autonomy from external control may be necessary to protect its educational functions, including the functions of professors covered by academic freedom. Institutional autonomy, however, also relates to the general control of private property, traditionally protected by the due process clause of the fourteenth amendment which is not different when the property owner is a university, the corporate owner of a shopping centre, or an individual. The AAUP felt that Princeton made a fundamental error by failing to distinguish between these two very different forms of institutional autonomy. Only when a university's claims of institutional autonomy relate to its educational functions, is academic freedom at stake. This was not the case with Princeton²¹⁵. According to the AAUP, Princeton's broad claim of institutional academic freedom would effectively preclude judicial review of institutional

decisions even in cases where the rights or interests of the faculty might be adverse to the institution's administration. Princeton disputed this²¹⁶.

5.3.10 Institutional autonomy and tenure cases

Another instance which has demonstrated the tension between institutional academic freedom and individual academic freedom is that of peer review for tenure. As stated earlier, tenure in the United States is regarded as an essential element of academic freedom²¹⁷. In order to acquire tenure, professors have to be subjected to peer review. For this the university depends on the candid views of other professors in the field concerned. To be effective these views are regarded as confidential²¹⁸. The question that has been posed in a few cases is whether an academic who has been denied tenure can compel the university to disclose the peer reviews if the denial is regarded as motivated by discrimination based on sex or race.

Title VII of the Civil Rights Act of 1964²¹⁹ prohibits discrimination in employment because of race, colour, religion, sex or national origin. Although universities were originally excluded from the application of the provisions of Title VII, Congress removed that exclusion in 1972, thereby bringing universities within the ambit of Title VII²²⁰. Congress realised that the university was equally likely to discriminate as any other employer. Congress found discrimination in the academic community even more disturbing

than in other areas because of the effect on the nation's youth²¹.

Since these two different historical progressions converged in 1972, confrontation between the university, with its concerns for confidentiality and autonomy, and the enforcement of Title VII were unavoidable. The question has been whether the university's desire for confidentiality and autonomy should trump the social goal of eradicating discrimination or, whether Title VII concerns should prevail over university concerns often presented as cases of academic freedom²².

In the case of Brown v Trustees of Boston University²³, Julia Prewett Brown sued Boston University claiming breach of contract and violation of Title VII after being denied tenure. A jury found that the university had breached the antidiscrimination provision of its collective bargaining agreement. The district court then applied the jury's finding of sex discrimination to the other claims and ordered monetary damages, enjoined the university from discriminating against Brown and awarded tenure to Brown²⁴.

In arriving at this decision Campbell C J emphasized that in tenure cases courts must take special care to preserve the university's autonomy in making lawful tenure decisions. These decisions necessarily hinge on subjective judgments regarding the applicant's academic excellence, teaching ability, creativity, contributions to the university community, rapport with the students and colleagues, and other

factors that are not susceptible of quantitative measurement. In the absence of discrimination, a university must be given a free hand in making such tenure decisions.

While the Chief Judge was prepared to concede this, he also pointed out that an employee's right not to be denied tenure for discriminatory reasons, prevents insulating the tenure process from any judicial review. As in other forms of employment, an inference of discrimination can be construed from a demonstration that a university's given reasons for denying tenure to the plaintiff were obviously weak or implausible or that the tenure standards for prevailing at the tenure decisions were manifestly unequally applied. The essential words were "obviously" and "manifestly". A court may not simply substitute its own views concerning the plaintiff's qualifications for those of the properly instituted authorities; the evidence must be of such strength and quality as to permit a reasonable finding that the denial of tenure was "obviously" or "manifestly" unsupported²⁵.

The Supreme Court also addressed the tension between confidentiality for evaluators and Title VII discovery rights in University of Pennsylvania v Equal Employment Opportunity Commission²⁶. The university's argument, as restated by the court, was that the first amendment is infringed by disclosure of peer review materials because disclosure undermines the confidentiality which is central to the peer review process, and this in turn is central to the tenure process, which in turn is the means by which the university seeks to exercise

its asserted academic-freedom right of choosing who will teach. Disclosure therefore has a chilling effect on peer reviews and frustrates the objective of candour which confidentiality ensures.

Rosalie Tung alleged that she was denied tenure by the University of Pennsylvania on the basis of her race, sex and national origin - in violation of her Title VII rights. Tung did not officially receive a reason for her lack of success. She learned unofficially, however, that the Wharton School's lack of interest in China-related research was why the Personnel Committee recommended against her becoming tenured.

The Equal Employment Opportunity Commission ("EEOC") subpoenaed confidential letters written by Tung's evaluators, the department chairman's evaluation and other documents reflecting the deliberations of the faculty committees participating in the tenuring process. The subpoena also sought comparable portions of the personnel files of five males who had been granted tenure, in order to consider Tung's allegations that they were equally or less qualified than her.

The University of Pennsylvania and a number of amici relied on a first amendment claim of constitutional academic freedom in asking the Supreme Court to recognize a special privilege against disclosure of confidential peer review materials to the Equal Employment Opportunity Commission in Title VII cases. This special privilege could equally apply to a claim

that a university impermissibly denied appointment or tenure in violation of a faculty member's academic freedom.

Although various federal circuit courts had previously held in Title VII cases that constitutional academic freedom requires a qualified privilege against disclosure²⁷ as a test balancing academic freedom and educational excellence on the one hand and individual rights to fair consideration on the other, the Third Circuit expressly declined to limit the EEOC's subpoena authority to accommodate an academic institution's constitutional right to academic freedom. Although the court conceded that such disclosure would burden the tenure review process and would impact on academic freedom, it rejected both qualified privilege and a balancing test because they would allow universities to hide evidence of discrimination behind a wall of secrecy.

The University of Pennsylvania complained that the Third Circuit failed to consider its first amendment interest in institutional academic freedom because a confidential system of peer review is essential to determining "who may teach", which is one of the core components of first amendment academic freedom identified by Frankfurter J in Sweezy. While the university readily acknowledged that the EEOC and individual litigants might in certain circumstances have access to confidential peer review documents in order to promote the compelling state interest of eliminating employment discrimination, it objected to the Third Circuit's automatic disclosure rule which did not give any weight to

university interests in academic freedom, and required disclosure of confidential material simply on the filing of a complaint. The university felt that the party who sought such material should have to demonstrate specific reasons for disclosure that would outweigh the first amendment interest in confidentiality shared by universities and the professors who participate in peer review²⁸.

The AAUP also disagreed with the Third Circuit. It saw a precise analogy between EEOC investigations of tenure files and the investigations into the contents of university lectures conducted by legislative committees concerned about communist subversion during the McCarthy era. While the AAUP was of the opinion that the court should not immunize universities from government scrutiny, it also felt that it should strike a balance between the competing investigative and academic interests. The AAUP also took pains to point out that the University of Pennsylvania did not pose any tension between the academic freedom of the university and the academic freedom of the faculty. It emphasized that by giving the faculty primary responsibility for the tenure decision, the university was pursuing a traditional and well-justified academic policy that merited first amendment protection²⁹.

The government's brief unequivocally denied that the Third Circuit's decision interfered with academic freedom in any way. While conceding that prior Supreme Court decisions had not clarified the definition of constitutional academic freedom, the government was prepared to accept that it

included the university's choice of professors. Yet it emphasized that Sweezy itself extended this freedom only to decisions made "on academic grounds". According to the government, university decisions relating to employment motivated by the kind of invidious discrimination prohibited by Title VII are not made "on academic grounds" and are thus not entitled to constitutional protection. It further asserted that individual faculty members have a countervailing academic freedom interest in being evaluated on the basis of their professional performance. The EEOC investigations of peer review decisions determine only whether these decisions are based on academic considerations or on discriminatory ones and thereby reinforce rather than undermine the appropriate tradition of judicial deference to university decision making. Moreover, the government observed that when it removed the exemption of universities from Title VII in 1972, Congress rejected the contentions that EEOC investigations would violate academic freedom by interfering in the selection and promotion of faculty members²³⁰.

The Supreme Court rejected the University of Pennsylvania's first amendment claim and accepted the government's position. The court distinguished cases such as Sweezy and Keyishian as being cases that involved direct governmental restrictions on the content of speech and on the right of the university to determine who may teach. Unlike Keyishian, where the government attempted to substitute its employment criteria for those of the university, the EEOC left the University of Pennsylvania free to select and apply its own standards as

long as they did not violate the proscriptions against employment discrimination in Title VII. Although the court was prepared to concede that the precise contours of its prior academic freedom decisions remained undefined, it considered itself fortunate in not having to provide additional guidance because the University of Pennsylvania required only the rejection of the expanded right of academic freedom to protect confidential peer review materials from disclosure. The court concluded that the university's concerns about the impact of disclosure on academic freedom were extremely attenuated remote and speculative. This it did while it expressed its continued support for judicial deference to legitimate academic decision making.

The court granted relief in University of Pennsylvania because of what might be thought of as a conflict in approach, between the Third Circuit's decision in EEOC v Franklin and Marshall College²³¹ and what was held in EEOC v University of Notre Dame du Lac²³². In Notre Dame, the court found a qualified academic freedom privilege, which allowed the university to redact the name, address, institutional affiliation and any other identifying features of the reporting scholar.

Franklin and Marshall is distinguishable from Notre Dame in that while redaction in the former took place as a result of a district court order, Notre Dame voluntarily produced redacted files to the EEOC. There is apparent agreement in these cases on the stage at which or the circumstances under which the evaluators must be identified in the course of EEOC

investigations. The conflict in approach in these two circuit court cases, to which the Supreme Court referred²³³ appeared to lie less in the ultimate access by EEOC to confidential information and more in the appropriate role of academic freedom as the basis for non disclosure. The Seventh Circuit relied on academic freedom to establish a qualified peer review privilege, and avoided disclosure of the identity of a reviewer until the claimant specifically asked for the identity of her evaluator. The Third Circuit, on the other hand, rejected the argument that academic freedom was relevant to requiring disclosure. The court declined to recognize a qualified academic privilege, and refused to adopt any balancing approach in determining the EEOC's right of access²³⁴.

The second circuit has also considered the argument that a qualified academic freedom privilege protects the confidentiality of information generated in the tenuring process. In Gray v Board of Higher Education City of New York²³⁵ although the court recognized a qualified academic privilege, it held that the interest in academic freedom did not outweigh a black educator's interest in discovering the identity of two committee members who recommended against his tenure. The court came to the conclusion that the educator's need for information to prove discriminatory interest was more important than the college's interest in keeping the votes confidential²³⁶.

Those who assert a qualified privilege not to disclose certain information during the investigatory stage of the employee's

or former employee's claim, emphasize that disclosure has a chilling effect on the procurement and quality of evaluators' comments and conclusions. In Gray it was contended that disclosure of how two tenure committee members voted would chill candid peer evaluations and disturb harmony of faculty relations. In Franklin and Marshall, the disclosure of documents involving on and off campus evaluators was likely to result in less than "candid, honest assessments of the candidates under review" as well as embarrassment and confrontational situations. In Notre Dame, it was held that disclosure would compel the university to break the promise of confidentiality given in advance to evaluators and deemed critical by the university in obtaining candid and frank evaluations in all cases. After University of Pennsylvania, it would appear that none of these considerations either singly or cumulatively, are sufficient to create an evidentiary privilege against a rejected tenure applicant who alleges impermissible discrimination in the tenure process. "Thus, discovery triumphs when pitted against whatever public good may transcend from confidentiality of peer-review generated views and conclusions"²⁷.

In University of Pennsylvania, Blackmun J noted that the court would not decide whether the petitioner could redact information from the requested files before giving them to the EEOC, because the lower courts had not considered the issue fully. Redaction would permit universities to remove certain information from the files that would reveal the identity of the evaluator. By negating the argument that the disclosure

of the evaluator's identity would have a chilling effect on future evaluation, redaction could be regarded as a viable solution capable of meeting the needs of both parties although it has some limitations²³⁸.

University of Pennsylvania required a balancing of society's interest in academic freedom for institutions and society's concern over fairness in tenuring educators with due regard to congressional mandates and the law of evidence. The decision rejected the use of academic freedom as a ground for confidentiality for peer review evaluators. From this it appears that the societal value of obtaining the truth when impermissible discrimination is alleged, is more important to society than the anonymity for the evaluators who express opinions about or vote on a candidate for tenure²³⁹.

5.3.11 The public-private dichotomy

There is a debate on whether public or private universities and colleges enjoy more institutional academic freedom. The fact that there are both private and public universities in the United States accounts for the different perceptions on the extent of an individual professor's academic freedom. According to some scholars the law provides greater protection for public-sector academics than it does for their colleagues in private universities. This is attributed to the fact that academic freedom has been tied to the first amendment's right of free speech and assembly and to the fourteenth amendment's due process requirements. These federal constitutional

protections are not generally available to an academic of a private college or university because the allegations of institutional impropriety would not involve "state action". Certain statutory rights, however, are available to faculty members of private universities as well as employees of public universities. A typical example is Title VII which prohibits employment discrimination based on race, colour, religion, sex or national origin²⁴⁰.

Although teachers at private colleges cannot rely on state action, it is unlikely that courts will allow these institutions to completely disregard their faculty's constitutional rights. In Board of Regents of State Colleges v Roth²⁴¹, Douglas J noted the public-private dichotomy and maintained that "the First Amendment, applicable to the States by reason of the Fourteenth Amendment, protects the individual against state action when it comes to ... freedoms guaranteed by the First Amendment"²⁴². Although he acknowledged that faculty working in private institutions have less government-protected academic freedom, Douglas J did not approve of the distinction on the basis of the public-private dichotomy. On the contrary he noted that the same problems relating to dismissal owing to philosophical, political or ideological beliefs may well be true of private universities if they become instrumentalities of the state either through financing or other umbilical cords²⁴³. For this reason it has been contended that these umbilical cords which include federal funding, regulation, student aid and tax status considerations may be relied upon successfully in future to

extend protections of the first and fourteenth amendments to academics in private universities. Private universities will no doubt be wary of restricting the academic freedom of their academics because this might have a negative impact on their image. Universities generally are characterised by the fostering of unfettered enquiries and intellectual expression of scholars for the benefit of society²⁴⁴.

There is no evidence that private colleges and universities generally afford their academic staff the same amount of academic freedom as that granted by public universities. Individual reputations among peer universities and the competition to hire the best scholars will obviously induce many private institutions to allow their professors the same academic freedom granted by public universities to their professors²⁴⁵.

In the cases that have come before the Supreme Court, the Supreme Court has recognized institutional academic freedom at both public and private universities. It, however, did not resolve the question whether constitutional academic freedom has different meanings at private than at public universities although it did recognize this issue in University of Pennsylvania a private university²⁴⁶. The court noted that attempts by government to regulate the selection of academic staff or otherwise influence utterances by academics would create first amendment problems. The court added that analogous attempts at public universities would result in

complex first amendment problems because the government would be both the regulator and the speaker²⁷.

Rabban is of the view that earlier Supreme Court decisions do suggest first amendment restraints on the institutional academic freedom of public universities that may be inapplicable to their private counterparts. He refers to Sweezy and Keyishian where the Court emphasized the value of critical inquiry in universities to democracy and civilization while it justified first amendment protection of academic freedom. Rabban is of the opinion that the democratic functions of universities has greater significance for public universities than for private universities because, as he further contends, the speaker is the speaker as well as the regulator. He also feels that public universities themselves bound by the first amendment in their relationships with their faculty members and students, may have less discretion than private universities in choosing educational goals that may deviate from democratic values. For this reason the same educational choices that might violate the first amendment obligations of public universities to diversity of thought might be protected by the first amendment academic freedom of private universities against state intervention. To illustrate this Rabban mentions as an example that a private university might have academic freedom to declare itself an "ivory tower" which would be committed to the world of ideas uncontaminated by influences from the outside world, and consequently might be allowed to impose absolute restrictions

on public access to the campus that might violate the first amendment if adopted by a public university²⁴⁸.

Admittedly private universities may have purposes unrelated to education that may enable them to deviate from first amendment limitation or public universities. A typical example is a university affiliated to a religious denomination which may be entitled to make institutional choices for religious rather than educational reasons and those choices may be protected by the first amendment. The AAUP expressly recognizes the religious connection as a reason for some limitation on the exercise of academic freedom²⁴⁹. On the whole, however, it is difficult to conclude that either public or private institutions have more academic freedom.

5.4 GERMANY

5.4.1 University autonomy and academic freedom in general

Article 5(3) of the Basic Law of Germany provides for the protection of academic freedom, research and artistic creativity. The rights guaranteed in article 5(3) of the Basic Law can be traced to the Constitution of 1849. The Frankfurt Parliament which was heavily influenced by professors and intellectuals declared in article 152 of its abortive constitution that "the teaching of art and science is free". Article 142 of the Weimar Constitution reinforced this declaration as follows: "The state guarantees the protection and support of research and scholarship". Similarly article

5(3) of the Basic Law stipulates that "art and learning, research and teaching are free". A proviso to this states that "freedom of teaching shall not absolve (one) from loyalty to the Constitution". These provisions have been regarded as expressing the traditional view of the German university as an autonomous institution of public life organized primarily to train an intellectual elite for service to the state²⁵⁰.

In an earlier chapter it was made clear how the Humboldtian concept of academic freedom developed in Germany, and that it involved both Lehr-und Lernfreiheit²⁵¹. Despite the emphasis on academic freedom, it is important to point out that German universities are state universities, financed by the state. Their constitutions or statutes are dependent upon the legislation of the state. A member of the government (usually a minister) is responsible for university affairs. Moreover, professors and junior faculty members are civil servants. Full professors are appointed by the state. These appointments, however, are normally done according to the nomination by the university. Responsibility for university education generally rests with the various Länder, although the federal government has power to frame some general and basic rules which provide a broad framework for the university system. Notwithstanding their legal and financial dependence on the state, German universities have developed a high degree of autonomy in their internal affairs²⁵².

Before the reforms which were caused by the student unrest of the sixties and early seventies, the internal structure of

universities was largely dominated by full professors, with representatives of the various groups of junior academic staff sitting and voting in the councils of academic self-government. The university was divided into several faculties (Fakultäten). No distinction was made between undergraduate colleges and graduate schools. The basic units were the institutes or "seminars" mostly administered by one full professor as a director²⁵³.

During the sixties a great need for the reform of this university system arose. The reforms were externally induced²⁵⁴. Great impetus to this was given by the fact that the university had become a mass enterprise with a substantial increase in student numbers. This also necessitated an increase in staff numbers. As a result, "the education explosion led to a transformation of the university from a republic of scholars to an institution of mass instruction". Moreover, a university reform was needed which was designed to adapt research and teaching to the altered circumstances, to solve the problems and to ease the tensions that had developed in the meantime²⁵⁵.

The first problem was to restore the declining effectiveness of instruction and learning and to restructure the curriculum. Previously the German universities followed a system of open admission which meant free access to university to all the high school graduates. With the massification of university education especially in the fifties, it became necessary to limit the number of students (numerus clausus) in certain

disciplines like medicine, psychology, pharmacology and some other scientific subjects²⁵⁶.

The second problem that needed reform was that of stattering. Roughly the teaching personnel of a German university consisted of full professors, Dozenten a position similar to that of a lecturer and assistants. Both professors and Dozenten hold a post doctoral degree, the Habilitation which is evidence of continuous and successful research activities and entitles everyone who has obtained it to give lectures and seminars within the university. The distinction between the professors and Dozenten was regarded as being obsolete. There was discontent among the Dozenten because most of them did not have tenure. They also wanted a great say in faculty matters. Assistants were supposed to assist professors in his duties, give some lectures for beginners and work towards their own Habilitation. During the sixties this group was disproportionately expanded in order to cope with the rising student numbers and to save money by avoiding to appoint more professors. This practice had led to some abuses. The assistants needed better safeguards for academic freedom and independence a certain representation and say in faculty and departmental matters²⁵⁷.

The third need was for administrative reform. The administrative officials could not cope with the problems of mass instruction. The traditional divisions (Fakultäten) had grown so much that the introduction of a department system

which would improve co-operation within the ranks of professors was necessary²⁵⁸.

5.4.2 The student unrest

These were the themes that needed attention. There were no doubt many other aspects and problems of the crisis of the university in Germany. These included the procedures for financing; academic freedom as against social accountability, or the legitimate claims of society and the legitimate autonomy of universities and the relative roles of teaching and research. The radical student movement that took place in the sixties precipitated state intervention to address these issues. There are various reasons behind the student uprisings. What provided fertile ground for this was the appeal of the new leftist political philosophy which rebelled against what was perceived as the repressive principle of achievement because some students were living in a situation where the principle of achievement had been suspended for an indefinite period. This resulted in the "alliance of the radicals with the dull and the lazy"²⁵⁹.

The young people could not reconcile themselves with the prevailing political and social cultural and moral values, and the institutions of society especially in Germany after World War II. The crisis was exacerbated by the search for identity and by the questions which young people posed as to what their parents had done during the Nazi period or what they had done in the fifties. The movement consisted of young men and women

of the upper middle class who regarded themselves as protagonists of the exploited and oppressed masses or the people's interests. The Germans were theoretically and ideologically prepared for taking the revolutionary road having had the examples of the American student movement, the Persian and Dutch experiences. The West German students were also much more receptive to political theory than, say, the "British". Students were also exposed to Marxism as a result of the influence of the Frankfurt School of sociologists. Concepts such as exploitation, repression, manipulation and liberation were well understood and accepted²⁶⁰.

The movement was largely spearheaded by the Marxist opposition to wicked, capitalist and bourgeois system of the West. The ultimate political objective was to abolish liberal and constitutional democracy. Within the university context the movement advocated the abolition of what was regarded as bourgeois scholarship and the introduction of "critical" scholarship in the sense of the new left. They intended to replace pluralism and diversity within disciplines and departments by a scholarship in the service of what they regarded as "the people's" interest. This approach pervaded all disciplines. Knowledge and the search for knowledge would be judged in terms of political principles and the political functions of truth. Moreover, they opposed the repressive principle of achievement which they regarded as being aimed at adapting all human beings to the needs of a capitalistic and bureaucratic society. For this reason they opposed examinations, any scheme of courses and credits and the mooted

curriculum reform. It was in this way that they gained the support of the dull and lazy²⁶¹.

What prolonged the crisis of the universities were the legislative reforms which resulted in the change of university constitutions and brought about new university laws. The underlying idea was not only to calm the movement but also to implement crucial reforms. For this reason the structure of the university, the organization of decision-making institutions had to be modernized. This had to be done through the democratization of universities and in particular through the introduction of participatory democracy. The university was regarded as consisting of four groups, namely, professors, assistants (junior staff), students and non-academic staff. Although there was controversy as to the proportion of representation, the general feeling was that full and associate professors, or all tenured academic staff were to be in the minority. Democratization was meant to deprive professors of their decisive influence over academic matters. They had to be stripped of their "power" and "privileges". The Berlin University Act of 1969 is a typical example. This Act created a university parliament (Konzil) consisting of thirty three each of professors, junior staff and students as well as fifteen representatives of non-academic staff. Its main tasks were the election of the president and the vice-presidents and the passing of the bylaws. The academic senate consisted of eleven professors, six assistants, five students and two non-academic staff. They were responsible for central decision making but had to

contend with a strong executive power of the president²⁶². There were also department committees consisting of seven professors, four assistants, three students and non-academic staff. They were responsible for teaching research, examinations and appointments within the department.

These provisions for democratization of the university administration were completed both in Berlin and at other Länder by democratizing the group of professors. This was done by promoting a large number of assistants to tenured professorships by bureaucratic decree and without taking into account their scholarly achievements, which was usually a Habilitation, or by requiring an easier Habilitation and without the usual requirement of a second publication in the form of a book. The underlying reason was that each of the groups within a university had its own specific interest and the best way of running the university was to combine them on boards where no single group would predominate, thus forcing them to compromise or to co-operate. Emphasis was placed on the equality of the groups and academic qualifications and competence were of relative significance. Everyone was therefore considered competent to make decisions although in varying degrees. The philosophy underlying participatory democracy was that those who were affected by decisions should have a large say in its making. Moreover, the assumption was that democracy could be transferred without modification from the political community to any area of society²⁶³.

The prevalent belief was that the radical movement had been caused by abuses and failures of the old system and was supposed to be aimed at reasonable reform. It appeared natural to force rapid reform and grant the adherents of the reform movement an important say within the new structure. It was also believed that responsibility within the institution would calm certain irresponsible and even violent elements of the movement and would separate radical reforms from extreme radicals within students. This view seemed to overlook the international dimensions of this phenomenon²⁶⁴. The radical student movement received support from the news media politicians and even professors. Reports were generally biased in favour of students. Excesses were played down and their causes were looked for among the reactions of the wicked. The ideal goals of the youth were used as excuses for certain methods. Unrest was regarded as being reasonable and sound and was considered to be the effective instrument for reform. The radical attack on the legitimacy of existing institutions in the name of the new democracy disclosed not only a serious lack of self-confidence but also faith in the values, institutions and legitimacy of the system. The general reaction was to understand and to justify the attack. This was coupled with a desire for appeasement by those in charge by weakly consenting to the new democratic participation of all groups in academic decisions with less power for the professors and more for the students²⁶⁵.

The political group that was largely responsible for this was the left wing of the Social Democratic Party (SPD). The

left-wingers strongly resented the idea of an elitist university and the principle of meritocracy. They therefore supported the rebellion of the upper-middle class youth. They also advocated participatory democracy. Owing to the fact that the working class was no longer the real subject of the class struggle, they wanted to use the university as an instrument for radical change of the social and political order. Although the majority of the voters were generally against the movement, they did not exercise any pressure on politicians to deal with it. As a result university reform by democratization was promulgated in several Länder especially those with SPD government such as Berlin, Hesse and Lower Saxony²⁶⁶.

5.4.3 Results of legislative reform on academic freedom

The legislative reforms resulted in the permanent institutionalization of the radical student movement. This institutionalization ensured its perpetuation²⁶⁷. It further entrenched the atmosphere of permanent confrontation and conflict. It also led to a difficulty in taking decisions. Decisions could only be taken after a struggle for power and with due regard for political goals and implications. Academic life consisted of conflict and political tactics to secure or to prevent majorities to take or prevent certain decisions. There was, however, no agreement about the rules of conflict as is the case between political parties in a democracy. This demonstrated that legislators made a fundamental error in thinking that antidemocrats would behave

as democrats when they were involved in democratic institutions and "that the appeal to the group interest and the claims of different groups for power should result in a better co-operation and in maintaining that measure of objectivity which is still needed in academic matters. Instead, it ended in confrontation and in abandonment of former standards of academic decisions"²⁶⁸. Although sometimes a compromise could be struck, it would normally be that of the lowest common denominator; in other instances the boards would be completely paralyzed, or the time-consuming, harsh and occasionally violent confrontations ended with a reasonable or unreasonable majority decision. As the sessions of all boards or councils were open to the public, this exposed these meetings to further disturbance or disruption by radical elements. This generated a climate of pressure where decisions could not be taken rationally. The institutionalization of confrontation was much more compatible with the interpretation of "class struggle" between the "ruling class" of professors, who had conveniently been reduced to a minority position, and the "oppressed class" of students and junior faculty and non-academic personnel²⁶⁹.

What facilitated this state of affairs was that professors were generally handicapped in this struggle. Being individualistic and difficult to organize, they could do nothing but defend tolerance and pluralism against the attack of the new absolutistic doctrine. As many of them just wanted to get on with their job of teaching and research, instead of being perpetually molested by university politics, they were

physically and psychically ill-equipped to deal with the situation. They were fewer in number and they were weakened by heterogeneity of interest. There were radical professors as well and the assumption that professors would vote as one on vital matters proved to be incorrect. What exacerbated the situation was that there were few if any German university scholars with a Marxist or other "dominant" point of view who were prepared to stand for academic freedom, tolerance and qualification by achievement²⁷⁰.

Although the majority of the students did not support the radical student movement, they were in a weaker position. The opponents of radicalism only had some remarkable gains where vital interests of the majority of students were endangered by permanent disruptions of lectures and examinations and strikes. On the whole, however, they could not compete with radicals and could not develop a positive platform of their own in university politics. They constituted the silent majority that weakly consented to what the radicals advocated. Moreover, they did not want to be seen to be on the side of the "Establishment". In the election of the student leadership only a few students voted and mostly the activist ones²⁷¹. In some universities the combination of democratization and the introduction of a presidential system proved fatal for the development of the university or academic freedom. The election of supporters or sympathisers with the radical movement was almost assured. This led in some cases to the election as presidents of young assistants with unfinished doctoral theses and without administrative and

academic experience. They tended to form a generally leftist administration bent on appeasing radicals²⁷².

The hope that the legislative reforms and consequently the participation of radicals would eliminate violence proved to be unfounded. Violence and unrest continued albeit to a limited extent. These included the disruptions of classes and examinations and of board or council sessions. Sometimes these resulted in teaching off campus, even in private houses. There were also some physical attacks against professors and students who wanted to attend lectures or who attempted to build a non-radical organization. The weak reaction of the administrations towards organized pressure made it seem profitable for those who wanted to push through their goals through violence. The disciplinary committees of democratized universities, were also democratized and became totally ineffective. This further encouraged violence and a state of lawlessness²⁷³.

The prevailing political climate also influenced appointments. Appointments were not made on academic grounds only but on political ones. The applicant's political orientation or affiliation would predominate even though sometimes councils would pretend that the decision was based on scholarly qualifications. Almost every important appointment led to months of conflict and countless meetings. Younger applicants would be tested in hearings on their "quality as appeasers", and subjected to questioning which had nothing to do with their subject or their teaching competence²⁷⁴. Where this

method of decision making did not serve political ends, it tended to promote mediocrity²⁷⁵.

As the radicals opposed the principle of achievement and disciplined work as a principle of capitalist repression, and enforced adaptation or as a means of perpetuating inequalities, examinations were therefore discredited or it was advocated that they be simplified. A thesis had to become a collective paper with no way of ascertaining individual achievement. Requirements had to be decided upon by democratized councils with non-graduates voting. These had a vested interest in lowering requirements. All these contributed to the lowering of academic standards²⁷⁶.

Free academic discourse which is the essence of academic freedom was stifled by emphasis on Marxist theory and literature. Thus dogmatic indoctrination took the place of scholarly instruction²⁷⁷. There was also emphasis on the "relevance" of one's research, discipline and topics. The radicals also sought to make all teaching conform to the labels of "liberation", "emancipation", "dialectic critiques" and so on. Those who espoused these were influential in the committees on reform of the curriculum. As a result scholarship could not flourish in this atmosphere. "The struggle for the prerequisite of scholarships and academic freedom; endless sessions in the large number of committees with at least one caucus for preparation; frequent confrontations, intimidation and stress" all meant an immense waste of time and energy and preoccupied every scholar during

term time²⁷⁸. An unfortunate consequence was often that once an institution has been totally or almost captured by radicals, many great scholars, especially among the older generation, tended to withdraw from active participation in the struggle for academic freedom²⁷⁹.

Hitherto autonomy had been an instrument for securing academic freedom, that is freedom of individual scholars and teachers and of the institution from social, political and ideological pressures. But autonomy ironically came to be used to restrict this freedom and to forestall government intervention to uphold this freedom. Whereas radicals had previously opposed the traditional idea of the university as an ivory tower and had advocated a re-orientation towards active involvement with the changing world, they now attempt to establish a new ivory tower of their own "painted red". While they talked about the responsibility of a university for a democratic society, they did not mean the existing society, but their own idea of the "society of the future". They espoused an elitist educational dictatorship where universities would be the driving force of social reform regardless of professional standards and the scholarly pursuit of truth. Having styled themselves as an avant-garde, they considered themselves as the spokesperson of the hidden "true" consciousness of the masses, which they regarded as having been hitherto manipulated in the interest of oppression. It is for this reason that they claimed autonomy from parliament and society. "A university based upon the ideal of academic freedom, which includes the freedom to criticize society as it

is now, is nevertheless part of the democratic system and has its responsibility for society. Radical democratization destroys not only academic freedom as an individual right but this responsibility for society in its present form also. It is the emancipation of the self-appointed 'democrats' from real democracy"²⁸⁰.

This development has been regarded as dangerous in the long run because it would lead to the decline of scholarship or scholarship would be given an ideological slant in the service of the pretended "objective interest of the people" or the "society of the future"²⁸¹. It was for these reasons that in 1970 an association known as the Bund Freiheit der Wissenschaft (Association for Freedom in Science) was established. Although it was regarded by some as reactionary, it saw itself as having the purpose of defending academic freedom, countering pseudoreforms and promoting the implementation of a reasonable and necessary reform. Being a non-partisan organization with members from all democratic political parties, it consisted of university teachers, assistants, students and concerned citizens from academic and non-academic professions. There were also other similar organizations with which it co-operated. Although some of them were to the right, the truth of the matter is that many people had become tired of the disruptions and anarchy and felt that order and discipline had to be re-established. The attempt was to inform the public about the "mess" and the dangerous tendencies in universities and schools. These organizations had to lobby in the legislature, and to organize

resistance within single universities where necessary. This swayed public opinion and to a large degree influenced politicians²⁸².

5.4.4 Turning point

A turning point in the legislative reform process was reached by the decision of the Group University Case²⁸³. In 1971 the Lower Saxony had changed its system of governance for higher education. The legislature of Lower Saxony had conferred on certain non-professional groups within the university who were not entitled to professional status. At some major universities, for instance, including Göttingen University, the academic council was to consist of twenty-four professors, twenty-four research assistants, twenty-four students and sixteen non-academic employees. Other collegial bodies within the university were similarly organized.

About 398 professors from Lower Saxony claimed in a constitutional complaint that the new rules of university governance encroached upon the freedom of teaching and research in violation of article 5(3)(1) of the Basic Law. Federal and state educational officials filed briefs in support of the statute, while the West German Rector's Conference and other faculty organizations were arrayed against it. The latter in alliance with the professoriate, argued that the inclusion of insufficiently qualified persons in the governing councils of the university threatened the

faculty's pre-eminent position as the decision-making authority in the areas of science, research and teaching.

In December 1972 the Constitutional Court presided over three days of oral argument in the case. The court decided that in questions of the appointment of professors and in questions of teaching, professors must have a majority; in questions of research, a "sufficient" majority; and that non-academic staff should have no vote at all in such matters. The university councils, which elect the president, and enact bylaws, and university senates are not bound to such a restriction : a 30 percent minority of professors there was thought to be constitutional.

In coming to the conclusion the Constitutional Court had to take into account a number of factors. It is important to consider these in some detail²⁸⁴. In the opinion of the Constitutional Court, the right contained in article 5(3) to engage freely in scholarly activities is a right which the state is bound to respect. Everyone engaged in science, research and teaching enjoys a negative right against state encroachment upon the discovery and dissemination of knowledge. The world of scholarship is one of personal and autonomous responsibility for the individual scholar, and the state is not entitled to dictate in this realm. The court further contended that article 5(3) protects no single conception or theory of scholarship but rather every form of scholarly activity both in the interest of the individual scholar's self-realization and for the benefit of society as a

whole. For this reason the state is obliged to defend a system of free scholarly inquiry and affirmatively to provide for an institutional framework in which such inquiry can be carried out.

The Constitutional Court pointed out that the provisions of the constitution were particularly important because without a satisfactory institutional structure and corresponding financial support, which only the state can provide, it would be difficult to have scholarly research and teaching in broad areas of scholarship and in particular in the field of natural science. For this reason the individual scholar has a right to state support, including that of an organizational kind, necessary to adequately safeguard his constitutionally protected sphere of freedom because only such support enables him to engage in scholarly activity. This, however, did not mean that academic freedom could be achieved only at German universities of a traditional nature or that it prescribed how scholarly activity in universities is to be organized. The legislature had a discretion within certain limits, to organize universities in conformity with today's social and sociological realities.

The court recounted the history of the German university and its tradition of faculty self-governance. It found that in spite of its increasing dependence upon the state, and the many changes in university structure brought about by the state in the last two centuries, the Humboldtian principle that research and teaching should remain free of government

influence has been a steadfast and sacred pillar of German academic life. The court found the principle of academic self-governance to be rooted in early nineteenth-century university statutes as well as in various national and state constitutions. States reserved the right to oversee the appointment of university professors, the court noted, but this traditional practice seldom interfered with the essential autonomy of the scholarly enterprise or the self-governance of the university.

Although in the area of the university organization the legislature enjoyed considerable leeway in shaping university policy, this discretion is driven and limited by the right to freedom secured by article 5(3) and the value judgment it contains. On the basis of the constitutional consideration, the court felt constrained to assess the organizational features of laws dealing with institutions of higher learning by determining whether and to what extent they favour or impede either the basic right of every individual scholar to research and teach freely or the functional capacity of an institution dedicated to "free scholarship" to operate.

In line with this the court was of the opinion that the "group university" as such was not incompatible with the value inherent in article 5(3), as in itself it is not "alien to scholarship" to allow members of the university a say in its affairs because it does not necessarily lead to procedures and policies in opposition to freedom of research and teaching. Such a system may serve as an appropriate instrument for

resolving group conflict in the university and also as a means for mobilizing the expertise of individual groups for the purpose of reaching better decisions in the administration of the university. The Constitutional Court, however, refrained from deciding whether this system was the most appropriate form of university organization.

The court was of the opinion that academic assistants are as much entitled to the rights provided for in article 5(3) as regards research activities as university professors. The court further found that there was no constitutional objection to the participation of students in academic administration as long as and to the extent that they are participating in research and teaching. The involvement of non-academic staff in university self-governance, the court further contended, did not basically conflict with the constitutional pledge of academic freedom. This group includes experts whose practical experience can be particularly beneficial in the administrative area of universities. Academic activity at universities is largely dependent on these experts to an increasing extent. They create the technical and administrative conditions which make teaching and research possible and carry corresponding responsibility.

As the court further contended, university professors enjoy a special position in research and teaching. By virtue of their office and commitment they bear a particularly heavy responsibility for the smooth running and academic status of the university. They therefore hold a key position in

academic life. The court concluded that the state is under an obligation to keep this special position of professors in mind when it shapes the organization of academic administration. This task requires that due attention be paid to the value decision contained in article 5(3) coupled with the general-equality clause which prohibits treating those groups equally which are essentially unequal. For this reason the legislature required to confer on professors that degree of authority and responsibility commensurate with their scholarly mission in the light of the functions of the university. It must ensure an organizational framework that does not allow other groups to undermine the free scholarly activity of professors. While the legislature was at liberty to prescribe the voting strength of various groups in the decision-making councils of the "group university" it must consider the special position of university professors and ensure that their strength is proportionate to their status and functions.

Where teaching is concerned, the court went on, it is not only the university teachers who fulfil essential functions but also teaching and research assistants. Although their participation in discharging teaching tasks in the modern mass university is not always the same when compared on divisional, departmental and sectional levels, their share is nonetheless quantitatively significant and qualitatively important. When it comes to decisions directly affecting teaching, they possess the kind of factual knowledge and interest that readily justifies their rights to codetermination. As teaching also directly affects the interests of students, appropriate

decisions can often be reached only if the experiences and arguments of both teachers and students are taken into account. There are therefore no constitutional objections to the participation of student representatives when deciding such issues. The unrestricted participation of non-research and non-teaching staff in decisions relating to teaching, however, cannot be justified by any of the aforementioned considerations. For this reason the legislature must guarantee that within the framework university teachers retain the degree of influence commensurate with their position in the area of teaching.

When determining the extent of codetermination by various groups in matters directly concerning research, one must use stricter criteria, the court argued. Decisions on research presuppose the ability to assess the current status of research in a given field and the urgency of an individual research project in the light of social needs, as well as the ability to understand clearly the technical, financial and personnel possibilities in individual areas of research. The responsibility which emanates from such decisions becomes particularly clear when large amounts of money are needed for expensive special facilities required by modern research or when research facilities are established or expanded. While research assistants cannot be denied the right to co-operate with specialists in making such decisions, and while the large number of students will not possess the qualifications necessary for participation in research, based on their level of education and qualifications, one cannot completely rule

out the fact that students contribute to some extent to these decisions. There are therefore no constitutional objections against allowing students a certain degree of codetermination, particularly because decisions affecting research may also have an eventual effect on teaching.

The value judgment of article 5(3) together with article 3(1) of the Basic Law, however, demands that university teachers retain the privilege of having a decisive influence in decisions concerning research directly. By virtue of their qualifications, functions and responsibilities, university teachers must be able to prevail against other groups in this special area.

The court concluded that in university councils concerned with teaching, professors are constitutionally entitled to at least 50 percent of the votes. In matters relating to research, however, the influence of university professors should be decisive. This meant, according to the court, that university professors must have substantially more than 50 percent of the votes so that they may be able to assert themselves against the combined opposition of other groups.

This was no doubt an extremely important case in reasserting the importance of academic freedom for professors. It has been regarded as a "classical example of judicial legislation of a kind not frequently encountered outside the United States of America"²⁸⁵. From a very general statement the Federal Constitutional Court inferred what has been legitimately

termed "a professorial charter". The court provided critical support for the standardization of university governance²⁸⁶. In assuming this activist role the court embarked on a course of judicial creativity with consequences which are potentially extremely far-reaching, not least for the court itself and the position of respect which it occupies in Germany²⁸⁷. In this way it became the single most important element in the university task environment with regard to the process of legislative reform²⁸⁸.

Whatever the merits or demerits of this decision, it was a reflection that some people felt that the democratization process had been taken too far and was sometimes remarkable. It was also an attempt to demonstrate that simple democratization may be inappropriate for the university. The university as an academic institution places a high premium on knowledge and expertise.

There were other rulings which emanated from the Constitutional Court which tackled head on the most controversial issues confronting German higher education. These included questions of criteria for admission the determination of classroom "capacities" and acceptable teaching loads and the government supervision of personnel policy. These rulings were subsequently translated into legally codified guidelines for the Länder governments as the 1976 Federal Framework Law for Higher Education (Hochschulrahmengesetz = HRG)²⁸⁹.

In the light of these developments, it is clear that the extension of the judicial approach of "politicized legalism" (Verrechtlichung) into the sphere of educational reform policy created the conditions under which the judicial branch of government emerged as the public's vehicle for political conflict resolution in Germany²⁹⁰. The term Verrechtlichung is used to embrace the combined effects of legal codification and courtroom interpretation of parliamentary statutes. It has been described as a process whereby the constitution is repeatedly invoked and its principles elaborated and interpreted in exhaustive detail. Such legalism is regarded as having the effect of channelling recurrent conflicts among political or ideological factions in many institutions²⁹¹. The institutions of higher learning were ordered to reform themselves, while Länder interference made self-organization first difficult, and later impossible. What was harmful to the concept of university autonomy was the fact that subsequent drafts of the Framework Law followed what were essentially political proscriptions which appeared in the opinions of the judges which accompanied the decisions. The draft proposals did not promote administrative effectiveness²⁹². When the Framework Law was passed in 1976 it became a political end in itself rather than a means to a more effective system of higher education²⁹³.

There is no doubt that the German experience had a profound effect on university autonomy and academic freedom. The student unrest, which was largely motivated by the feeling on the part of the students that they required greater

participation in the structures of governance, led to reforms that adversely affected university autonomy and academic freedom. The reforms led to the institutionalization of conflict so that university structures could not effectively take decisions. The Constitutional Court tried to ameliorate this position. But its decisions may sometimes be criticized as going beyond adjudication to legislation.

What is interesting is that what happened in Germany was not unique. Similar occurrences took place in the Netherlands²⁹⁴, France²⁹⁵ and Italy²⁹⁶ with similar results. A lesson to be learnt from these experiences is that not everything that comes with transformation through democratization is for the benefit of university education and in particular university autonomy and academic freedom.

5.5 AFRICA

5.5.1 Introduction

Although most of the African states have adopted universities modelled on western ones, African states in general have faced a crisis of democracy²⁹⁷. Although many of the political leaders have paid lip service to freedom and democracy, Africa has generally been characterised by authoritarian regimes and lack of freedom. Admittedly many of the African states have taken steps to move away from one-party states to multi-party democracy. But on the whole a culture of democracy and freedom has not developed in many of the African states²⁹⁸. If

the view is true that university autonomy and academic freedom can only thrive in a free and democratic society owing to the indivisibility of human freedom²⁹⁹, it is obvious that most of the African states cannot be expected to be the defenders of university autonomy and academic freedom.

Some of the African leaders have emphasized other expectations from universities than university autonomy and academic freedom. In particular they have emphasized that these universities should contribute to development. When it comes to university autonomy and academic freedom, these have been seriously limited. Universities in general have been characterized by political control³⁰⁰.

Some African politicians have expressed themselves on universities and academic freedom. Nkwame Nkrumah, speaking at a university dinner in 1963, said "There is, however, a tendency to use the words 'Academic Freedom' in another cause, and to assert the claim that a university is more or less an institution of learning having no respect or allegiance to the community or country in which it exists... This assertion is unsound in principle and objectionable in practice"³⁰¹.

Another African leader who was outspoken on the role of the university was President Julius Nyerere of Tanzania. "I know I am asking a great deal of the University of East Africa (he said in 1963). I am asking its members to be both objective and active, which is a difficult combination. What is more, I am asking this under circumstances in which I know that both

are liable to give rise to some misunderstanding with the government and people. This will be reduced if there is complete honesty, but courage and self-sacrifice may be demanded from all of us, including the University members. Because I cannot claim that I, any more than my colleagues, will never mistake honest criticism for unconstitutional opposition. Nor can I honestly promise that our need for national unity in our struggles ahead will never lead us into the error of abusing the nonconformist. I hope we shall not make these mistakes, but of only one thing am I quite certain. The basis of human progress throughout history has been the existence of people who, regardless of the consequences to themselves, stood up when they believed it necessary and said 'That is wrong; this is what we should do'... Members (of this University) must serve Africa as menials, collecting and disseminating the ... we ought to want. At the same time they must be torch bearers of our society, and the protectors of the flame should we, in our urgency, endanger its brightness"³⁰².

In 1966 he repudiated the notion that a university could operate in isolation from government or that there was an unavoidable clash with the government as though "Government is not concerned with truth". As he further put it:

"I fully accept that the task of a university is to seek for truth, and that its members should speak the truth as they see it regardless of consequences to themselves. But

you will notice the words 'to themselves'; I do not believe that they should do this regardless of the society"³⁰³.

President Nyerere was prepared to spell out the moral grounds of the academic's obligation to speak out and to say what he had discovered:

"The purpose of learning is the advancement of man. Knowledge which remains isolated from the people, or which is used by a few to exploit others, is therefore a betrayal. It is a particularly vicious kind of theft by false pretences. Students eat the bread and butter of peasants because they have promised a service in the future. If they are unable or unwilling to provide that service when the time comes, then the students have stolen from the peasants as surely as they had carried off their sacks of wheat in the night"³⁰⁴.

It would appear that this view implied that this remained true even if students returned to the peasant or his representatives in government, the kind of knowledge that they did not expect to be given and did not much like when they were given it. Moreover, it would appear that Tanzania did not have a place for a "freedom" which allowed a small elite to exchange privileged or unpopular truths among themselves"³⁰⁵.

Nyerere's speech at the inauguration of the University of Dar-es-Salaam, demonstrated a much more restricted view on the issue of academic independence than his previous speeches had done:

"Having made clear why we are establishing it, and what we expect from it, and having done our best to select administrators and teachers capable of fulfilling our intentions, we have then to trust those we employ and those we select to attend it. We can watch and warn. We can demand that they should explain what they are doing and why - and we can tell them to change if that is necessary! We can instruct the staff to examine themselves and their work every year - to conduct 'post-mortems' with the students at the end of every course... But we should be stupid to try to bind the University staff hand and foot, and move them like puppets. The University must be allowed to experiment, to try new courses and new methods. The staff must be encouraged to challenge the students and the society with new arguments, and to put forward new suggestions about how to deal with the problems of building a socialist Tanzania based on human equality and dignity. Further they must be allowed, and indeed expected, to challenge orthodox thinking on scientific and

other aspects of knowledge... Only by allowing this kind of freedom to our University staff will we have a University worth its name in Tanzania... For the University of Dar-es-Salaam will be able to serve out socialist purposes only if we accept that those whom we are paying to teach students to think, must themselves be allowed to think and speak their thoughts freely"³⁰⁶.

The reason for quoting extensively from the speeches of President Nyerere is because they demonstrate the general trend on university autonomy and academic freedom in Africa. Before independence black political leaders would be critical of the colonial regime and the lack of autonomy and freedom of universities. After independence they would adopt a conciliatory approach in terms of which they would expect greater harmony between the university and the government. But when the honeymoon was over, they would be much more intolerant to the freedom that universities have wanted.

It is for this reason that throughout the African continent post-secondary education institutions have erupted in protests, strikes and demonstrators. Students have risen against authoritarian regimes. African governments have often retaliated with closure, expulsions, imprisonments and even brutal physical force"³⁰⁷.

Academics on the other hand have attempted to keep the flame of academic freedom alive. A typical example is a symposium that was organized in Kampala, Uganda, on 2-29 November 1990 on the theme: "Academic Freedom, Research and the Social Responsibility of the Intellectual in Africa". The academics debated critically the following sub-themes:

- (a) The state and academic freedom;
- (b) Civil society and academic freedom;
- (c) The intelligentsia and academic freedom;
- (d) Donors and academic freedom; and
- (e) The social responsibility of intellectuals.

At the end of the symposium the African academics produced The Kampala Declaration on Intellectual Freedom and Social Responsibility. In its preamble the declaration states quite clearly that: "Intellectual freedom in Africa is currently threatened to an unprecedented degree" and in article 13 calls upon African states to take prompt and appropriate measures in respect of any infringement by state officials of the rights and freedoms of the intellectual community brought to their attention³⁰⁸. It will be instructive to have a closer look at a few African countries.

5.5.2 UGANDA

5.5.2.1 Introduction

Tertiary education in Uganda was influenced by the colonial system. Makerere University was established in 1922 originally as a technical school although in a fairly short time it had embarked on the offering of courses in Medicine, Agriculture, Elementary Engineering, Surveying and Teacher Education. It was the first tertiary institution in the whole of East Africa. No legal instrument specifically established Makerere as the highest institution of learning in East Africa as it then was³⁰⁹. This did not mean that Makerere evolved "naturally" or autonomously from the existing colonial educational programme. As a technical school it drew its resources mainly from the colonial government and offered courses that were approved by the colonial administration³¹⁰.

By the early 1930's the government had not yet formulated a distinct policy on tertiary education. It also did not see the need to make statutory provision for the functioning of the college. Higher education at Makerere and elsewhere in East Africa was still in its formative stages of development. In March 1929, the directors of education of the three East African territories agreed that Makerere be the centre of higher education in the region.

When a commission was appointed in 1935 to examine and report on higher education in East Africa, it gave further substance

to this decision. The commission examined the organization and operation of Makerere College, institutions or other agencies for vocational training connected with the college and the system of education from which students at the college were drawn. Recommendations were made on the development and administration of the college in the light of the general interests and needs of the committees from which future students might be drawn and the education needs of the women³¹¹.

The commission made several other recommendations concerning education in general and Makerere College in particular. These included that:

- (a) all post-secondary courses at the college and its associated institutions should form the "Higher College of East Africa";
- (b) the Higher College should have an autonomous governing body;
- (c) the principal and staff of the College be of "university type" and "university status";
- (d) professional courses in teacher education, medicine, agriculture and veterinary science continue; and
- (e) the College be developed as a centre for research.

Soon after the recommendations of the commission, an ordinance was passed by the governor to regulate the operation and development of the college.

5.5.2.2 The Makerere College Ordinance of 1938

The first legal instrument passed to regulate the operation of Makerere was designed to make provision for the control, administration and working of Makerere College. It clearly demonstrated that tertiary education was to be closely monitored and developed by the colonial state. The ordinance established an assembly of the College with a chairman appointed by the conference of East African governors³¹². Other members included the principal of the college, one appointee of the native government of Buganda, another from the Makerere College Union Society and two from the Academic Board. The remainder of the assembly was to comprise appointees of the governors of the three territories and the British Resident of Zanzibar³¹³. The main function of the assembly was to receive and consider the annual report and accounts of the council and advise the council on questions of general policy in regard to the conduct of the college³¹⁴.

The actual control over the administration and operation of the College was vested in a council that was established as a body corporate with perpetual succession and a common seal³¹⁵. The chairman was to be appointed by the secretary of state, on the recommendation of the governor, following consultation with the conference of East African governors of each

territory and the academic board. The main duties of the council were the management and control of the affairs, concerns and property of the College and to undertake that management and to exercise that control in accordance with the provisions of the ordinances and the directions of the governors, acting on behalf of the conference of East African governors. It also had to act at all times in a manner that appeared or was best calculated to promote the interests of the College³⁶.

The council had a duty to consider any advice offered by the College assembly, and where such advice was not accepted, to report the matter to the assembly and to the governor. Specific duties entailed the consideration and submission for approval to the governor of the annual estimates of revenue and expenditure; fixing the scale of fees and boarding charges; regulations regarding the terms of service, duties and discipline of the staff and the establishment of an academic board and boards of studies. All members of staff were to be subject to the general authority of the council and of the principal, although officers seconded from the government were to be disciplined by the governor. The principal was to be appointed by the secretary of state on such terms and conditions to be fixed in consultation with the governor and the council³⁷.

The dominant role played by the colonial and metropolitan state in the organization and control of the college demonstrated that the college did not have any academic

autonomy. The appointment of the principal of the college vested in the secretary of state as did the appointment of the chairman of the council. Frequent reference was made in the ordinance to the governor and the conference of East African Governors. Most of the duties of the council were overseen by the governor. In the constitution of the respective organs of the university college, government-appointees predominated³¹⁸.

In the amendment to the 1938 Ordinance passed in 1941, the situation did not change to any considerable extent. The 1941 Makerere College (Amendment) Ordinance³¹⁹ incorporated the office of secretary of state in the formulation of the conditions of service, appointment and dismissal of staff³²⁰. It also made provision for the secretary of state to remove the college principal on the recommendation of the council and the governor³²¹. One would have expected that as the College began to develop, measures would have been taken to allow it to function more autonomously of the state. On the contrary, the college had no autonomy. There was also agitation for freedom from colonial rule which was on the increase. The source of discontent was the growing awareness and agitation of the indigenous population. This also engulfed Makerere. As a result it was felt necessary that a firm hand be maintained over the College to deal with such indiscipline and the colonial state moved in directly and decisively to ensure that such control could be easily imposed³²².

It is interesting to note that there was no separation between the state and the university as was the case in Britain. This

shows that Britain was inconsistent in its colonial policy. She was prepared to do in the colonies what she did not do to its citizens at home. At the college for instance the representation of persons drawn from within the College was minimal. It ensured that state policy could on the whole be fully implemented in the operations of the institution (Ol-On 61). With the President as chancellor, the clearly political nature of his other office, revealed the absence of any independence between the state and the university³²³.

The 1949 Act, which replaced the previous legislation, was not different from it. However, it abolished the college assembly and made provision for the appointment of a visitor by the secretary of state³²⁴. The visitor was vested with the powers to revoke or amend section 7 of the Act relating to the membership of the college council after consulting the council and subject to the secretary's prior approval³²⁵. It also gave him general advisory powers.

The Act made the College council the main governing body of the institution with the governor as the remaining supervisory officer. There was also a marked reduction in the reference to the governor, the East African High Commission and the secretary of state. Although the secretary of state remained responsible for appointing the principal of the College, this was to be done after consultation with the visitor and the College council. He also retained the power to remove him, although this could only be for good cause and on the

recommendation of the visitor and the council³²⁶. The governor no longer featured in this action.

What accounted for this general relaxation of state control was that there was a general relaxation in the controls exercised by the colonial government over political and social life in the colonies in the post-war era. These developments coincided with the heightened agitation for liberation and self-government which commenced in the 1940's and epitomized by the Bataka Uprisings of 1945 and 1949. This led to the state adopting a "liberalized" attitude to social and political life in the colonies. Yet in the university governance the government appointees still predominated on the council, the activities of staff were strictly monitored and no African was appointed as a member of the council even though some were eligible³²⁷.

In 1950 Makerere College students started to read for external degrees of the University of London. Makerere had thus become a University College of London. At the administrative level, the 1949 Act was still in operation and there was no legal instrument that regulated the relationship between the two institutions. The formal link with London signified the attainment of maturity on the part of Makerere. In 1961 Makerere became Makerere University College as a result of the termination of the link with London due to the dawning of independence. In 1963 the University of East Africa was established, with Makerere, the University College of Nairobi and Dar-es-Salaam forming its three constituent colleges. The

1962 University of East Africa Act vested the institution with the responsibility for university education within East Africa and it required it to co-operate with the governments or other appropriate bodies in the planned development of higher education, and, in particular to examine and approve proposals for new facilities, new departments, new degree courses or new subjects of study submitted to it by the constituent colleges³²⁸.

The University was dissolved as a regional institution as a result of the growing economic crisis that confronted the three East African countries almost from independence. But even before the dissolution of the University of East Africa, steps had already been afoot to autonomize Makerere and make it an independent institution fully accountable to the government of Uganda.

5.5.2.3 The post-colonial control of Makerere University

On 12 January 1970, Ugandan President Obote set up a Visitation Committee to report and make recommendations on the status and direction of the education offered by Makerere at the time. Before the completion of the visitation report, parliament assented to the Makerere University (Interim Provisions) Act on 29 June 1970. The preamble to this Act stated that until the submission of the Visitation Committee Report, it was advisable that the law of Makerere University be delayed but interim provision should be made to establish Makerere University to enable it to carry on its educational

and other functions in the interim period. When the Makerere University, Kampala Act was passed on 5 October 1970, it resembled the earlier Interim Act in many ways. This implied that the Visitation Committee was set up primarily as a cosmetic measure and that the government had already decided on the type of institution it wanted as well as the measure of control to be exercised over it³²⁹.

5.5.2.4 The Makerere University, Kampala Act 1970

A characteristic feature of the 1970 Act was the introduction of extensive state control over the institution similar to the first colonial statute which governed Makerere. The Act made the President of the Republic automatic Chancellor of the University³³⁰, with exclusive powers of appointment of the Vice-Chancellor, his deputy³³¹ and the chairman of the university council³³². Extensive reference was made to the Minister (of education) in relation to the establishment of constituent colleges³³³, the appointment of the secretary and registrar³³⁴, the appointment of faculty deans³³⁵, professors and institute directors³³⁶ as well as the approval of any statutes made by the council for the government control and administration of the University³³⁷.

The minister could, if he deemed it to be in the public interest to do so, direct any university control over Makerere. This was in line with the rise of extensive dictatorial tendencies in the administration of Obote commencing from the middle of the 1960's. The powers given to

cabinet ministers gave the ministers virtual control over parastatal organizations and educational institutions. Makerere was therefore brought firmly under governmental control. This was a serious violation of its academic autonomy and freedom³³⁸.

The dictatorial powers of the President were reflected in his being automatic Chancellor of the University. This was not simply a ceremonial position, although he could also confer degrees, but he was also empowered to appoint the Vice-Chancellor on such terms and conditions and for such period as the President might determine³³⁹. Thus an office that was supposed to be primarily academic and professional, was made highly political. The University was made a subsidiary of the government and this placed a check on the freedom of expression of both staff and students not to mention the control of the administration. For this reason the President had to intervene into every major crisis affecting the University. The Vice-Chancellor had therefore no fixed tenure of office. He could be removed at the pleasure of the President. Moreover, he could not take any stand which might not be liked by the government. Whenever there was a crisis on campus he would wait in trepidation. At the same time within the campus he would be a power unto him/herself and there existed no checks and balances to curtail the possible abuse of power³⁴⁰.

5.5.2.5 The Makerere University, Kampala Act (Amendment)
Decree, 1975

The 1975 decree which amended the 1970 Act was a curious piece of legislation in that while it appeared to lessen the direct control of the state over the institutions, it also curtailed the staff and student organisation and representation. The reduction of ministerial control was seen in S5 concerning the establishment of constituent colleges which had then to be done after consultation with the council and the senate. Section 7.4 provided for consultation with the council and the senate. Section 7.4 provided for consultation with the chairman of the council in the making of recommendations to the President on the appointment of a member of staff to act as Vice-Chancellor. The amended s8.2 still provided for the appointment of the secretary and registrar by the Minister, but acting on the advice of the appointments board on such terms and conditions as the Minister might determine. Similar amendments were made to sections 12.1 concerning the appointment of faculty deans and 12.2 on the appointment of professors and directors.

The curious nature of this decree is evident in the amendment of s22 concerning the constitution and powers of the appointments board. The new section vested the board with the responsibility "... except as otherwise provided... for the appointment, promotion, removal from service and discipline of all officers of the University". The exception in fact defeated the rule as the power over appointments and

dismissals of senior academic and administrative staff remained vested either in the President, the Chancellor or the Minister. Moreover, the nine members of the board were still to be appointed by the Chancellor, with no representation from within the University³¹.

The overtly fascist ideology of the Amin regime was reflected in the decree. It removed reference in section 9 of the Act concerning the membership of the council to "two members of the academic staff (elected by the Academic Staff Association)" and instead substituted "two members of staff elected from amongst themselves jointly by the academic staff and the senior administrative staff". The effect of this amendment was to make legal Amin's previous outlawing of the Academic Staff Association, on the grounds that the association was engaged in politically divisive activities. It also combined the representation of the academic staff with that of the senior administrative staff thereby reducing such representation to an even smaller figure than before. The decree thus confirmed the prevailing government attitude that academic freedom was a privilege and not a right. The same view was apparent in the amendment of section 16 concerning the membership of the senate which deleted reference to student representation³².

The Minister's general powers of direction were greatly strengthened by the amended section 35 which specified that the Minister might give directions on any matter to a university authority as to the exercise of any powers and the

performance of any functions under the Act and the authority would be compelled to comply with such directions.

The situation in Uganda was such that politically it was impossible to challenge the authority of the state. Anyone who did so, did so at his own peril³⁴³. The formal structures of staff and student organizations were outlawed having no vehicle for the expression or communication of any grievances. The 1976 invasion of the campus by armoured troops made ugly face of the authoritarian require clear³⁴⁴. The government was characterized by the abuse of power and the utter contempt for the rule of law. This demonstrated that where there is gross violation of the civil liberties of the ordinary citizen it is impossible for academic freedom to flourish because human freedom tends to be indivisible³⁴⁵.

In spite of the take over by the National Resistance Movement (NRM) the position of the University and academic autonomy did not improve to any significant extent. Although the NRM relaxed some of the more draconian controls over the university when the staff and students challenged the government on fundamental issues, relating to governance and the economy, the government reacted by suppressing the students and staff³⁴⁶.

The confrontation between the university and the government has been a reflection of the socio-economic and political realities of Africa. For many of the African countries tertiary education has been regarded as a luxury. What has

been of primary importance is primary and secondary education. Issues like academic autonomy and freedom have therefore been treated with nonchalance³⁴⁷.

At a symposium on Academic Freedom in Kampala in 1990 many questions relating to legal control over the University were raised and debated. The conclusion was that to the extent such control must exist, they must be based on dialogue and democratic practice. The removal of the rights of association and assembly to students and staff, the dictatorial control exercised by the university council and excessive emphasis on discipline, without due regard to the grievances of students and staff are only a recipe for conflict. They only heighten the undemocratic nature of those controls especially the use of armed forces on the campus³⁴⁸. "The ultimate conclusion is that draconian laws in place at tertiary institutions cannot work, if the objective is to secure the acquiescence of the university in the operation of the neocolonial state, whether that operation is characterized as 'development', 'modernization', 'science and technology', or the fight against 'poverty, ignorance and disease'. Nothing short of the transformation of the character of the neocolonial state will lead to the positive transformation of the society over which it governs"³⁴⁹.

5.5.3 ZAMBIA

5.5.3.1 Introduction

The Zambian higher education system developed against a colonial and post-colonial backdrop. It was characterized by limited provision of facilities and restrictive access to apprenticeship training. For a long time Zambia (then Northern Rhodesia) shared the services of a common institution, the University of Rhodesia and Nyasaland with Southern Rhodesia and Nyasaland. Owing to colonial rule university autonomy and academic freedom were not a major priority³⁵⁰.

Upon independence in 1964 the Zambian government set out to reform the previous restrictions and deprivations in the higher education system. It was decided to establish a university in Zambia and to reorganize technical education and vocational training. In 1966 the University of Zambia was opened³⁵¹.

Zambia entered its independence as a pluralist system dominated by the ruling United National Independence Party (UNIP). However, pluralism was short-lived and in 1973 a one-party political system was established by UNIP after a national referendum³⁵². The introduction of a one-party state meant the curtailment of civil liberties which had a negative impact on academic autonomy and freedom.

5.5.3.2 The University of Zambia Act 1972

The University of Zambia was established by the Act of 1965. In 1972 a new Act was enacted. It provided for the appointment of the Chancellor by the President on the advice of the council³⁵³. Provision was made for the appointment of the Vice-Chancellor by the Chancellor on the advice of the council. The Vice-Chancellor would be the academic and administrative head of the university³⁵⁴. The tenure of office of the Vice-Chancellor would be determined by the council³⁵⁵. These provisions demonstrated that there was no clear autonomy for the university as the President was responsible for the appointment of the Chancellor who in turn had to appoint the Vice-Chancellor.

The Act also provided for the establishment of the council responsible for the general control and supervision of the property and policy of the university³⁵⁶. The council consisted of various members the majority of whom were appointed by the President³⁵⁷. This also demonstrated the political control over the university through the President's appointment of the majority of the members of the council which is the policy making body of the university.

The pattern of political control over the university was similar to other one-party states in Africa. The tendency in Africa has been the dominance of the ruling party and the consequent one-man rule.

5.5.3.3 The University of Zambia Act of 1987

The University of Zambia Act of 1987 provides for the establishment of the university and senate to administer the affairs of the University. The council members are appointed by the chancellor who is also President, on the advice and recommendation of the relevant authorities. Members of council are drawn from the university community, local authority area, parliament, selected ministries, the international academic community and the Zambian public. The council is responsible for the general control of the university³⁵⁸.

The senate is the academic governing body. It organizes, controls and directs the entire academic life of the university in teaching, research, assessment and general standards of education. Senate members are appointed mainly from the university community. Deans and directors are members. Other members include the librarian, dean of students and professorial and nonprofessorial academics. Non-university members are few and are appointed by the Vice-Chancellor³⁵⁹.

A collegial system of authority and participation forms the basis of the administration of the University. Formal committees at different levels allow wide participation by both academic and non-academic staff in the decision-making process. The University Act allows membership of most of the

key bodies and their standing committees by academic and non-academic staff.

Academic staff are represented on the University council and its standing committees, the senate, boards of studies and other university and department-based unit committees. Non-academic staff are represented on the University councils and all their subcommittees except the appointments, finance and disciplinary committees³⁶⁰.

Despite this collegial system of administration, there is virtually little academic autonomy. This is evidenced by the dominant position played by the President and the fact that the majority members of the council are government appointees. There is therefore no clear separation between the government and the University. This is not surprising because Zambia was for a long time a one-party state. One-party states have been characterized by an authoritarian style of government which dominates all sectors of society including the tertiary-education sector.

Admittedly since the 1980's and especially after the collapse of communism in many Eastern European countries, UNIP came under severe criticism within Zambia. The pressure on UNIP mounted to such an extent that in 1990 Zambia abandoned the one-party for a pluralist democracy. Despite these political changes a culture of democracy has not completely evolved and as a result academic autonomy and freedom have not flourished.

5.5.4 ZIMBABWE

5.5.4.1 University autonomy and academic freedom in general

5.5.4.1.1 Historical background

The origins of the University of Zimbabwe can be traced back to the years of World War II, when a group of white business and professional people primarily interested in an institution providing university education for white Rhodesian youth, formed the Rhodesia University Association. In addition to this group, there was also a much smaller group of white liberals, mainly missionaries and clergymen, who were interested in providing university education for Rhodesian blacks. The latter had the support of the British government, which was concerned with the provision of higher education for blacks in the three territories of Central Africa, namely, the then Northern Rhodesia (Zambia), Southern Rhodesia (Zimbabwe) and Nyasaland (Malawi). The Rhodesia University Association later promoted a bill in the Southern Rhodesia parliament establishing an inaugural board, which was to lead to the formation of the university³⁶.

When the University College of Rhodesia was established in 1955, it was therefore a product of two distinct and conflicting forces or impulses- "the impulse of white Rhodesians' nationalism, which wanted to have a university of its own, and the impulse of Colonial Office thinking about the provision of higher education for Africans in Northern

Rhodesia and Nyasaland"³⁶². This was further influenced by the fact that local Rhodesian whites were not able to raise the necessary finance to start a university without compromising with the desire of the colonial office that Africans be allowed to attend it. The fact, however, that the "A" level was a requirement for entry into university was regarded as a sufficient bar to prevent a lot of Africans to enter the university for a long time³⁶³.

There is therefore no doubt that the issue of university autonomy and academic freedom was not uppermost in the scheme of things of the university college³⁶⁴. The international backers of the university college were also aware that there was no local grouping committed to university autonomy which could guarantee the new institution freedom of action. There were those among whites who felt that a Rhodesian university should be a proper university and consequently like others in the anglophone world. There was also a measure of support for this view among certain politicians although others took this with a grain of salt. Nonetheless they took advantage of these views with a view to giving the new university an elaborate and artificial protection. A royal charter dated February 1955 brought the infant university into legal existence as an autonomous body with all powers of the university college vested in a council charged with the duty of governing the institution. The charter provided for the creation of an academic board to control, regulate and supervise instruction, education and research, subject to review by the council. Power to appoint staff was vested in

the council on the advice of a selection board drawn from the academic staff. The council itself consisted of ten academics, seven nominees from government bodies, and seven nominees from the business and professional sectors. Its royal charter and its affiliation with the University of London were aimed at protecting both academic freedom and academic standards against local pressures³⁶⁶.

The outcome of all this, however, did not please anyone. One newspaper commented as follows: "The University College of Rhodesia and Nyasaland has been an institution foreign to this land right from its very inception. It has been conceived not to help this country as we know it, but to promote it to something outlandish, way out of recognition. It has its head in the clouds, its soul in London, and its heart heavens knows where"³⁶⁷.

The University was started at a time in Rhodesian history when the liberal, assimilationist, meritocratic perspective in white Rhodesian politics, always present but never ascendant, was perhaps at its most favourable position to make its might felt. "The confluence of its aspirations at this point in time with the international influence brought to bear by the British Government and other grant-awarding agencies produced what may perhaps be its single most significant and enduring accomplishment - tradition, protected against some of the more flagrant particularisms of its environing society by its Royal Charter"³⁶⁸.

The University College was therefore exposed to conflicting expectations. Whites did not feel it met their needs and there were extremely few Africans in it to have any meaningful impact on African society. Some valued the protection offered by the royal charter and the association with London as the threats to academic freedom posed by the prevailing political climate could be foreseen. Nonetheless, the views of white society had an influence on the university. This was evidenced, among others, by the withdrawal of the offer of appointment by the principal Dr Walter Adams, to Dr Bernard Chidzero who was to have been the first African lecturer, when he discovered that he was married to a white woman. There were other instances like the drying up of municipal grants to the university if the extra-academic activities of the staff with a political inclination were publicized³⁶⁹.

5.5.4.2 The era of Unilateral Declaration of Independence

The conditions that favoured an assimilationist, meritocratic voice in white Rhodesian politics did not endure. In 1962, a government came to power committed to the reaffirmation of the racial principle as a fundamental factor in the structuring of Rhodesian society. From then until the final overthrow of the government nearly 20 years later, the university was thrown on to the defensive, regarded as a "Trojan horse in the midst of a country fighting for its existence as a white state"³⁷⁰. It managed to survive, with considerable political difficulty through various strategies. These included a degree of independent funding from overseas sympathisers; the fact that

it was the country's only provider of trained people in certain fields, and the recognition that its very existence was an important symbol of international legitimacy for a government which needed it. "Its existence was a major legitimating factor for the state, the strength of which paradoxically was in direct proportion to the degree to which it was permitted to operate in its universalistic mode". This meant that the state of Rhodesia, at the time under deep international suspicion of not being free, not being multiracial, and indeed of hardly being a state at all, was able to say to a sceptical world, "we have a free, multiracial international university", and acquire some legitimacy from doing so³¹.

Because of the prevailing political situation, some academics felt that they could do something and that the best way of doing this was to join the African nationalist parties. But they also appreciated that if they were attacked, searched or banned from meetings or even deported for this, what would have happened to them would have been the violation of civic liberty and not academic freedom. Although some politicians argued that academic freedom was untouched this was highly doubtful. When some members of the academic staff became involved in a sit-in campaign against the colour bar in Salisbury, the university authorities were extremely critical of this, as they did not see it as an expression of academic freedom³². This criticism is evident in a letter which the Principal wrote to these members:

"The College Council is worried by the effect on the College of the publicity aroused by the political activities of some members of the staff... The problem is not one of academic freedom. If it were, the Council would not hesitate to resist any attempts to restrict the legitimate academic activities of any member of its staff, whether in teaching, research or publication. The problem is whether and how far a member of the academic staff, in his personal capacity as a citizen, should feel himself free to engage in public political activity. Some classes of citizen are by rule or custom debarred from any such activity; members of the civil service and judges are examples... The Council sees no reason for extending this... to university academic staff... On the other hand there may be some limit to the extent or kind of public political activity that is appropriate for a member of a university staff... In the present, controversy has led to hostile criticism of the College itself, and to some damage to its interests, in the loss of prospective students, in the loss of financial support, and the loss of financial support, and in the creation of doubts in the objectivity of its teaching and research... Membership of a university (involves) a

special obligation of discretion and responsibility in both public statements and actions. The obligation is two-fold, an obligation to speak and to lead, and an obligation to weigh with scrupulous care the effects of speech and action. Membership implies a loyalty to the interests and strength of the university institution itself"³⁷³.

The university was generally regarded as a threat to the racial particularism of the state. The white Rhodesian solution was not to do away with the university, but to "discipline" it, either by placing it under much stricter government control or by making it all-white, with the possible creation of a separate black university³⁷⁴.

Although the university was regarded as autonomous, there were various avenues through which the government could exert pressure on the university. The most pervasively important of these strategies was the increasing dependence of the university on government funding. After UDI, access to British government funding was almost completely cut off, as was access to UNESCO funds and personnel. Consequently the university became almost entirely dependent upon the Rhodesian government for both operating budget and development capital. A further important control in the hands of government was its ability to prohibit the entry to the country of university appointees or prospective students and to detain or deport

members of the university who incurred its displeasure, a prerogative the government used frequently during the history of the university. The government could also exercise a degree of control on student intake by its allocation of scholarship and bursary funds and, indirectly, could influence the university's curriculum development and the subject choice of black students by its influence on the racial aspects of the occupational structure into which black graduates would move. Access to research data could and was often denied to scholars, although it must be conceded that the government's performance in this regard was better than that of many African countries. Censorship laws were enacted which inhibited in some cases the publication of the results of research and analysis and restricted access to the range of academic literature necessary for full debate. All these factors, coupled with veiled threats to intervene in the university's affairs to "maintain public order" had a pervasive subjective effect in inhibiting the performance of the university's critical role from the universalistic perspective. Most of these pressures were, however, indirect and not direct threats to the university's autonomy. The response of the council was partly determined by this fact, partly by the composition of the council and partly by the means available to the council to counteract them³⁷⁵.

The council's membership consisted of government nominees, academic nominees and nominees of business and professional interest. In essence the council espoused the assimilationist perspective of the "liberal" white Rhodesian element of the

fifties. Committed to a university of international academic standard on the British model, to which access could be provided on a meritocratic basis, the council was strongly disposed to defend the university's formal autonomy. It used various strategies to achieve this purpose³⁷⁶. In the difficult years the university manoeuvred on many different fronts to "manipulate its resources in the bargaining process to maintain the degree of autonomy necessary to perpetuate the universalist, rational ethos of the university tradition"³⁷⁷.

Certain bargaining strengths allowed the university a degree of autonomy and to exercise a measure of academic freedom not anticipated or intended by the state. It maintained and implemented its prerogative to admit students solely on the basis of academic criteria. In its teaching and research it maintained a constructively critical universalistic perspective, subjecting to the test of rationality the goals and values of Rhodesian society. It provided its students, black and white, with an alternative communal context in which different racial perspectives could be evaluated on the basis of interpersonal contact as well as by intergroup debate³⁷⁸.

5.5.4.3 The post-independence era

From 1980 onwards, the successor to the University of Rhodesia, the University of Zimbabwe, was operating in a different political climate in which the black African majority which now formed the government was demanding radical changes in the university³⁷⁹. The price of survival under the

previous white government had, among other things, been a pace of Africanisation of academic staff that was felt to be slow, and although black students had continued to be admitted, it was not in proportion to the ethnic make up of the population³⁸⁰. While the university maintained the principle of non-racialism and often defended it, the pace of Africanisation seen in terms of student intake and staff appointments, was for a variety of reasons, regarded as slow. This was a cause for much tension and suspicion between black and white staff. This was so even though over the years there had been co-operation and intermingling. Under a repressive minority white government the university's meritocratic values had been perceived as an instrument for preserving black African participation in a multi-racial university, but under a representative African government the university would have to pay attention to the need to increase this on a racially sensitive and selective basis³⁸¹.

In September 1980, a former dean of the law faculty at the University of Dundee, Walter Kamba, was appointed vice-chancellor at the University of Zimbabwe. The term "Africanisation" was replaced with "Zimbabwenization" which required that non-Zimbabweans be appointed to permanent posts only if no appointable Zimbabwean was available. At this time virtually all departmental headships were in white hands. Kamba undertook that current contract and tenure arrangements would not be affected. At this time a three-phase policy modelled on the American affirmative action was implemented. This meant the removal of discrimination, equalisation of

opportunity and redressal. Kamba's policy involved a decisive shift of departmental control into black hands and a review of staff appointment procedures³⁸².

Having implemented a redressal Kamba next moved on the departmental issue. University Ordinance 25 of 1982 had separated professional status from departmental administration which was delegated to the department chairperson appointed by the Vice-Chancellor. The chairpersons did not have to be full professors. In January 1983, Kamba appointed a large number of blacks to department chair posts, although in a number of departments white also were appointed. As "chairperson" implies consultation in a way that "head" does not, this was perceived as a move towards democracy. It also had the effect of Africanising the middle echelons of the university and creating the perception among black staff that control of the university had effectively passed into black hands.

Next, Kamba addressed the prevalent view that whites had been appointed above their qualifications, and blacks below. In 1982 he appointed a Vice-Chancellor's working committee to review salary notches, grading and tenure issues. The black majority in the committee, gave more weight to academic excellence, less to diffuse experience criteria, and advocated tougher promotion criteria. A 1983 ordinance formalised the committee's findings by providing a review channel for staff who felt aggrieved. In 1985 there were 35 applications for review, four from whites and of these, seven were promoted. The committee's review gave greatest weight to the most

traditional academic criterion, namely, research publications³⁸³.

5.5.4.4 The Zimbabwe Act of 1982

The Zimbabwe Act of 1982 replaced the previous charter of the University of Rhodesia. The objects of the university were regarded as "the advancement of knowledge, the diffusion and extension of arts, sciences and learning, the provision of higher education and research and so far as is consistent with those objects, the nurturing of the intellectual, aesthetic, social and moral growth of the students at the University..."³⁸⁴.

Section 5(1) of the Act prohibits discrimination in the membership of the university on the basis of political belief, race, colour, origin, nationality or sex in the employment of any person as a member of the academic or administrative staff or employee and in the admission of students. Section 5(1) provides that nothing in this sub-section will be deemed to prevent preference being given in the making of appointments and promotions or in the admission of students to citizens and residents of Zimbabwe.

5.5.4.5 The university-government relations

The constitution of the university especially the senior membership and the composition of the council demonstrates that there is no clear separation between the government and

the university. It clearly shows more overt government control than was the case before. The President of Zimbabwe is, for instance the Chancellor of the University. In this capacity he is the Chief Officer and not only has power to preside over any assembly or meeting held by or under the authority of the university³⁸⁵, he also has power to appoint the Vice-Chancellor after consultation with the Minister of Education and the council. This appointment is a contract appointment³⁸⁶.

The Vice-Chancellor is the chief academic, administrative and disciplinary officer of the university, with general responsibility for maintaining and promoting the efficiency, effectiveness and good order of the university³⁸⁷. In this capacity he has wide powers to discipline staff and students, to control the admission of students and to suspend or dissolve any student organization³⁸⁸.

Provision is also made for the appointment of one or more Pro-Vice-Chancellors by the council with the approval of the Minister. The Pro-Vice-Chancellor has such duties and powers as may be delegated to him by the Vice-Chancellor³⁸⁹.

A disturbing feature of the Act is the composition of the council. The council is dominated by government nominees. Not only as the Chancellor, Vice-Chancellor and Pro-Vice-Chancellors ex officio members of the council, but a majority of the members are appointed by the Minister³⁹⁰. This therefore demonstrates that there is no clear separation

between the government and the University. Although it could be argued, that there is no harm in such a relationship, there is no doubt that it has a negative effect on university autonomy and academic freedom as has been demonstrated in other African countries.

No doubt when the new black majority government took over, some, especially among black academics, felt that there would be no harm in having more government intervention into the affairs of the University. After all it was a democratically-elected and therefore legitimate government which also had a mandate to remove discrimination and expedite the process of transformation. They undoubtedly believed that government intervention would always be benevolent. But this would not always be so.

A number of incidents in 1988 and 1989 on the campus of Zimbabwe led to direct government intervention into the University. A crackdown on "left wing" campus critics of Zimbabwe's officially Marxist government sent shock waves about the future of academic freedom. Scholars were concerned that anti-student violence by Zimbabwe's democratically-elected and predominantly black government might be used by neighbouring South Africa's white government to justify its more drastic suppression of dissent. Conflict began on September 29, 1988 when riot police used clubs, teargas and rubber bullets to block a demonstration organized by the University of Zimbabwe and Harare Polytechnic Student Representative Councils at what they regarded as the

government's failure to follow its own socialist principles. Subsequent to this, an outspoken law lecturer was expelled because he was suspected of sparking the protests. The law faculty reacted by condemning the expulsion of the lecturer and by criticising President Mugabe³⁹¹.

In the subsequent months the government threatened action against "radical" lecturers and students. This provoked a strong reaction from academics at the University. A number of academics signed an open letter supporting the right to demonstrate and opposing the government's attack on human rights and academic freedom³⁹².

In October 1989 an ugly confrontation between the students and the police took place on campus. This followed on the arrest of two student leaders. Vice-Chancellor Walter Kamba decided to close the University in consultation with President Mugabe after demonstrators had set fire to the his car. More students were arrested. The Vice-Chancellor said that academic freedom did not protect extreme anti-government language such as that of students. He defended the right of police to intervene on campus when they saw fit. A year later, Prof. Kamba decided to retire citing "interference from non-professional fingers" as one of the reasons for his decision³⁹³.

The announcement by Prof. Kamba of his intention to retire came at a time when there was confrontation between the government and the University on the University Amendment Bill

which members of the University community regarded as denying them academic freedom. The Bill eventually became the University of Zimbabwe Amendment Act 1990, under protest from lecturers and students³⁹⁴. The University community expressed concern at the fact that there was no democratic participation in the passing of the Amendment Act. Submissions from the University community had been ignored by the government; Parliament as the people's instrument for realising the hard won democratic traditions, was denied the fullest input and digestion of views from the University community over the Amendment Act. Moreover, the University community expressed concern over various aspects of the Act relating to the Minister's power of appointing staff, the Vice-Chancellor's powers, the Minister's role in appointing members of the council and the staff disciplinary procedure³⁹⁵. All of this fell on deaf ears.

5.6 CONCLUSION

When one considers what has been discussed above, one might be inclined to say the idea of an autonomous university is a myth³⁹⁶. This is so because even countries like the United States and Britain, not to mention African states, have tended to limit the scope of what may be regarded as legitimate academic autonomy. The better view, however, is that there is no absolute university autonomy but only degrees of relative autonomy. It would appear that no state will support a university or allow it to exist within its midst unless this existence is perceived to be functional for its preservation

and extension. The university has its own functional requisites and, in so far as it has a universalistic perspective, will have its own reference point for action embedded in an academic sub-culture which is considered to be international³⁹⁷. The degree to which it attains the autonomy necessary to maintain this perspective will, to a large extent, depend on the continuous bargaining process between the institution and its enviroing society. The university is obviously in a weaker position than the government, because it is dependent on the government for subsidy. Its role and its status is therefore the result of a "trade-off", an exchange, which is constantly being redefined. Moreover, the result of the interchange can produce unintended and unanticipated consequences, characteristic of the interaction between the institutions of education and politics in societies everywhere³⁹⁸.

From the afore-going comparative perspective, South Africa has a number of lessons to learn as to what should be done and what should not be done. These lessons can be learnt not only from Britain and the United States, but also from the African countries. What may be learnt from the African experience are broad policy issues on academic autonomy. From the American perspective the courts can learn to deal with a number of issues that impinge on academic autonomy and freedom.

FOOTNOTES

1. S35(1) of the interim Constitution.
2. Chapter 2.
3. Bray 43; on a discussion of the various models see G Neave "On Being Economical with University Autonomy : Being an Account of the Retrospective Joys of a Written Constitution" in M Tight (ed) Academic Freedom and Responsibility (1988) 33ff.
4. Neave 37-38; Bray 44.
5. Van der Vyer (1982) 569.
6. Neave 32.
7. See, for instance J Jaconelli Enacting a Bill of Rights: The Legal Problem (1980).
8. See generally Lord Chorely "Academic Freedom in the United Kingdom" 1963 Law and Contemporary Problems 28; Jasper 457.
9. Lord Chorely 650-51; Jasper 458.
10. Lord Chorely 652; Jasper 459.
11. Lord Chorely 655-58; Briggs 98; Jasper 459.
12. Jasper *ibid.*
13. Brook 146.
14. Brook *ibid.*
15. Neave 38.
16. Neave 39.
17. Neave *ibid.*
18. On this in general see the Robbins Report Committee on Higher Education (1963).
19. Bray 50.

20. Bray 51.
21. Chapter 40 deals with Higher Education and Further Education.
22. The White Paper (1987).
23. In administering such funds the UFC may impose its own conditions for grants in respect of activities which qualify for funding from other sources. It advises the secretary of state on activities eligible for funding and undertakes activities that are necessary or expedient for the exercise of its functions. It must consult with interested parties before it exercises its discretion or imposes conditions for the allocation of grants and, in return, the required information must be given to the UFC.
24. Supplementary functions of the UFC include the imposition of conditions for the repayment of grants. The secretary of state may also set his own conditions on grants to the UFC irrespective of grants or payments made by the UFC to the universities. In performing these functions the UFC is subject to the directions of the secretary issued in terms of orders. This form of intervention indicates the government's seriousness on the control of the university and reform. By virtue of their autonomy universities were previously free to spend their block grants as they wished, but in terms of the new measure they are obliged by government to repay the funds with interest where they have failed to deliver what is expected of them.

25. The UC is a statutory body which consists of five persons appointed by the secretary of state as commissioners and their names are tabled in parliament.
26. A variety of interpretations may be given to "redundancy" and "good cause". Some of these have been severely criticized, see D Farrington and F Mattison (eds) Universities and the Law Conference of University Administrators United Kingdom (1990).
27. Farrington 20-21.
28. Bray 47.
29. Bray 55.
30. Bray 56.
31. Bray *ibid.*
32. Bray 57.
33. Bray *ibid.*
34. Bray 58.
35. Bray *ibid.*
36. Over the years it has published reports on a variety of issues including university finance, research and links with industry.
37. See its opposition to the Education Reform Bill of 1987 and its fight for the protection of academic freedom - Jasper 469.
38. Bray 59.
39. It fought for academic freedom as early as 1934 and was instrumental in the expansion of the university system after World War II. Later it bargained for better qualified academics and continued its negotiations for better salaries and working conditions.

40. Bray 59.
41. Bray 60.
42. For a discussion of this see Bray 62ff.
43. Neave 39-41; Bray 70-71
44. Neave 41.
45. Neave 43.
46. Neave *ibid*, Bray 72.
47. Neave 43; Bray 72.
48. Neave 44-45; Bray 72-73.
49. Neave 46-47; Bray 73-74.
50. Neave 47-48; Bray 74.
51. Jasper 458.
52. Brook 149.
53. Hansard (UK) (1988-01-13) col 268-269.
54. Tight 114.
55. For a detailed discussion of this see Bray 72ff.
56. For a discussion of these see Bray 82 ff; see also Jasper 472-73.
57. Bray 80; Jasper 459.
58. Jasper 458.
59. Jasper 460-61
60. Bray 80-81.
61. Jasper 461.
62. Hansard (UK) vol 123 1-12-1989 col 779.
63. Jasper 462.
64. Jasper 463; Bray 81.
65. s203(6)(a) of the Act.
66. s203(6)(b) of the Act.

67. Jasper 464-65 : What the Commissioners are supposed to take into account has been mentioned above.
68. Jasper 467-8.
69. Jasper 468.
70. Jasper 469.
71. Jasper 470.
72. Jasper 471.
73. Bray 92.
74. Bray 93; Tight 129-131.
75. at 158.
76. W H Daughtrey "The Legal Nature of Academic Freedom in the United States Colleges and Universities" 1991 University of Richmond Law Review 233ff; D M Rabban "A Functional Analysis of 'Individual' and 'Institutional' Academic Freedom Under the First Amendment" 1990 Law and Contemporary Problems 229ff; J P Byrne "Academic Freedom: A Special Concern of the First Amendment" 1989 The Yale Law Journal 253ff; C L H Barrow "Academic Freedom and the University Title VII Suit After University of Pennsylvania v EEOC and Brown v Trustees of Boston" 1990 Vanderbilt Law Review 1578ff.
77. W P Murphy "Academic Freedom - An Emerging Constitutional Right" in H W Baade & R O Everett (eds) Academic Freedom: The Scholar's Place in Modern Society (1964) 18; S M Jasper "Britain's Education Reform Act : A Lesson in Academic Freedom and Tenure" 1990 Journal of College and University Law 449.
78. Byrne 253.
79. See chapter 2.

80. Rabban 229.
81. AA Morris "Academic Freedom and Loyalty Oaths" in Baade and Everett 57ff.
82. Rabban 229.
83. Rabban 230.
84. Rabban 231.
85. Rabban *ibid.*
86. Rabban *ibid.*
87. Rabban 233-4.
88. Rabban 236.
89. 342 US 485 (1952); for a discussion of this see van Alstyne 105ff.
90. at 493.
91. at 504-5
92. 354 US 234 (1957); for a discussion see van Alstyne 109ff.
93. at 250; see also Daughtrey 238.
94. at 261-62; see also Daughtrey 248.
95. at 263.
96. Rabban 237.
97. Rabban 237; see also chapter 2.
98. Rabban 238.
99. On this see chapter 2.
100. Rabban 238.
101. Rabban 239; see also Regents of the University of California v Bakke 438 US 265 (1978); Widmar v Vincent 454 US 263 (1981).
102. Byrne 290-1.
103. Byrne 292.

104. Byrne 293.
105. 360 US 109 (1959); see also van Alstyne 112.
106. at 112.
107. Byrne 294
108. 385 US 589 (1967); see also van Alstyne 113ff.
109. at 603.
110. at 641.
111. Byrne 296.
112. Byrne 297.
113. Byrne *ibid.*
114. Byrne 289; Rabban 239-40.
115. Rabban 240.
116. Rabban *ibid.*
117. Rabban 241.
118. Rabban 242 ff.
119. Rabban 254.
120. Rabban 118.
121. Byrne 298.
122. see e.g. Keife v Geanakos 418 F.2d 359 (1st Gr 1969);
Parducci v Rutland 316F Supp 352 (1970).
123. Byrne 301.
124. Byrne 302.
125. 315F Supp 1196 CD.Md 1981.
126. Byrne 303.
127. Byrne 304; Rabban 287.
128. Byrne 305.
129. Byrne 306; Rabban 287.
130. Powell v Syracuse University 439 US 24 (1978).
131. Rabban 288.

132. Byrne 307.
133. Rabban 283.
134. Byrne 131.
135. Board of Curators v Horowitz 435 US 78 (1978).
136. Goss v Lopez 419 US 565 (1973).
137. Regents of the University of Michigan v Ewing 474 US 214 (1985).
138. Byrne 309.
139. Byrne 310-11.
140. Barrow 1583-84.
141. see chapter 2.
142. at 261.
143. at 262.
144. at 263.
145. Byrne 313.
146. 438 US 265 (1978); see also van Alstyne 119ff.
147. at 312.
148. Byrne 314.
149. Byrne 315.
150. Byrne 315.
151. 454 US 263 (1981); see also van Alstyne 141ff.
152. Byrne 316.
153. 474 US 214 (1985); see also van Alstyne 139.
154. at 225.
155. at 226.
156. see chapter 2.
157. Byrne 322.
158. 40 Ill. 186 (1866).
159. 187-88.

160. Byrne 324; Rabban 284.
161. Byrne 325; Rabban 283.
162. Board of Curators v Horowitz 435 US 78 (1978).
163. Byrne 326.
164. Byrne 327.
165. L A Glenny and T K Dalglisch Public Universities, State Agencies and the Law : Constitutional Autonomy in Decline (1973) 15; C M Scully "Autonomy and Accountability : The University of California and the State Constitution" 1987 The Hastings Law Journal 927ff; see also Byrne 327ff.
166. Byrne 327.
167. at 272 ft 211.
168. He disputes Byrne's assertion at 327.
169. Michigan Constitution of 1850 at XIII paragraph 6-8; Glenny and Dalglisch 17.
170. Michigan Constitution at VIII (S7); Glenny and Dalglisch 18; see also Scully 930ff.
171. see People v Regents of the University of Michigan, 18 Mich p369, 68 NW 253 (1896).
172. see Sterling v Regents of the University of Michigan 110 Mich p369, 68 NW 253 (1896).
173. see Regents of the University of Michigan v State 47 Mich App 23, 208 NW 2d 871 (1973).
174. see Regents of the University of Michigan v State 166 Mich App 314, 419 NW 2d 773 (1988).
175. see State Bd of Agriculture v Auditor-General 226 Mich 417, 197 NW 160 (1924).
176. see Regents of the University of Michigan v Employment Relations Commission 389 Mich 96 204 NW 2d 218 (1973).

177. Byrne 328.
178. Sterling v Regents of the University of Michigan 110 Mich 369 377, 68 NW 255 (1896).
179. Byrne 329.
180. Byrne *ibid*.
181. Glenny and Dalglish 19ff; see also Scully 948ff.
182. Byrne 329.
183. Byrne 329-330.
184. Byrne 330.
185. Byrne *ibid*.
186. This view is quite cogent despite the contrary view by Rabban.
187. Byrne 331.
188. Rabban 283.
189. Byrne 332.
190. Byrne 333.
191. Byrne 334.
192. Byrne 334-5.
193. at 335.
194. Byrne 335.
195. Byrne 336.
196. at 603.
197. 385 US at 603.
198. Byrne 337.
199. at 603.
200. Byrne 338.
201. Rabban 284.
202. Barenblatt v US 360 US 109 (1959).
203. Rabban 229.

204. Byrne 311-12.
205. Rabban 311-12.
205. Rabban 256.
206. 438 US 265 (1978).
207. 454 US at 276; Rabban 256.
208. Rabban 266.
209. at 276.
210. Daughtrey 260.
211. 455 US 100 (1982).
212. 110 S Ct 577 (1990).
213. Rabban 259.
214. Rabban 259-260.
215. Rabban 260.
216. Rabban 261.
217. Chapter 2.
218. Scully 941.
219. Pub. No. 88-352, 78 Stat 253 (1964).
220. Equal Employment Opportunity Act of 1972, HR Rep. No. 238
92d Cong 2d session.
221. Barrow 1574.
222. Barrow *ibid*.
223. 110 S Ct 3217 (1990).
224. For a discussion see Barrow 1578.
225. Barrow 1578.
226. 110 S Ct 577 (1990).
227. e.g. EEOC v University of Notre Dame du Lac 715 F2d 331,
337 (7th Cir 1983).
228. Rabban 263-4.
229. Rabban 264-5.

230. Rabban 265.
231. 775 F 2d 110 (3rd Cir 1985).
232. 715 F 2d 331 (7th Cir 1983).
233. Pennsylvania at 581.
234. Daughtrey 245.
235. 692 F 2d 901 (2d Cir 1982); cf In re Dinnan 661 F 2d 426, 427 (5th Cir. 1981).
236. see Scully 942.
237. Daughtrey 246; see also Barrow 1588-93.
238. Barrow 1596-98.
239. Daughtrey 246.
240. Daughtrey 257.
241. 408 US 564 (1972).
242. at 591.
243. at 581.
244. Daughtrey 258.
245. Daughtrey *ibid.*
246. *supra*.
247. at 586-87.
248. Rabban 266-67.
249. Rabban 269; Daughtrey 259.
250. D P Kommers The Constitutional Jurisprudence of the Federal Republic of Germany (1989) 426.
251. Chapter 2.
252. T Nipperdey "The German University in Crisis "in P Seabury (ed) Universities in the Western World (1975) 119; E D Duryea "The University and the State: A Historical Overview" in P G Altbach and R O Berdahl (eds) Higher Education in American Society (1981) 18.

253. Nipperdey 119.
254. J C Mushaben "Reform in Three Phases : Judicial Action and the German Federal Framework Law for Higher Education of 1976" 1984 Higher Education 424.
255. Nipperdey 120; Mushaben 425.
256. W Webler "The Sixties and the Seventies: Aspects of Student Activism in West Germany" 1980 Higher Education 161.
257. Nipperdey 121.
258. Nipperdey 122.
259. Nipperdey *ibid.*
260. Nipperdey 123; W Webler "The Sixties and the Seventies: Aspects of Student Activism in West Germany" 1980 Higher Education 158.
261. Webler 159; Nipperdey 159.
262. Nipperdey 125.
263. Nipperdey 126.
264. See S M Lipset "The American University 1964-1974; From Activism to Austerity" in P Seabury (ed) Universities in the Western World (1975) 143ff; H Dickman The Imperiled Academy (1993).
265. Nipperdey 127; Webler 165.
266. Nipperdey 128; Mushaben 428; Webler 165.
267. Nipperdey 131.
268. Nipperdey 132.
269. Nipperdey *ibid.*
270. Nipperdey 132-133.
271. Nipperdey 133.
272. Nipperdey 134.

273. Webler 159ff; Nipperdey 135.
274. Nipperdey 135.
275. Nipperdey 136-37.
276. Nipperdey 137.
277. Nipperdey 136.
278. Nipperdey 139.
279. Nipperdey 140.
280. Nipperdey *ibid.*
281. Nipperdey 141; Webler 162.
282. Mushaben 429; Nipperdey 141.
283. (1973) 35 BVerfGE 79.
284. For a discussion of this see Kommers 437ff; B van Niekerk
"Social Engineering in the German Constitutional Court -
Some Reflections on a Recent Judgment" 1975 SALJ 300ff.
285. Van Niekerk 309.
286. Mushaben 431.
287. Van Niekerk 309.
288. Mushaben 423, 430.
289. Mushaben 424, 430ff.
290. Mushaben 432.
291. Mushaben 420.
292. Mushaben 432.
293. Mushaben 433.
294. H Daalder "The Dutch Universities between the 'New
Democracy' and the 'New Management'" in P Seabury (ed),
Universities in the Western World (1975) 195ff.
295. F Bourricaud "The French University as a 'Fixed Society'
or the Futility of the 1968 'Reform'" in P Seabury (ed)
Universities in the Western World (1975) 232ff.

296. G Sartori "The Italian University System" in P Seabury (ed) Universities in the Western World (1975) 246ff.
297. Caston (1989) 312; Caston (1992) 1298.
298. C R M Dlamini Human Rights in South Africa: Which Way South Africa? (1995).
299. see Chapter 1.
300. Caston (1989) 313-14; Caston (1992) 1298-9.
301. Cited by D P Chimanikire "Academic Freedom and University Autonomy : The Case of Zimbabwe" in Institute of African Studies University and Academic Freedom : What do they Mean?.
302. "Inauguration of the University of East Africa" 28 June 1963 quoted by T Ranger Towards a Radical Practice of Academic Freedom : The Experience of East and Central Africa (1981) 13.
303. Cited by Ranger 14.
304. "Relevance and the Dar-es-Salaam University" 29 August 1970 Freedom and Development (1973) 195, quoted by Ranger 14.
305. Ranger 14.
306. Quoted by Ranger 17-18.
307. J Oloka-Onyanga "The Legal Control of Tertiary Institutions in East Africa" 1989-90 Zimbabwe Law Review 57.
308. Chimanikire 59.
309. Oloka-Onyanga 58.
310. Oloka-Onyanga 59.
311. Oloka-Onyanga 59.
312. s4

- 313. s4.1
- 314. S6
- 315. S9
- 316. S13
- 317. Oloka-Onyanga 60.
- 318. Oloka-Onyanga 61.
- 319. Ordinance 8 of 1941.
- 320. s2
- 321. s5
- 322. Oloka-Onyanga 61.
- 323. Oloka-Onyanga 62.
- 324. s5.2
- 325. s7.8
- 326. s15.
- 327. Oloka-Onyanga 62.
- 328. Preamble to Act of 1962.
- 329. Oloka-Onyanga 63-64.
- 330. s6
- 331. s7.2
- 332. s9.4
- 333. s5
- 334. s8.2
- 335. s12.1
- 336. s12.2
- 337. s3.2
- 338. Oloka-Onyanga 64.
- 339. s78.
- 340. Oloka-Onyanga 65.
- 341. Oloka-Onyanga 66.

342. Oloka-Onyanga *ibid.*
343. Caston (1989) 323; Caston (1992) 1301.
344. Caston (1989) 324; Caston (1992) 1302.
345. Caston (1989) 323; Caston (1992) 1301.
346. Oloka-Onyanga 67.
347. Oloka-Onyanga *ibid.*; Caston (1989) 314ff.
348. Caston (1989) 324; Caston (1992) 1301.
349. Oloka-Onyanga 69-70.
350. L H Kaluba "Zambia" 1992 Encyclopaedia of Higher Education vol. 2 825.
351. Kaluba *ibid.*
352. Kaluba 826.
353. s4(1)
354. s5(1)
355. s5(2)
356. s14(1)
357. s15
358. Kaluba 827.
359. Kaluba 828.
360. Kaluba *ibid.*
361. O E Maravanyika "Zimbabwe" 1992 Encyclopaedia of Higher Education 831; M W Murphree "Universalism, Particularism and Academic Freedom : The Rhodesian Case" in H W van der Merwe and D Welsh The Future of the University of South Africa (1977) 107-108.
362. Ranger 3; Maravanyika 831.
363. Ranger 4; Maravanyika 832.
364. cf Murphree 110.
365. Maravanyika 832; Murphree 109.

366. Maravanyika 832; Caston (1989) 318; Murphree 109; Ranger 4.
367. Ranger 4-5.
368. Murphree 110.
369. Maravanyika 832; Ranger 5.
370. Murphree 110-111.
371. Caston (1989) 319; Murphree 112-13.
372. Ranger 6-7.
373. Quoted by Ranger 7.
374. Murphree 112.
375. Murphree 112-113.
376. Murphree 113 ff.
377. Murphree 118.
378. Murphree *ibid.*
379. Caston (1989) 319.
380. Caston (1989) 319; Murphree 104-5.
381. Caston (1989) 319; Maravanyika 834.
382. V Nell and F van Staden "An Affirmative Action Prospectus for South African Universities. Part 1, Affirmative Action in the United States and at the University of Zimbabwe" 1988 Suid-Afrikaanse Tydskrif vir Wetenskap 22.
383. Nell and van Staden 22.
384. s4
385. s7
386. s8(1)
387. s8(2)
388. s8(3)
389. s9
390. s11

391. Chimanikire 61.
392. Chimanikire ibid.
393. Chimanikire 62.
394. Chimanikire ibid.
395. Chimanikire 63.
396. Murphree 117; see also K L Shrimali The Myth of University Autonomy and Other Essays (1978).
397. cf E Shils "The Academic Ethos" in P Seabury (ed) The Future of the University in Southern Africa (1977) 5ff.
398. Murphree 117.

CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

The issue of university autonomy and academic freedom is as old as the universities themselves. It is as old as it is fundamental. For this reason it cannot be questioned. What may be questioned is the extent of autonomy and academic freedom; hence the need for re-assessment. Although it is customary to regard academic autonomy as being traceable to the twelfth and thirteenth centuries, two models emerged at the time. The one was the Bologna model where the autonomy concerned the freedom of the students to learn and the students were in control of their masters. According to the Paris model autonomy related to the teachers who had the freedom to teach and the student had little autonomy. The reason behind these differences is that the students of Bologna were more mature and experienced people. Most of them were already working being businessmen and other influential people. The students of Paris on the other hand were still young and inexperienced¹.

Later, other models developed, namely the Kantian model, the Napoleonic model and the British and German models, most of which were a further development of the Paris model. These models themselves have not remained static and have changed as a result of economic and political factors. These changes have been more in the direction of greater governmental intervention especially because the government has come to

perform more duties in the modern age than was the case before¹.

One of the factors which facilitated the development of university autonomy and academic freedom at the inception of universities was the system of guilds which was generally used by people involved in trade and craftsmanship. The characteristics of coherence and independence which the guilds had in running their internal affairs was appealing to the scholars of the time and they emulated these.

Another factor which contributed to the development of university autonomy was the fact that universities had no property in the form of buildings and other immovable structure. For this reason they hired other people's buildings for their lectures. What appeared as a weakness on the one hand, was a strength on the other. It was used as an effective weapon by the university in bargaining for better rights and privileges. If they were badly treated in one city they could decide to migrate to another. The very threat of a university to leave a city was a serious one to the city authorities, because it meant loss of potential revenue and prestige to the town or city. In a number of instances this was used effectively against city authorities⁴.

The possession of a great degree of independence meant that universities had a great measure of freedom in the management of their internal affairs. This was also conducive to the development of academic freedom. The autonomy of universities

did not mean that they were above the law or the secular authorities. On the contrary, the universities subjected themselves to the law and to the secular authorities. They used the emperor and the pope to obtain more powers to run their affairs or to protect themselves against city authorities.

From this account it is clear that university autonomy developed not as a deliberate goal of the university, but as a by-product of the universities in their struggle against the church or city authorities. University autonomy and academic freedom were obviously affected by various social, economic and political factors throughout the history of the development of the universities so that the type of autonomy universities have today is different from what they had then. The greatest single factor which has accounted for the limitation of autonomy is the fact that governments all over the world have come to be responsible for a significant portion of the funding of universities. Implicit in this funding has been an expectation of loyalty to the government. Moreover, governments have felt justified to stipulate certain conditions to the giving of subsidies. These are aimed at ensuring accountability. In this way therefore the autonomy is defined by the government and not by the university.

Throughout the centuries, however, university autonomy and academic freedom have been regarded as the corner-stones of the university system. This is so, especially since the Humboldtian era in Germany because the role of the university

was regarded as that of teaching and research. Teaching and research have become an inseparable whole which sets the university apart from other institutions that teach or do research. A university that has no academic autonomy and freedom is therefore regarded as a contradiction in terms.

The significance of university autonomy and academic freedom today is of more than historical interest. The historical dimension is only important in as far as it demonstrates the resilience and tenacity of these concepts. The significance of university autonomy and academic freedom is based on the fact that universities have to generate and disseminate knowledge and information. In order to be able to do this effectively, they must enjoy a great measure of autonomy and freedom to run their internal affairs and to decide on what research to do and the academics should be able to decide not only what research to undertake, but also what ideas to propagate.

The definition of autonomy that has become a classic not only here but has also been quoted with approval in numerous American cases is that it entails the freedom of a university to determine for itself on academic grounds only who should teach, what should be taught, how it should be taught and who should be admitted as students. Although this definition has later been found to be narrow, it still remains a useful guideline in demarcating the limits of legitimate autonomy. The limits of this autonomy are important because some people have problems as to how an institution that is subsidized by

the government can claim to be autonomous from the government. Is it not true that he who pays the piper calls the tune, they ask?

Notwithstanding this view, there is no doubt that a university needs autonomy and a measure of freedom for its academics if it has to play its role of generating and disseminating knowledge effectively. Academic freedom is important because it enables academics to think freely, to speculate and to experiment with new ideas. Important developments have been spearheaded by those people who think freely and creatively. Knowledge generated through this creative and critical thinking is important for the development of society. Academic freedom is also important because it allows for critical scrutiny of all aspects of society, social, economic and political and facilitates re-evaluation and renewal. Knowledge is advanced through critical inquiry and not through encouraging orthodoxy or adherence to accepted dogma.

Politicians and other members of society tend to react negatively to new ideas even if they are ultimately to the benefit of society. Experience has taught that if free thinkers are muzzled, society in general suffers. Societies that allow for freedom of thought and speculation tend to be more advanced socially, economically and politically than those that do not.

Another justification for academic freedom is that universities are regarded as institutions for the generation

and dissemination of knowledge. This means that when they are established there is an implicit understanding that they will do what they were created for. It would therefore be inconsistent to punish academics for what they are supposed to do or to restrict universities from what they are supposed to do. A university without autonomy and academic freedom is not strictly a university. Although this view may be questionable, it emphasises an important aspect of a university.

Although the names "university autonomy" and "academic freedom" are often used synonymously, they are distinguishable from each other. Autonomy refers to the ability of a university to take decisions relating to the institution as a whole, its ability to decide who should teach, what should be taught, the proportion between teaching and research and who should be admitted to study. It relates to the managerial and administrative functions of the university. The university should perform these without outside interference or pressure.

Academic freedom relates to the freedom of the individual academic to teach, to do research, to espouse ideas that may be new and even unpopular and not be sanctioned for holding those views. It involves even the decision as to what research to undertake and to publicize the results of that research, either individually or collectively. It also entails freedom to participate in the decision-making processes of the university and freedom to associate. This

freedom also extends to students so that they can learn and express ideas and views freely⁵.

Although university autonomy is distinguishable from academic freedom, these are mutually interdependent. University autonomy is a necessary although not a sufficient precondition for academic freedom. Academic freedom can only thrive in an autonomous institution although even an autonomous institution can stifle academic freedom. But there can be little or no academic freedom in a university that is not autonomous. Both the university and the individual academic have this freedom and autonomy. Thus in terms of the Constitution the individual should be able to raise the defence of academic freedom if the university as employer infringes it and the university should be able to raise this defence against external interference in its internal affairs. The individual can raise this defence not only against the university as employer, but also against the government or other outside interference. Although the interim Constitution has been regarded as being of vertical and not of horizontal application, and although the university is not a government organ, it is generally bound by the bill of rights and consequently by the provision on academic freedom⁶.

University autonomy and academic freedom are institutional and not ordinary human rights. They are derived from membership of an institution and not from being human in general. This, however, does not mean that they are not important. On the

contrary, they are fundamental to the existence and functioning of the university and the creation of knowledge⁷.

What has also emerged is that university autonomy and academic freedom can only flourish in a free and democratic society. The reason for this is that human freedom is one and indivisible. In a society where there is little civic liberty, it becomes difficult to defend or to promote academic autonomy and freedom which may be regarded as elitist. That is why in many of the African states university autonomy and academic freedom have not flourished⁸.

The concept of autonomy is not immutable and static. It shifts according to the degree to which the government would like to be involved in directing the affairs of higher education. With the increase in government subsidization of higher education and the diminishing of resources, there has been a greater degree of government involvement in the internal affairs of universities by way of a demand for rationalization and financial accountability. While politicians have not disregarded academic freedom in general, they have emphasized that this should be balanced with responsibility. Britain is the typical example. In South Africa this has also been the case and this will increase rather than decrease⁹.

There is no doubt that when universities were established in South Africa, they were based largely on the British and German models. They also emphasized all the values developed

by universities in Europe over the centuries. Among these were academic autonomy and freedom. There is no evidence that before the era of apartheid, universities were under strict government control although they were subsidized by the government. Universities, however, could not escape the influence of the prevailing political situation.

Although universities enjoyed a measure of autonomy, they seldom exercised that autonomy to the benefit of black people in general. They were much more influenced by the societal and political views. Even those universities that regarded themselves as "open", did not pursue a completely non-discriminatory policy in the treatment of black students. Although black students were admitted to some historically white universities, their right to dignity was not recognized, in that segregation in social and extramural activities was applied. Some of those universities applied separation in both class and the social life of the students¹⁰.

We have no doubt moved full circle from the time when universities were autonomous and could determine who could be admitted as a student and who could teach at a university. This was punctuated by a period of government intervention in the running of the affairs of the university. This coincided with the period of the establishment of the historically black universities, which were created with a political motive of separating blacks from whites in their training to further reinforce the government's policy of apartheid. These universities were more controlled by the government than the

historically white one's and had no autonomy. But even historically white universities became constrained by the government from admitting black students. This government intervention seriously compromised university autonomy and academic freedom".

During this era of government intervention in the university affairs, it does not mean that the situation remained static. On the contrary a number of developments took place which led to the attainment of greater autonomy by especially the historically black universities and the recovery of autonomy by the historically white universities. These developments were caused by the protests of students especially in the seventies and the actions of certain universities. The government was also under intense international pressure. Today all universities are theoretically open and relatively autonomous although in practice some will be more open than others. There is more academic freedom than in the past. Admission criteria may be adopted by various universities which may tend to limit access to university education. No doubt some universities are under pressure to admit more students or more students of colour. The idea of "massification" advocated by the NCHE implies that most universities will be under pressure to grant access to university education to an increasing number of students sometimes beyond their capacity".

UP
/ /

Apart from direct government intervention in the internal affairs of universities, the government seriously restricted

academic freedom through race and security legislation. Security legislation violated freedom of thought and expression and freedom of research, especially on race and government policy issues, unless one wanted to risk detention without trial, banning or deportation. This is evidence that academic freedom can only thrive in a democratic state where the other freedoms are respected. Where other human freedoms are severely restricted, it is impossible for academic freedom to flourish. The courts did very little to promote academic freedom. In a few contempt cases, the courts demonstrated that the protection of academic freedom was not high on their scale of priorities. Despite the limitation of university autonomy and academic freedom, this situation could not continue indefinitely. Changes gradually began to take place which had the effect of reversing this state of affairs. But the restriction of university autonomy and academic freedom at the time adversely affected the role of universities¹³.

When one considers the negative implications of the government intervention in the affairs of universities, it becomes quite clear that this was not beneficial to the development of the universities. It would be folly therefore to repeat the mistakes of the past. The opening up of universities has created further problems, some of which stem from the poor educational system from which black students have emerged¹⁴. It is ironical that the government had to engage in the tactics of separating universities on racial lines in the past and today it is equally engaged in strenuous efforts to remove traces of discrimination although it is understandable that

the new government has to do this. That is why universities are under pressure for transformation.

From this it is clear that universities do not exist in a vacuum, but in a social and political context. They are influenced by the society of which they form part and by the policies of the government. The government has a considerable influence especially where it is responsible for the subsidising of the universities. Government subsidy is always given with a tacit expectation of loyalty to the government. The influence of society cannot be underestimated. Most of the historically white universities were influenced by this in their treatment of black students. Even the "open universities" could not freely admit black students and treat them equally after admission even before the era of government control. In order to overcome negative societal influences, universities need a leadership that is deeply committed to university autonomy and academic freedom and to other values that form part of a free and open society.

VD
/

Although the university and the government are interdependent, they have distinctive roles. It is not desirable that the government should prescribe to universities what to do, but should allow them a great degree of autonomy and academic freedom. Whether or not the government does allow this autonomy and academic freedom depends on whether it is democratic and respects fundamental human rights in general. Authoritarian governments tend to be more interventionist than those that espouse liberal democracy although the experience

of Britain demonstrates that even democratic governments can limit autonomy and academic freedom. The government may see itself as having a legitimate interest in limiting these, in the interests of what it regards as higher ideals of accountability, transparency and responsibility.

see to look

Now that we have a new democratic dispensation, it appears that there is greater likelihood that universities could become more autonomous. This is also supported by the protection of academic freedom in the Constitution. That, however, depends on how the government of this country behaves in future. The fact that it has behaved well now does not guarantee that it will do so in future. It is hoped that it will learn a lesson from the mistakes of the past government. But that cannot be taken for granted. Universities themselves must jealously guard their autonomy and academic freedom. The challenge will not be easy as universities are subjected to conflicting expectations as is the case in a society in transition. Universities themselves may not be united on the defence or assertion of academic freedom as was the case in the past. For some it may not be "politically correct" to do so. When governments intervene in university affairs, they usually use various pretexts which may obscure their real motive. It is only a government that is not only committed to democratic values, but also one that sees the value of knowledge and the production of well-trained personpower that will respect the autonomy of universities.

Although the new government was democratically elected, it does not mean that we now have a culture of democracy. Democracy in this country will not flourish overnight. Experience has taught that democracy takes time to strike root. The role of universities could nonetheless be important even during this era. But that will depend on how the government relates to universities. The inclusion of a provision in the interim Constitution which entitles national government to alter the governing bodies of universities may create problems. Fortunately, it is subject to the provisions of a bill of rights and it is a transitional measure.

The American experience also demonstrates that even a democratic government can violate university autonomy and academic freedom. The experience of the McCarthy era bears eloquent testimony to this. That is why the Supreme Court in order to curb excesses produced by the scare of communism declared academic freedom a concern of the first amendment which is essential for the maintenance of democracy and the creation of a healthy society⁴⁵.

The conflict between the universities and the government is often caused by the fact that the government has policies it wants to implement to which universities may be opposed, or of which they may be critical. This may be because these policies may be in the interests of the universities or society in general. Universities are supposed to be critical of government policies. Criticism is generally not pleasant even for a democratic government. When governments try to

pre-empt this criticism by controlling universities, universities may be opposed to this. But not all universities oppose government policies. Some do, while others may agree with them. This is largely a question of self-interest. Parochial self-interest, however, is not to the benefit of higher education in general. This was the case in the past in South Africa and it will always be the case whatever government is in power.

This shows that university autonomy and academic freedom are as vulnerable and as precarious as the concept of judicial independence. It is perhaps because they share some similarities although they also differ. Judges are appointed by the executive and there may be an expectation that they should have some loyalty or indebtedness to the executive. If they do not, those who appointed them may either be angry or feel betrayed. Similarly, although university staff are not appointed by the government, universities are highly subsidised by the government. With government subsidy comes some expectation of loyalty to the regime. If universities are critical and not supportive of government policy, the government is irritated and may react by suppressing such criticism. Judicial independence, like academic autonomy and freedom, is crucial to the role of a judge.

President Kruger is said to have once remarked that a judge is as free and independent as a fish in a net. He was obviously averse to the issue of judicial review which he regarded as the principle of the devil which the devil introduced in the

Garden of Eden to test God's law¹⁶. This further demonstrates that governments in general do not feel comfortable if their acts are subjected to critical scrutiny either by academics or by the courts. To further illustrate the point, it is said that two South African Ministers of Justice, Mr Tielman Roos and Mr Oswald Pirow, both had occasion to complain that certain judges found against the government which appointed them and said: "The trouble about these judges is that they get delusions of grandeur. Having acquired security of tenure, they imagine they were appointed on merit"¹⁷. The same could be said about academics by some government officials. This may be the reason why in Britain the government decided to abolish tenure which in America is regarded as fundamental to academic freedom. Obviously the British government did not give that reason for abolition.

Despite what has been said above, there is greater scope for the protection of academic autonomy and freedom in South Africa. This is largely due to the fact that the Constitution provides not only for the protection of academic freedom but also of fundamental rights in general. We have not yet established a culture of fundamental rights. The foundation for that has been laid. The creation of a culture of democracy and of rights requires effort and commitment to the values that underpin a bill of rights.

Although academic freedom is protected in the Constitution, it does not mean that it will easily flourish. Academic freedom, which includes institutional autonomy, sometimes competes with

other rights. It has to be balanced with those rights. This has been the case in the United States of America and it will be the case here. In resolving the conflicts that may arise, the courts will have recourse to the rich international and comparative jurisprudence on the issue. The American experience is particularly instructive in this regard especially when it comes to institutional autonomy and the prohibition of racial discrimination¹⁸.

The issue of transformation through democratisation and affirmative action, seriously impinges on university autonomy and academic freedom. We shall do well to learn from the American and European experiences in this regard. According to the American experience affirmative action is a highly contentious issue. Some would see it as crucial in creating a diverse student body and staff whereas others regard it as reverse discrimination. Be that as it may, while provision is made in the Constitution for affirmative action, it has to be implemented with care. It should not unnecessarily restrict academic freedom in that universities should be compelled to appoint people of a particular race or group only to increase the representativeness of that group without taking into account the qualifications and competence of each person. Zimbabwe soon learned this lesson¹⁹.

On the issue of democratisation, there is no doubt that this has a great appeal in South Africa especially because blacks in the past were excluded from political participation in the mainstream politics of the country. The belief, however, that

democracy as it applies in the country in general can simply be applied to universities lock-stock-and-barrel, is greatly mistaken and may undermine academic freedom and autonomy. The European experience is of great significance in this respect. It demonstrates that simple democratisation is not a panacea for all the ills of university education. While there is no doubt a need for the representation of various constituencies, including non-academic staff and students in the structures of governance of the university, for purposes of legitimacy, it should always be borne in mind that a university is an academic institution which should place the highest premium on knowledge and expertise. When it comes to fundamental academic decisions, the views of those qualified by training and experience should predominate. This is what the German Constitutional Court had to decide. No doubt, the other constituencies may need to be consulted on matters that directly affect them. The German experience teaches that simple democratisation may lead to the institutionalisation of conflict rather than the resolution thereof. Moreover, to assume that people who do not have a culture of democracy will automatically become democrats simply by being involved in democratic structures has been proved to be incorrect. Democracy requires more than the setting up of formal democratic structures. It also requires a culture of tolerance of differing views. In other words liberal democracy, and not authoritarianism, is what is required to bring about a culture of democracy. Marxist supporters tend to be extremely authoritarian and rigid. They may also support violent attacks on the university administration which

German
Review

is incompatible with academic freedom. Academic freedom can only flourish in an atmosphere where there is scope for rational thinking and where there is no threat to life, limb or property²⁰.

As stated earlier, university autonomy and academic freedom are not ends in themselves. They are a means to an end which is the generation and dissemination of knowledge which is to the benefit of society and the training of high-level personpower. There is no doubt that in societies where academic freedom is protected, universities are in a better position to create more knowledge and to produce well-rounded leaders. Knowledge is essential to enable people to lead a good life. In authoritarian societies, this may not be the case. The reason for this is that distinguished academics either leave or do not go to such universities. Intelligent and gifted people do not tolerate living under a repressive regime where they are told what to think. Where there is a brain drain from a country, the country and its people suffer. This has been the problem with many African countries²¹.

Although many African countries emphasise issues of development than academic autonomy and freedom, it does not mean that contribution to development is incompatible with these. On the contrary, where academics are free to speculate and to experiment, they may be in a better position to contribute to development than where they have to be directed from above.

South Africa is in some respects in a similar position as many African countries. It can still be regarded as a "developing" country. The RDP is evidence of this. While there is merit in universities contributing to the RDP, universities should be allowed not only to contribute to the RDP, but also to be critical of it and to suggest whatever improvements.

Because the government is deeply involved in funding university education, there is no doubt that it is going to be more and more involved in directing the course of tertiary education. This will obviously mean the narrowing of the boundaries of academic autonomy. The NCHE, however, has strongly recommended that the principles of academic freedom and institutional autonomy be maintained as key conditions for a vibrant higher education system. Although the Commission also recommended co-operative governance, this does not mean arbitrary government interference in the affairs of institutions. It means universities are entitled to do their work creatively although there may be a need for greater accountability²². It is hoped that this will continue to be so and that both the government and higher education institutions will be committed to the same societal goals. What is unacceptable, however, is that politicians be responsible for the appointment of senior staff at universities and that councils consist of a majority of government nominees. Just as it has been said that justice should not only be done, but should manifestly and undoubtedly be seen to be done, academic autonomy and freedom should not only be practised, but should manifestly be seen to be practised. That cannot be the case

where the university is under virtual government control. The council is the main governing body of the university. If it consists of a majority of government nominees, the conclusion will be unavoidable that its decisions are inspired by the government. In that case universities become pawns in the political game²³.

The fact that academic freedom is protected in the Constitution is obviously an advantage. But experience has taught that to provide for rights in a bill of rights is one thing, and to make those rights effective is another. It is accepted that constitutional safeguards are not a complete and indefeasible bulwark, but "they do make the way of the transgressor, of the tyrant, more difficult. They are, so to speak, the outer bulwarks of defence"²⁴.

The effective protection of academic freedom will obviously be strengthened by the way the courts interpret the provisions of the Constitution. If the courts interpret these provisions so as to protect academic freedom, the government will be reluctant to interfere with it. What will also contribute to this strengthening is that universities themselves must be prepared to assert and defend their academic freedom which includes both institutional and individual academic freedom. The universities, and especially the leadership, will have to be united on this issue of academic freedom and speak with one voice. What we cannot afford is to have universities divided on this issue. That will weaken the position of universities.

In order to circumvent excessive and unnecessary government intervention into universities, universities themselves will have to insist not only on their autonomy and academic freedom, but also on accountability and responsibility. It is not always easy to say when government intervention is legitimate and when excessive and unwarranted²⁵. But it can be said that government involvement in universities is legitimate if it is aimed, not at imposing a particular ideology on the university, but to ensure accountability and responsibility. Accountability and responsibility are not necessarily in conflict with academic autonomy and freedom. University autonomy and academic freedom should not be used to attain goals for which they were not meant, but rather for the effective attainment of the functions of the university, which are teaching and learning. If that be the case, universities will remain centres of excellence and when they raise objections, they will be taken seriously.

FOOTNOTES

1. See chapter 2.
2. See chapter 2.
3. See chapter 2.
4. See chapter 2.
5. See chapters 2 and 4.
6. See chapter 4.
7. See chapter 1.
8. See chapters 1 and 5.
9. See chapter 5; J File "The Politics of Excellence :
University Education in the South African Context" 1986
Social Dynamics 27.
10. See chapter 3.
11. See chapter 3.
12. NCHE 5ff.
13. See chapter 3.
14. V Bronstein and J Hersch "Teaching Law as a Second
Language in a Second Language" 1991 SALJ 159ff.
15. See chapter 5.
16. J G Kotze Memoirs and Reminiscences (1949) xii-xiii.
17. Cowen 151.
18. See chapter 5.
19. See chapter 5.
20. See chapter 4.
21. See chapter 5.
22. NCHE 194-7; File 27ff.
23. See chapter 5.
24. Cowen 119.
25. See chapter 5.

BIBLIOGRAPHY

A. BOOKS AND ARTICLES

- ALEXANDER J C "The University and Morality: A Revised Approach to University Autonomy and its Limits" 1986 Journal of Higher Education.
- ALLOTT A N The Future of Law in Africa (1960).
- ALLOTT A N The Limits of Law (1980).
- ANORLD C Land-grant Colleges (1931).
- BAADE H W and EVERETT R O Academic Freedom : The Scholar's Place in Modern Society (1964).
- BARROW C L H "Academic Freedom and the University Title VII Suit after University of Pennsylvania v EEOC and Brown v Trustees of Boston" 1990 Vanderbilt Law Review 1571.
- BEHR A L "Towards Open Universities in the RSA: The Long Haul" 1985 Journal of Education.
- BEHR A L New Perspectives in South African Education 2ed (1984).
- BEHR A L and MACMILLAN R G Education in South Africa (1966).
- BEINART B The Open Universities in South Africa and Academic Freedom 1957-1974 (1974).
- BERGH O M Ontwikkeling van Universiteite met Besondere Verwysing na die Organisasoriese Reelings van Swart Universiteite in Suid-Afrika unpublished D.Phil thesis University of Port Elizabeth (1987).
- BHANA S "The Racial Factor in Indian University Education" in H W van der Merwe and D Welsh (eds) The Future of the University in Southern Africa (1977) 216.
- BIBLE John 8:32.
- BICKEL A M "The Aims of Education and the Proper Standards of the University" in P Seabury (ed) Universities in the Western World (1975) 6.
- BOK D Beyond the Ivory Tower : Social Responsibilities of the Modern University (1982).
- BOUCHER M Spes in Arduis: 'n Geskiedenis van die Universiteit van Suid-Afrika (1973).

- BRAY W The Legal Status of the South African University Unpublished LLD thesis UNISA (1993).
- BRINKMAN H J "Medeseggenkap van Studente in Nederlandse Universiteite" in H J Brinkman and B J van der Walt (ed) Medeseggenkap van Studente in die Universiteitsbestuur (1992) 1.
- BRONSTEIN V and HERSCH J "Teaching Law as a Second Language in a Second Language" 1991 SALJ 159.
- BROOKES E H A History of the University of Natal (1966).
- BUDLENDER G "The Conservative Bias of South African Universities" in Van der Merwe and Welsh (eds) The Future of the University on Southern Africa (1979) 260.
- BYRNE J P "Academic Freedom : A Special Concern of the First Amendment" 1989 The Yale Law Journal 253.
- CACHALIA A, CHEADLE H, DAVIS D, HAYSOM N, MADUNA P and MARCUS G Fundamental Rights in the New Constitution (1994).
- CARDOZO B N The Nature of the Judicial Process (1921).
- CASTON G "Academic Freedom" 1992 The Encyclopaedia of Higher Education vol 2 1295.
- CASTON G "Academic Freedom : the Third World Context" 1989 Oxford Review of Education vol 15 no. 3 305.
- CHAPMAN J W The Western University on Trial (1983).
- CHIMANIKIRE DP "Academic Freedom and University Autonomy: The Case of Zimbabwe" in Institute of African Studies University and Academic Freedom : What do they Mean? Unpublished manuscript.
- CHORLEY LORD "Academic Freedom in the United Kingdom" 1963 Law and Contemporary Problems 28.
- COBBAN A B "Universities: 1100-1500" 1992 The Encyclopaedia of Higher Education vol 2 1245.
- COWEN D V The Foundations of Freedom (1961).
- CURREY R F Rhodes University 1904-1970: A Chronicle (1970).

- DAHL R A Dilemmas of Pluralist Democracy : Autonomy vs Control (1982) 1ff.
- DAUGHTERY W H "The Legal Nature of Academic Freedom in the United States Colleges and Universities" 1991 University of Richmond Law Review 233.
- DENNING A Freedom under the Law (1949) 5.
- DE VRIES M Translated from Dutch and quoted in Inaugural Address as Rector of the University of Stellenbosch (1979) reproduced by Marcum 177 at 178.
- DHLOMO O D "University Goals in Relation to Staffing and Administration" in A J Thembela (ed) Proceedings of a Symposium held on 7-9 September 1981 at the University of Zululand (1982) 57.
- DICKMAN H The Imperiled Academy (1993).
- DLAMINI C R M "A Court-enforced Bill of Rights for South Africa?" 1988 Journal of Contemporary African Studies 81.
- DLAMINI C R M The Administrative Law of a Typical South African University Unpublished LLD thesis University of the Western Cape (1994) 353.
- * DLAMINI C R M "The Transformation of SA Universities" 1995 SAJHE 39.
- DLAMINI C R M "Parliamentary Sovereignty, a Bill of Rights and Judicial Review" 1989 De Rebus 865.
- DLAMINI C R M Human Rights in Africa : Which Way South Africa? (1995).
- DREIJMANIS J The Role of the South African Government in Tertiary Education (1988) 18.
- DUGARD J "Judges, Academics and Unjust Laws" 1972 SALJ 271.
- DUGARD J "The Quest for a Liberal Democracy in South Africa" 1987 Acta Juridica 237.
- DUGARD J "The Role of International Law in Interpreting the Bill of Rights" 1994 SAJHR 208.
- DU PLESSIS L M "Whither Capital Punishment and Abortion under South Africa's Transitional Constitution?" 1994 SACJ 146.

- DU PLESSIS L M and DU PLESSIS A G trans E Hees
Introduction to the Law (1992).
- DU PLESSIS S J P Voorgaardse Aakademiese Produktiwiteit van die PU vir CHO vir die Tydperk 1962 tot 1976 unpublished D Ed thesis Potchefstroom University for CHE (1978).
- DURYEA E D "The University and the State : A Historical Overview" in P G Altback and R O Berdahl (eds) Higher Education in American Society (1981).
- DU TOIT G P J Universiteitsrade in Suid-Afrika unpublished MA dissertation University of the Orange Free State (1973) 32 ff.
- DWORKIN R Taking Rights Seriously (1977).
- FARRINGTON D & MATTINSON F Universities and the Law Conference of University Administrators United Kingdom (1990).
- FILE J "The Politics of Excellence : University Education in the South African Context" 1986 Social Dynamics 27.
- GLENNY L & DALGLISH T K Public Universities, State Agencies and the Law : Constitutional Autonomy in Decline (1973).
- GERWEL J "Who Should Go To University? University Admissions in National Perspective" unpublished paper.
- GRISWOLD E N Academic Freedom and Human Freedom (1967).
- HAHLO H R and KAHN E The South African Legal System and its Background (1968).
- HALSY A H "The Idea of a University: the Charles Carter Lecture, 1984" 1985 Oxford Review of Education 115.
- HANSARD (UK) (1988-01-13)
- HAYEK H A The Rule of Law (1975) 5.
- HENKIN L The Rights of Man Today (1978).
- HIGGS P "The Nature and Mission of a University: A Fundamental Response" 1991 SAJHE vol 5 no 2 164.
- HOFSDATER R & METZGER WP The Development of Academic Freedom in the United States (1955) 3.

- HOLBROOK D "Is the Idea of a University Now Totally Jettisoned?" 1984 Culture, Education and Society 191.
- HORRELL M African Education: Some Origins and Development Until 1953 (1963) 66.
- HOSTEN W J, EDWARDS A B, BOSMAN F and CHURCH J Introduction to South African Law and Legal Theory 2 ed (1995) 291.
- JACONELLI J Enacting a Bill of Rights : The Legal Problem (1980).
- JASPER S M "Britain's Education Reform Act : A Lesson in Academic Freedom and Tenure" 1990 Journal of College and University Law 449.
- JOUBERT W A The law of South Africa (1979) vol 8 235.
- KALUBA L H "Zambia" 1992 Encyclopaedia of Higher Education vol. 2 825.
- KAPP C A Die Akademiese Leiersfunksie van die Departementshoof aan Suid-Afrikaanse Universiteite - 'n Konseptualisering Vanuit die Tersiere Didaktiek unpublished D Ed degree University of Stellenbosch (1983).
- KAUL J N The Governance of Universities: Autonomy of the University Community (1988).
- KANE-BERMAN J Soweto: Black revolt, white reaction (1978).
- KEENAN J H "Open Minds and Closed Systems: Comments on the Functions and Future of the 'Urban' 'English-speaking' University in South Africa" 1981 Social Dynamics.
- KERR A Fort Hare 1915-48: the Evolution of an African College (1968).
- KERR C "A Critical Age in the University World: Accumulated Heritage Versus Modern Imperatives" 1987 European Journal of Education 183.
- KGWARE W M "The Role of Black Universities in South Africa" in H van der Merwe and D Welsh (eds) The Future of the University in Southern Africa (1975) 233.
- KHUTSONG B M "Universities in Post-apartheid South Africa" 1992 SAJHE.
- KOMMERS D P The Constitutional Jurisprudence of the Republic of Germany (1989).
- KRIEL J "A University on African Soil - Towards a Definition of Goals" in A J Thembela (ed)

- Proceedings of a symposium held on 7-9 September 1981 at the University of Zululand KwaDlangezwa (1982).
- LEFF G Paris and Oxford Universities in the Thirteenth and Fourteenth Centuries (1968).
- LOIZOU A Ethos Community and Academic Freedom (1989) 1ff.
- LOWENTHAL R "The University's Autonomy Versus Social Priorities" in P Seabury (ed) Universities in the Western World (1975) 75-76.
- LYNTON E A "Re-examining the Role of the University" 1983 Change Year.
- MacIVER R M Academic Freedom in Our Time (1955).
- MAHONY D "Autonomy and the Demands of the Modern State: A Systemic Study" 1992 Higher Education Review.
- MALHERBE E F J "Die Onderwysbepalings van die 1993 Grondwet" 1995 TSAR 8.
- MALHERBE E F J "Die Regsbeskerming van Akademiese Vryheid en 'Universiteits-outonomie' in 'n Nuwe Suid-Afrika" 1993 TSAR 366.
- MARAIS E J "The University and Culture - the Special Role of a Dual-medium University" in H W van der Merwe and D Welsh (eds) The future of the university in Southern Africa (1977) 196.
- MARAVANYIKA O E "Zimbabwe" 1992 Encyclopaedia of Higher Education 831.
- MARCUM J A Education, Race and Social Change in South Africa (1982).
- MARKUS T A "Universities and the Market" 1985 Culture, Education and Society 5.
- MATHEWS A S Freedom State Security and the Rule of Law (1986).
- MATTHEWS Z K Freedom for my People Memoir by M Wilson (1981) 195.
- MEEHAN E J "The University and the Community" 1993 SAJHE 89 ff.
- METZGER W P Academic Freedom in the Age of the University (1955) 109.

- METZGER W P "Academic Freedom in Delocalized Academic Institutions" in W P Metzger, S H Kadish, A DeBardleben and E J Bloustein (eds) Dimensions of Academic Freedom (1969).
- MILLER S "Academic Freedom in South Africa" 1991 The Australian University Review 34.
- MILTON J R L "A Cloistered Virtue?" 1970 SALJ 424.
- MORRIS A A "Academic Freedom and Loyalty Oaths" in H W Baade & R O Everett (eds) Academic Freedom : The Scholar's Place in Modern Society (1964) 57.
- MOSES I "Leadership: Deans and Heads of Departments" 1992 The Encyclopaedia of Higher Education vol 2 1390.
- MOSHA H J "The Role of African Universities in National Development: A Critical Analysis" 1986 Comparative Education 94.
- MOTLHABI M The Theory and Practice of Black Resistance to Apartheid: A Social-ethical Analysis (1984).
- MOULDER J "University Neutrality: Some Puzzling Reflections in a South African Mirror" in H W van der Merwe and D Welsh (eds) The Future of the University in Southern Africa (1977) 245.
- MOULDER J "Universities and Africanisation" 1995 SAJHE 7.
- MURPHREE M W "Universalism, Particularism and Academic Freedom : The Rhodesian Case" in H W van der Merwe and D Welsh (eds) The Future of the University in South Africa (1977) 102.
- MURRAY B K Wits: the Early Years: a History of the University of the Witwatersrand Johannesburg and its precursors 1896-1939 (1982) 3.
- MUSHABEN J C "Reform in Three Phases : Judicial Action and the German Federal Framework Law for Higher Education of 1976" 1984 Higher Education 424.
- NATIONAL COMMISSION ON HIGHER EDUCATION (NCHE) A Framework for Transformation (1996).
- NEAVE G "On Being Economical with University Autonomy : Being an Account of the Retrospective Joys of a Written Constitution" in M Tight Academic Freedom and Responsibility (1988).

- NEL B F "The South African University in the 1980's: An Identity Crisis" 1983 Journal of the University of Durban-Westville 212.
- NELL V AND VAN STADEN F "An Affirmative Action Prospectus for South African Universities. Part 1, Affirmative Action in the United States and at the University of Zimbabwe" 1988 Suid-Afrikaanse Tydskrif vir Wetenskap 19.
- NIPPERDEY T "The German University in Crisis" in P Seabury (ed) Universities in the Western World (1975) 119.
- NKABINDE A C "Welcome Address: Symposium on the Definition of Goals 7-9 September 1981" in A J Thembela (ed) A University on African Soil - Towards a Definition of Goals (1982).
- NKABINDE A C "Some Remarks on the Management of Strategic Information and the Resources of the University of Zululand made at a Meeting held on the 4th May 1992 for the Purpose of Briefing Heads of Academic and Administrative Departments" unpublished 1992 2.
- NKABINDE A C "Need for Certain Policy Decisions to be Taken by the Council" 1992 unpublished paper.
- NOLAN A Academic Freedom : A Service to the People (1986).
- NOWAK J E & ROTUNDA R D Constitutional Law 4 ed (1991).
- OLOKA-ONYANGA J "The Legal Control of Tertiary Institutions in East Africa" 1989-90 Zimbabwe Law Review 57.
- OLUBUMMO A and FERGUSON J The Emergent University with Special Reference to Nigeria (1960).
- OOSTHUIZEN G C Challenge to a South African University: The University of Durban-Westville (1981).
- PARSONS P G "The Student at Risk" 1993 SAJHE 24 ff.
- PERKIN H "History of Universities" 19 International Higher Education 169.
- PAULSEN F Die Deutschen Universitäten und das Universitätsstudium (1966).
- PAUW J R Die Westerse Universiteit - Sy Ontstaan, Aard en Toekoms (1975).
- PINCOFFS E L The Concept of Academic Freedom (1975).

- PENDLEBURY M "Concerning the Value, Scope and Limits of Democracy" 1995 Theoria 40.
- POTGIETER C J Die Administrasie van die Universiteit van Fort Hare en die Universiteit van Wes-Kaapland: 'n Vergelykende Studie unpublished MPA dissertation, University of Stellenbosch (1979) 25 ff.
- RAIT R S Life in the Medieval University (1918).
- RABBAN D M "A Functional Analysis of 'Individual' and 'Institutional' Academic Freedom Under the First Amendment" 1990 Law and Contemporary Problems vol 53 no. 3 232.
- RANGER T Towards a Radical Practice of Academic Freedom : The Experience of East and Central Africa (1981) 13.
- RASHDALL H The Universities in Europe in the Middle Ages 2 ed vol I (1936).
- RASHDALL H The Universities of Europe in the Middle Ages vol III (1936).
- RAWLS J A Theory of Justice (1972).
- ROBERTSON M Human Rights for South Africans (1991).
- ROHRS H "The Idea of the University in the Contemporary World" 1989 Education (Germany) 52.
- ROSS M G The University: The Anatomy of Academics (1976).
- SANDERS A J G M "The Characteristic Features of Southern African Law" 1981 CILSA 199.
- SHRIMALI K L The Myth of University Autonomy and Other Essays (1978).
- SCHWARTS H "Economic and Social Rights" 1992/3 The American University Journal of International Law and Policy 551.
- SCOTT P "Knowledge, Culture and the Modern University: Past Speaks and Future Prospects" 1989 The Times Higher Education Supplement 873.
- SCOTT P "Knowledge, culture and the modern university III: Redefined roles for a mass age" 1989 The Times Higher Education Supplement 24.
- SCULLY C M "Autonomy and Accountability : The University of California and the State

- Constitution" 1987 The Hastings Law Journal 927.
- SEARLE J The Campus War: A Sympathetic Look at the University in Agony (1972) 183.
- SEAGLE W The Quest for Law (1941).
- SHILS E "The Academic Ethos" in P Seabury (ed) The Future of the University in Southern Africa (1977).
- SHILS E "The Modern University and Liberal Democracy" 1989 Minerva 425.
- SHRIMALI K L The Myth of University Autonomy and Other Essays (1978).
- SIEBERT H Humboldt and the Reform of the Educational System (1942).
- SIMONS H J African Women : Their Legal Status in South Africa (1968).
- SMIT P "Die KUH-ondersoek na die universiteitswese: implikasies vir die universiteit" 1989 Aambeeld 6.
- SMIT N "Constitutional Academic Freedom" 1995 SALJ 682.
- SPIRAK G Thinking Academic Freedom in Gendered Post-coloniality (1992).
- STRYDOM A H "The University on its Way to the Year 2000" RSA 2000 (1980).
- SUNDAY TIMES "Varsities Face New State Threat" 5 December 1993 4.
- TAYLOR W "Leadership: University Vice-chancellors" 1992 The Encyclopaedia of Higher Education vol 2 104.
- TAYLOR W "Non-Western Societies and Higher Education" 1992 The Encyclopaedia of Higher Education vol 2 969.
- TIGHT M Academic Freedom and Responsibility (1988).
- THOM H B Stellenbosch 1866-1986: Honderd Jaar Hoër Onderwys (1966).
- THOMPSON L "Some Problems of Southern African Universities" in Van der Merwe and Welsh (eds) The Future of the University in Southern Africa (1977) 280.
- TRUMPelman M H The Joint Matriculation Board (1991).

- UNTERHALTER E "Education and Transformation : A View From the Ground" Apartheid Education and Popular Struggles (1991).
- VAN ALSTYNE "Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review" in W W van Alstyne (ed) Freedom and Tenure in the Academy (1993) 79.
- VAN DER ROSS R E "The Role of a Coloured University in Southern Africa" in Van der Merwe and Welsh (eds) The Future of the University in Southern Africa (1977) 242.
- VAN DER VYVER J D "Parliamentary Sovereignty, Fundamental Freedoms and a Bill of Rights" 1982 SALJ 557.
- VAN DER VYVER J D "The Bill-of-Rights Issue" 1985 TRW 13.
- VAN DER VYVER J D "The Private Sphere in Constitutional Litigation" 1994 THRHR 378.
- VAN DER WALT J C (Criticism of Judgment Van Niekerk v ...) 1970 THRHR 302.
- VAN DE SANDT CENTLIVRES A The Open Universities in South Africa (1957).
- VAN NIEKERK B "Hanged By the Neck Until You Are Dead" 1969 SALJ 457; 1970 SALJ 60.
- VAN NIEKERK B "The Uncloistering of the Virtue: Freedom of Speech and the Administration of Justice - A Comparative Overview" 1978 SALJ 362.
- VAN NIEKERK B "Social Engineering in the German Constitutional Court - Some Reflections on a Recent Judgment" 1975 SALJ 298.
- VAN WYK D Rights and Constitutionalism : The New South African Legal Order (1994).
- VENTER F "Die Staat en die Universiteits Wese in Suid-Afrika : Nuwe Wedersydse Grontwetlike Verantwoordelikhede, Regte en Verpligtinge" 1995 THRHR 385.
- VERVELD M Rondom die Middeleeue (1962).
- WALKER E A The South African College and the University of Cape Town (1929).
- WALKER M and BADSHA N "Academic Development: the 1990's" 1993 SAJHE 59.

- WALLERSTEIN I and STARR P (eds) The University Crisis Reader: The Liberal University under Attack (1971).
- WANDIRA A "The Special Tasks and Problems of the 'One-Country-One-University' Institution in Middle Africa" in H W van der Merwe and D Welsh (eds) The Future of the University in Southern Africa (1977) 76.
- WEBLER W "The Sixties and the Seventies : Aspects of Student Activism in West Germany" 1980 Higher Education 161.
- WELSH D and SAVAGE M "The University in Divided Society: the Case of South Africa" in H W van der Merwe and D Welsh (eds) The Future of the University in Southern Africa (1977).
- WELSH D and SAVAGE M The Open Universities in South Africa (1957).
- WIERUSZOWSKI H The Medieval University: Masters, Students, Learning (1966).
- WILKINS I and STRYDOM H The Super-Afrikaners (1978).
- WINTELER A "The Academic Department as Environment for Teaching and Learning" 1981 Higher Education 25.
- WOOLMAN S "Riding the Push-me Pull-you : Constructing a Test that Reconciles the Conflicting Interests which Animate the Limitation Clause" 1994 SAJHR 60.

B. LEGISLATION AND GOVERNMENT REPORTS

- African Charter on Human and People's Rights of 1979.
- American Declaration on the Rights and Duties of Man.
- Black Universities Amendment Act 6 of 1973.
- Commission of Inquiry into the Unrest in Soweto and Elsewhere (1977)
- Constitution of the Republic of Namibia
- Criminal Law Amendment Act 8 of 1953.
- General Law Further Amendment Act 19 of 1970.
- Government Gazette No 2217 of 22 November 1968.
- House of Assembly Debates 8 April 1957 column 4227.

- House of Assembly Debates 1958 vol 97 2066, 2075-6
- House of Assembly Debates 1958 vol 100 3169-73, 3186, 3503-14.
- House of Assembly Debates 1959 vol 99 1535-40
- House of Assembly Debates 10 April 1959 cols 3415-3416.
- House of Assembly Debates 10/11 April 1959 col 3705.
- House of Assembly Debates 1981 column 835. (Dr Hartzenberg).
- Internal Security Act 74 of 1982.
- International Covenant on Economic, Social and Cultural Rights
- Labour Relations Act 66 of 1995.
- Main Report of the Commission of Inquiry into Universities (1974).
- Medical University of Southern Africa Act 78 of 1976.
- Michigan Constitution of 1850
- Publications and Entertainments Act 26 of 1963.
- Rand Afrikaans University Act 51 of 1966.
- Republic of South Africa Constitution Act 200 of 1993.
- Robbins Report Committee on Higher Education (1963).
- Report of the Commission on Native Education 1949-51) (UG53/1951).
- Report of the Brookes Commission.
- Report of the Commission of Enquiry on Separate Training Facilities for Non-Europeans at Universities, 1953-1954.
- Report of the Commission on the Separate University Education Bill (UG.32/1958) 3.
- Report of the Commission of Inquiry into Certain Matters Relating to the University of the North (1975).
- Rhodes University (Private) Act 15 of 1949.
- South African Law Commission Interim Report on Group and Human Rights (1991).
- South African Law Commission Final report on Group and Human Rights (1994).

Suppression of Communism Act 44 of 1950.

Suppression of Terrorism Act 83 of 1967.

Tertiary Education (Education and Training) Act 92 of 1984.

The White Paper (1987)

Transfer Act 64 of 1959.

Union of South Africa Act of 1909.

Union of South Africa Short Summary of the Findings of the Interdepartmental Fact-finding Committee on the Financial Implications in Connection with the Establishment of Separate University Colleges for Non-Europeans (WP C-5) (1957).

Universal Declaration of Human rights of 1948.

Universities Act 61 of 1955.

Universities Amendment Act 67 of 1975.

Universities Amendment Act 65 of 1977.

Universities and Technikons Advisory Council Act 99 of 1983.

Universities (Education and Training) Amendment Act 61 of 1955.

Universities (Education and Training) Amendment Act 34 of 1987.

Universities (Education and Training) Amendment Act 41 of 1990.

Universities for Blacks Amendment Act 52 of 1979.

Universities for Blacks Amendment Act 14 of 1982.

Universities for Blacks, Technikons (Education and Training) and Education and Training Amendment Act 71 of 1985.

Universities for Blacks, Technikons (Education and Training) and Education and Training Amendment Act 3 of 1986.

University Education Act 45 of 1959.

University Incorporation Act 16 of 1873 (Cape).

University College Act 18 of 1909.

University of Cape Town Act 14 of 1916.

University of Durban-Westville Act 49 of 1969.
 University of Durban-Westville Act 81 of 1983.
 University of Fort Hare Act 40 of 1969.
 University of Natal (Private) Act 4 of 1948.
 University of Natal (Private) Act 7 of 1960.
 University of the North Act 47 of 1969.
 University of Port Elizabeth Act 1 of 1964.
 University of Pretoria Act 13 of 1930.
 University of South Africa Act 12 of 1916.
 University of South Africa Amendment Act 30 of 1951.
 University of Stellenbosch Act 13 of 1916.
 University of the Orange Free State (Private) Act 21 of
 1949.
 University of the Western Cape Act 50 of 1969.
 University of the Western Cape Act 78 of 1983.
 University of the Witwatersrand, Johannesburg (Private)
 Act 15 of 1951.
 University of the Witwatersrand, Johannesburg (Private)
 Act 15 of 1959.
 University of Zululand Act 43 of 1969.

VAN DER WALT COMMITTEE REPORT

VAN WYK DE VRIES COMMISSION Main Report of the Commission
 of Inquiry into Universities (1974).

Verslag van Kommissie van Onderzoek na Aangeleentehede
 rakende die Universiteit van Wes-Kaapland
 (1974).

Vista University Act 106 of 1981.

C. CASE LAW

Adler v Board of Education 342 US 485 (1952)

Baloro and Others v University of Bophuthatswana and
 Others 1995 (8) BCLR 1018 (B)

Barenblatt v US 360 US 109 (1959)

Board of Curators v Horowitz 435 US 78 (1978)

Bozzoli and another v Station Commander, John Vorster Square 1972 (3) SA 934 (W).

Brown v Board of Education of Topeka 347 US 483 (1954).

Directory, Advertising and Cost Cutters CC v Minister of Posts, Telecommunications and Broadcasting and Others (1996) Z AUSA 83(T)

EEOC v University of Notre Dame du Lac 715 F2d 331 (7th Cir 1983)

Glynn v Keel University [1971] 2 ALL ER 89

Goss v Lopez 419 US 565 (1973)

In re Dinnan 661 F2d 426 (5th Cir 1981)

Keife v Geanakos 418 F.2d 359 (1st Gr 1969)

Majavu v S 1995 (2) SACLR 46 (CkGD)

Ntantiso and Another v Minister of Law and Order 1995 (1) SACLR 119(E)

Parducci v Rutland 316F Supp 352 (1970)

People v Regents of the University of Michigan 18 Mich p369, 68 NW 253 (1896)

Phato v Attorney General, Eastern Cape and Another; Commissioner of South African Police Service v Attorney General, Eastern Cape and Others 1995 (2) SACLR 104(E)

Powell v Sycracuse University 439 US 24 (1978)

Princeton University v Schmid 455 US 100 (1982)

R v Senate of the University of Aston [1969] 2 ALL ER 964.

Regents of the University of California v Bakke 438 US 265 (1978)

Regents of the University of Michigan v Ewing 474 US 214 (1985)

S v Sefadi 1995 (1) SACLR 89 (D)

S v Turrell and Others 1973 (1) SA 248 (C).

S v Van Niekerk 1970 (3) SA 655 (T) for a full transcript of this see 1970 Acta Juridica 77.

S v Van Niekerk 1972 (3) SA 711 (A); for criticism of this case see J Dugard "Judges, Academics and Unjust Laws" 1972 SALJ 271.

Schoeman v Fourie 1941 AD 125.

Sweezy v New Hampshire 354 US 234 at 263 (1957)

University of Cape Town and another v Ministers of
Education and Culture (House of Assembly
and House of Representatives) and others
1988 (3) SA 203 (A).

University of Pennsylvania v Equal Employment Opportunity
Commission 110 S Ct 577 (1990).

Widmar v Vincent 454 US 263 (1981)