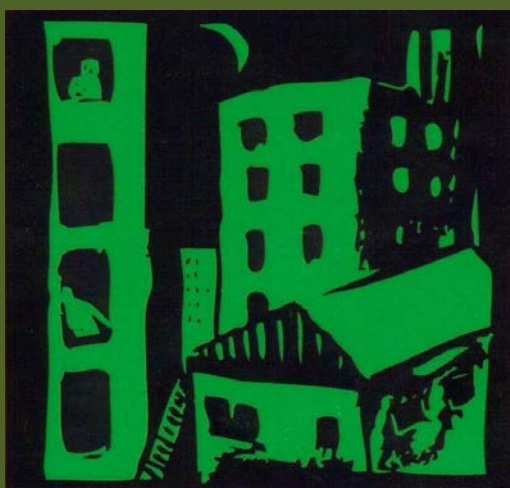


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# Academic freedom, institutional autonomy and the University of Malawi: An analysis of some trends and prospects

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## 1 INTRODUCTION

The history of higher education in Malawi has been steeped in modesty. Malawi attained its independence from Britain on 6 July 1964 and established its first public university in the same year. Although it took several years for the eponymously named university to take shape, the University of Malawi (the University) was the country's only public university for over 30 years – the second public university, Mzuzu University, was only established in 1997.<sup>1</sup> Coupled with a dearth of private universities in the country, the University was the only path to a university education in Malawi for many people. While other public universities

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\* Anganile-Kyala read an earlier draft of this article. I am, as usual, grateful for his ever-insightful comments. Mistakes and shortcomings are entirely mine.

<sup>1</sup> See <http://www.mzuni.ac.mw/background.html> (accessed 7 July 2017).

have now been established, and private universities have also sprung up in many parts of the country, the University retains a strong footprint in the country's higher education sector. It remains the biggest university in the country and, arguably, the most prestigious.

This article focuses on an analysis of the trends and prospects pertaining to academic freedom and institutional autonomy in the University. From a temporal perspective, the article focuses on the period from 1994 when Malawi adopted a new Constitution and reintroduced multiparty democracy. The focus on the period post-1994 is justified on the basis that by adopting a new Constitution, and reintroducing multiparty democracy, Malawi effected a significant transition and ushered in a governance paradigm markedly different from that which had prevailed before then.

The article is divided into four substantive parts excluding this introduction. The part following this introduction presents a framework for understanding academic freedom and institutional autonomy of a university. Thereafter, the article takes stock of developments in the University since 1994 that have a bearing on both academic freedom and institutional autonomy. The article then sketches some key trends, and offers suggestions about what could be done to redress some of the areas of concern in the University, insofar as academic freedom and institutional autonomy are concerned. The final part of the article is its conclusion.

A caveat is immediately in order. The focus of the discussion in this article is on academic freedom and autonomy of the University from the perspective of the management of the University and not necessarily from the academics' perspective. While, as will be demonstrated, institutional autonomy is often subsumed under the broad umbrella of academic freedom, this article's analysis focuses on the institutional dimension of academic freedom. The article is mindful that a recent analysis of academic freedom from the academics' perspective already exists<sup>2</sup>, and that academic freedom in Malawi, generally, before 1994 has already been the subject of scholarly interrogation.<sup>3</sup> Resultantly, academic freedom, from the lecturers' perspective, is only referred to tangentially. Additionally, although the article's discussion places the spotlight on the University, the observations and conclusions made herein have, arguably, equal applicability to other public universities in Malawi and also to other universities especially in Africa. As confirmed by the United Nations Educational, Scientific and Cultural Organisation (UNESCO), in spite of the diversity of arrangements that apply to higher education, similar questions arise in all countries with regard to the status of higher-education teaching personnel, which in turn calls for the adoption of common approaches, insofar as they are applicable.<sup>4</sup>

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<sup>2</sup> Nkhata M "The Chinsinga-gate affair: a not-so-subtle threat to academic freedom in Malawi" (2012) 6(2) *Malawi Law Journal* 183-201.

<sup>3</sup> Kerr D & Mpanje J "Academic freedom and the University of Malawi" (2002) 45(2) *African Studies Review* 73-91; Africa Watch *Academic freedom and human rights abuses in Africa* (New York: Human Rights Watch 1991) 35-40.

<sup>4</sup> UNESCO "Recommendation concerning the status of higher education teaching personnel" (1997) available at [http://portal.unesco.org/en/ev.php-URL\\_ID=13144&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13144&URL_DO=DO_TOPIC&URL_SECTION=201.html) (accessed 4 October 2017).

## 2 A FRAMEWORK FOR UNDERSTANDING ACADEMIC FREEDOM AND INSTITUTIONAL AUTONOMY OF UNIVERSITIES

There is a vital educational and cultural task which universities are especially suited to undertake and which no other institution can fulfil.<sup>5</sup> In the words of Leavis, this task involves bringing various “essential kinds of specialist knowledge and training into effective relation with informed general intelligence, humane culture, social conscience and political will”.<sup>6</sup> Universities, according to UNESCO, are “communities of scholars preserving, disseminating and expressing freely their opinions on traditional knowledge and culture, and pursuing new knowledge without constriction by prescribed doctrines”.<sup>7</sup> The core of a university’s mandate is always the pursuit and application of new knowledge.

The ideal product of the university must, therefore, be capable of possessing knowledge not “only of things” but also of their mutual and true relations.<sup>8</sup> It is also about the ability to appreciate one’s discipline of specialisation in terms of its place in relation to the whole body of knowledge. A university contributes to the cultivation of an ideal product by providing teachers who are well versed in their disciplines, who remain in collaborative contact with other similar minds, and who belong to an institution that is allowed to define its own interrelationships, establish its own rules and gain its own tone and character.<sup>9</sup> To fulfil their roles in society, all universities need academic freedom.<sup>10</sup> As pertinently put by Mayor, as societies face more complicated problems for which information and education remain key solutions, the role of a university has become more prominent.<sup>11</sup>

A university, by its very nature, must be cosmopolitan in the composition of its teaching staff as well as in its complement of students.<sup>12</sup> Admitting qualified lecturers and students to teach and be taught in a university must be done through established transparent university systems and processes based on nothing other than merit. The business of a university is to provide an environment in which it is most conducive to engage in speculation, experimentation and creation of new ideas.<sup>13</sup> A university must, therefore, be characterised by the spirit of free enquiry. Four freedoms are key to sustaining this atmosphere in a university: the freedom of a university to determine for itself, on academic grounds, who may teach, what may be taught, how it shall be taught,

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<sup>5</sup> O’Hear A “Academic freedom and the university” in Tight M (ed) *Academic freedom and responsibility* (Milton Keynes: Open University Press 1988) 8.

<sup>6</sup> Leavis F *Education and the university* (Cambridge: Cambridge University Press 1979) 24.

<sup>7</sup> UNESCO (1997) para 4.

<sup>8</sup> O’Hear (1988) 8-9.

<sup>9</sup> O’Hear (1988) 9-10.

<sup>10</sup> Rendel M “Human rights and academic freedom” in Tight (ed) (1988) 83.

<sup>11</sup> Mayor F “Academic freedom and university autonomy” in CEPES Papers on Higher Education *Academic freedom and university autonomy* (Bucharest: CEPES 1993) 11.

<sup>12</sup> Halsey A *Academic freedom and the idea of a university* (Cape Town: Creda Press Ltd 1976) 15.

<sup>13</sup> Conference of representatives of the University of Cape Town and the University of the Witwatersrand *The open universities in South Africa* (Johannesburg: Witwatersrand University Press 1957) 13.

and who may be admitted to study.<sup>14</sup> Academic freedom requires, from the academics' employing institution, more than just a guarantee of free speech; it also implies a long term commitment, by the institution, to provide conditions in which teaching and learning can occur optimally.<sup>15</sup>

While the ideals that universities exist to promote are often incontestable, it is clear that the history of universities evinces many struggles that universities have experienced in order to preserve the sanctity of their operations.<sup>16</sup> By way of illustration, the medieval Church in Europe, through the Holy Inquisition, sought to confine speculative thought within predetermined limits, and many leading scholars of the time ended up being victims of condemnation.<sup>17</sup> The spirit of the Holy Inquisition has persisted in various forms in modern times, most clearly manifested by repressive regimes choosing to persecute scholars believed to be propagating heretical ideas.

Governments are, by and large, the main threats to academic freedom and university autonomy but by no means the only ones.<sup>18</sup> Threats have come from religious authorities, civil society organisations and sometimes even from members of the academy.<sup>19</sup> Historical experience also demonstrates that the well being of academic freedom and institutional autonomy of universities is related to the level of democratisation in a country. The result is that, generally, the more undemocratic the regime, the more likely the suppression of academic freedom and the infringement of university autonomy.<sup>20</sup> In terms of the relationship between the State and a university, it is fair to state that this has been, and is likely to remain, contested terrain.<sup>21</sup> The State's provision of financial support for universities has given many governments an impetus to control universities. Academics, for their part, have often actively resisted attempts at government control of their institutions. The key for universities is to locate themselves, within the contested terrain, in a way that does not compromise their ideals. Academic freedom and institutional autonomy provide "indispensable preconditions for universities to discharge their educational and social responsibilities".<sup>22</sup>

For universities in the developing world, academic freedom and institutional autonomy acquire a special importance because of the roles that universities are required to undertake in these societies. In a developing country, like Malawi,

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<sup>14</sup> Conference of representatives of the University of Cape Town and the University of the Witwatersrand (1957) 13-14.

<sup>15</sup> O'Hear (1988) 7.

<sup>16</sup> Conference of representatives of the University of Cape Town and the University of the Witwatersrand (1957) 12.

<sup>17</sup> Hoye W "The religious roots of academic freedom" (1997) available at <http://cdn.theologicalstudies.net/58/58.3/58.3.1.pdf> (accessed 26 July 2017).

<sup>18</sup> Kamba W "University autonomy" in CEPES Papers on Higher Education (1993) 20.

<sup>19</sup> Mazrui A "Academic freedom in Africa: the dual tyranny" (1975) 74 *African Affairs* 393-400

<sup>20</sup> Sawyerr A "Academic freedom and university autonomy: preliminary thoughts from Africa" (1996) 9(4) *Higher Education Policy* 282.

<sup>21</sup> Jansen J "Accounting for autonomy" (2004) available at <https://www.chet.org.za/papers/41st-tb-davie-memorial-lecture-university-cape-town-accounting-autonomy> (accessed 4 October 2017).

<sup>22</sup> Kamba (1993) 20.

universities are “indispensable to socio-economic development and to the improvement of the quality of life of societies in general, and of the particular societies in which they exist and operate”.<sup>23</sup> While the preceding may hold true for many universities in the world, the fact is that the exigency to be served by universities in developing countries is more acute than in the “developed” countries. The premium to maintain academic freedom, therefore, remains very high for countries like Malawi.<sup>24</sup>

Resultantly, universities must always be at the centre of development. Universities must be capacitated to conduct research that could help in solving the various social, economic and political ills afflicting developing countries. For a university to play this role, it must enjoy a high degree of academic freedom and autonomy.<sup>25</sup> As reiterated by UNESCO, all countries must take necessary steps to ensure that higher education is directed at, among other things, human development and the general progress of society.<sup>26</sup> In the next segment of the article, the two concepts at the centre of this discussion are unpacked. In this article’s analysis of academic freedom, however, it is important to bear in mind the fact that academic freedom and institutional autonomy are concepts that have, in practice, been affected by social and material conditions.<sup>27</sup> The result is that different interpretations have been attached to these terms in different societies.<sup>28</sup>

## 2.1 Understanding academic freedom

Academic freedom defies an agreed upon definition.<sup>29</sup> Nevertheless, it is generally agreed that academic freedom is of unquestioned importance to institutions of higher learning.<sup>30</sup> Academic freedom is often posited as an essential condition for the proper functioning of a university.<sup>31</sup> Because of the complexities attendant on defining academic freedom, it has been suggested that a more fruitful course is not to focus on framing a fixed definition but to set out the different types of claims that find refuge under the umbrella of academic freedom.<sup>32</sup> Additionally, any discussion of academic

<sup>23</sup> Kamba (1993) 21.

<sup>24</sup> Mlenga J “Death on campus: is academic freedom possible for students and academics at the University of Malawi?” in Harlvorsen T & Nossun J (eds) *North –South knowledge networks: towards equitable collaboration between academics, donors and universities* (Cape Town: African Minds 2016) 188.

<sup>25</sup> Kamba (1993) 21.

<sup>26</sup> UNESCO (1997) para 10.

<sup>27</sup> Habib A, Morrow S & Bentley C “Academic freedom, institutional autonomy and the corporatized university in contemporary South Africa” (2008) 34(2) *Social Dynamics* 145.

<sup>28</sup> Kaya H “Academic freedom, institutional autonomy and the search for relevance in higher education in South Africa” (2006) available at [http://www.che.ac.za/sites/default/files/publications/d000115\\_Academic\\_freedom\\_Kaya\\_2006.pdf](http://www.che.ac.za/sites/default/files/publications/d000115_Academic_freedom_Kaya_2006.pdf) (accessed 3 July 2017).

<sup>29</sup> Appiagyei-Atua K, Beiter K & Karran T “The capture of institutional autonomy by the political elite and its impact on academic freedom in African universities” (2015) 47(3) *Higher Education Review* 50.

<sup>30</sup> Karran T “Academic freedom in Europe: time for a *Magna Charta*?” (2009) 22 *Higher Education Policy* 164-165.

<sup>31</sup> Vrieling J, Lemmens P, Parmentier S & Leru Working Group on Human Rights “Academic freedom as a fundamental human right” (2010) *Advice Paper No. 6* 4.

<sup>32</sup> Barendt E *Academic freedom and the law: a comparative study* (Oxford and Portland: Hart Publishing 2010) 17.

freedom must always keep in mind the historical character of the university and the conditions which have shaped the production and reproduction of knowledge within universities.<sup>33</sup>

The origins of academic freedom, Fuchs argues, lie in the continuous struggle of the human intellect trying to escape the shackles of bondage imposed by governments and other societal forces.<sup>34</sup> In spite of the many definitions of academic freedom, a broad understanding of academic freedom reveals that it coalesces about the following elements.<sup>35</sup> First, academic freedom belongs to the academic community comprising the university itself, academics and students. Secondly, academic freedom is the freedom of thought and conscience that a member of the academic community, be it a student or lecturer, has to choose, among other things, his/her research topic and method of research and to disseminate the results of his/her research without restriction. Thirdly, a prerequisite of academic freedom is institutional autonomy which requires universities to be free from political authority and economic power even if the university's operations are financed by the State. Fourthly, academic freedom is linked to responsibility which entails that the individual scholar is always responsible to the community of his peers which compares and evaluates methods and results, thereby serving as a correcting factor. Academic freedom, therefore, emphasises the freedom of individual members of a university to perform their professional duties without undue hindrance, and also the importance of granting universities the autonomy necessary to allow them to function. If academic freedom is allowed to prevail, intellectual interchange and the free pursuit of knowledge are guaranteed

Institutional autonomy is both a prerequisite for academic freedom as well as a consequence thereof.<sup>36</sup> Academic freedom for an institution includes autonomy or self-government in accordance with the institution's constitutive law.<sup>37</sup> It is the freedom that a higher education institution enjoys to enable it to pursue its mission and to be free from outside control.<sup>38</sup> Autonomy and self-governance relate to, among other things, academic policies, the balance between teaching and research, staffing ratios, the appointment, promotion and discipline of staff at all levels, the admission and discipline of students, curricula, standards, examinations and conferring of degrees and diplomas; and control over the material resources needed to undertake these activities.<sup>39</sup> The grant of tenure to academics who have fulfilled the conditions of their probation is often assumed to be a way of guaranteeing the freedoms conferred on academics.

<sup>33</sup> Lange L "Academic freedom: revisiting the debate" (2013) 8 *Kagisano* 57-75.

<sup>34</sup> Fuchs R "Academic freedom – its basic philosophy, function, and history" in Baade H & Everett R (eds) *Academic freedom: the scholar's place in modern society* (New York: Oceana Publications Inc. 1964) 4.

<sup>35</sup> Andren C & Johansson-Dahre U "Academic freedom and university autonomy" in CEPES Papers on Higher Education (1993) 43. For a gallant attempt at comprehensively defining academic freedom, see Karran (2009) 163-189.

<sup>36</sup> Fuchs (1964) 3.

<sup>37</sup> Rendel (1988) 74.

<sup>38</sup> Gordon J "Individual and institutional academic freedom" (2010) 49(2) *Brigham Young University Studies* 45-46.

<sup>39</sup> Rendel (1988) 75.

Academic freedom is not without its limits. It also entails certain responsibilities that scholars and institutions owe the wider society. At the individual level, institutions can legitimately limit academic freedom through several official means, for example, by insisting on teaching in accordance with an established curriculum, by enforcing academic discipline, and by prohibiting hate speech, among other means.<sup>40</sup> The limitations emphasise the fact that academic freedom is a situated freedom which can be limited to protect an institution's mission and also to further broader societal objectives.

## 2.2 Institutional autonomy for a university

According to Jansen, the concepts of academic freedom and institutional autonomy are as old as the idea of the university itself.<sup>41</sup> The history of institutional autonomy for universities confirms that autonomy is contextually and politically defined, and that a key element is always the role of the State.<sup>42</sup> The original understanding of academic freedom presupposed an acknowledgment that society always retained a legitimate interest in higher education, but that a means needed to be devised to demarcate the interests of society from the interests of members of the academic community.<sup>43</sup> By recognising academic freedom, a concession was made that there is an area of activity wherein universities possess the autonomy to determine how to proceed and wherein society should not needlessly intervene. Institutional autonomy, importantly, is not unique or exclusive to academics or intellectuals.<sup>44</sup> In relation to scholars, however, institutional autonomy helps in the creation of optimal conditions for intellectual production and reproduction, which makes it a critical component of academic freedom.<sup>45</sup>

A helpful starting point in understanding institutional autonomy is the 1988 Lima Declaration on Academic Freedom and Autonomy of Institutions of Higher Education (Lima Declaration).<sup>46</sup> The Lima Declaration defines autonomy as follows:

“Autonomy’ means the independence of institutions of higher education from the State and all other forces of society, to make decisions regarding its internal government, finance, administration, and to establish its policies of education, research, extension work and other related activities.”

Articles 18 and 19 of the Lima Declaration highlight some very important aspects of autonomy for universities. In Article 18, the Declaration states that the proper enjoyment of academic freedom demands a high degree of autonomy for institutions of higher education. Resultantly, States are under an obligation not to interfere with the autonomy of institutions of higher education as well as to prevent interference by other

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<sup>40</sup> Gordon (2010) 44.

<sup>41</sup> Jansen (2004).

<sup>42</sup> Neave G “On being economical with university autonomy: being an account of the retrospective joys of a written constitution” in Tight (ed) (1988) 31-48.

<sup>43</sup> Barnett R “Limits to academic freedom: imposed-upon or self-imposed” in Tight (ed) (1988) 90-91.

<sup>44</sup> Sawyerr (1996) 281.

<sup>45</sup> Sawyerr (1996) 281.

<sup>46</sup> Available at <https://www.hrw.org/legacy/reports98/indonesia2/Borneote-13.htm> (accessed 5 July 2017).

forces of society. In Article 19, several aspects of the autonomy of universities, as they pertain to the management of a university, are highlighted. Among them are the following: the autonomy of institutions of higher education must be exercised by democratic means of self-government, which includes the active participation of all members of the respective academic communities; members of the academic community must have the right and opportunity, without discrimination of any kind, to take part in the conduct of academic and administrative affairs; and all governing bodies of institutions of higher education shall be freely elected and shall comprise members of the different sectors of the academic community. Article 19 also emphasises the fact that autonomy should encompass decisions regarding the administration and determination of policies of education, research, extension work, allocation of resources and other related activities. Without autonomy, universities cannot function.<sup>47</sup>

Arguably, the most succinct exposition of institutional autonomy has been provided by UNESCO. UNESCO stated that institutional autonomy is:

“that degree of self-governance necessary for effective decision-making by institutions of higher education regarding their academic work, standards, management and related activities consistent with systems of public accountability, especially in respect of funding provided by the State, and respect for academic freedom and human rights”.<sup>48</sup>

UNESCO’s recommendation is that all countries must take steps to protect higher education institutions from threats to their autonomy.

Three reasons can be given to justify the protection of the autonomy of universities.<sup>49</sup> First, and as confirmed by the Lima Declaration, autonomy is a necessary precondition if institutions of higher learning must fulfil their proper function in society. Only autonomously governed institutions can objectively set and implement an agenda in accordance with a university’s founding objectives. Secondly, and in a way related to the first reason, teaching and research in a university are tasks conducted by highly trained professionals who, in their community of peers, are best placed to regulate each other. Universities, therefore, need autonomy in order to recruit the best possible candidates to conduct teaching and research. Lastly, autonomy leads to efficiency and effectiveness. By identifying pools of professionals to engage in teaching and research, universities, given the necessary space, are best placed, as institutions, to transfer such skills to others. Admittedly, the level of government involvement in the operations of universities varies across countries, but it is also dependent on whether or not the university is fully funded by the government. This may also have an influence on the level of autonomy actually enjoyed by a university. The emphasis on autonomy must not be interpreted to suggest that a university does not owe responsibilities to society. The broad responsibility that all universities owe their societies is to be governed in accordance with their founding instruments. Institutional autonomy also requires institutional accountability. Universities are, therefore, accountable for a commitment

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<sup>47</sup> Vrieling (2010) 19.

<sup>48</sup> UNESCO (1997) para 17.

<sup>49</sup> Moor R “Academic freedom and university autonomy: essentials and limitations” in CEPES Papers on Higher Education (1993) 61-62.



to quality and excellence in teaching and research.<sup>50</sup> Specifically, for scholars there is a duty to use their academic freedom to teach effectively and to “base research on an honest search for truth”.<sup>51</sup>

### 2.3 Academic freedom, institutional autonomy and the law

As repeatedly stated in this article, academic freedom is the broad umbrella under which institutional autonomy must be understood. Institutional autonomy, understood differently, is one of the pillars that undergirds academic freedom.<sup>52</sup> The two, however, remain intimately interlinked. Academic freedom depends both on the institution and on the general rules operating in society.<sup>53</sup> An institution’s academic freedom depends on the formal and informal rules governing its existence and the resources available for its operations. While very important, institutional autonomy, of itself, is no guarantee of academic freedom since an autonomous institution, for example, may nevertheless treat academics and students unfairly.<sup>54</sup> In practice, the individual’s academic freedom depends on institutional autonomy since it is a necessary but not sufficient condition for academic freedom.<sup>55</sup> Academic freedom thrives not simply because there is a free exchange of ideas among teachers and students, but also because there is autonomous decision making by the academy itself.<sup>56</sup>

The claim for autonomy by a university is not a simple claim for privileged status by universities but rather a recognition that universities perform special functions which will be best discharged if they are allowed their autonomy. Neither is it a claim for exemption from public accountability or from a duty to explain their policies.<sup>57</sup> The claim for autonomy is justified by the realisation that the output of universities requires the exercise of initiative and creativity, which are attributes that can flourish only in a context of considerable liberty and freedom. Formally, a university is autonomous to the extent that it is free to take, within its organisational structures and by its own procedures, decisions relating to its legislation and administration.<sup>58</sup> Beyond the formalistic dimension, however, effective autonomy also requires that the organisation of a university should be such that its decision makers include a recognisable component from the academic members of staff so that they can participate in the shaping of academic policy.

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<sup>50</sup> Beiter K, Karran T & Appiagyei-Atua K “Yearning to belong: Finding a “home” for the right to academic freedom in the UN human rights covenants” (2016) 11 *Intercultural Human Rights Law Review* 125.

<sup>51</sup> UNESCO (1997) para 33.

<sup>52</sup> UNESCO (1997) identifies four pillars that underlie academic freedom: institutional autonomy, self-governance, tenure and individual rights and freedoms. Appiagyei-Atua (2015) 52-54 asserts that the fifth pillar must be the students’ right to academic freedom.

<sup>53</sup> Rendel (1988) 80.

<sup>54</sup> See Barendt (2010) 67.

<sup>55</sup> Rendel (1988) 80.

<sup>56</sup> Rabban D “Academic freedom, Individual or Institutional” (2001) 87(6) *Academe* 18.

<sup>57</sup> Hetherington H “University autonomy” in International Association of Universities *University autonomy: its meaning today* (Paris: IAU 1965) 2.

<sup>58</sup> Hetherington (1965) 4.

No legally binding global or regional international human rights instrument expressly protects the right to academic freedom.<sup>59</sup> The only international law document that lays down standards with regard to academic freedom and international autonomy is the UNESCO Recommendation Concerning the Status of Higher Education Teaching Personnel of 1997.<sup>60</sup> Nevertheless, the law has a bearing on academic freedom and institutional autonomy. At a general level, universities are established under a governing law which will stipulate, among other things, the rights and duties of academics while also establishing procedures that must be followed by the various faculties and departments. Specifically in relation to academic freedom, human rights law contains many provisions which have been enunciated to justify the protection of academic freedom.<sup>61</sup>

For example, freedom of expression and the right to education have always been interpreted to include a protection for academic freedom.<sup>62</sup> In the same vein, the African Commission on Human and Peoples' Rights has recognised academic freedom even though the African Charter on Human and Peoples' Rights does not make any explicit provision thereof.<sup>63</sup> First, in connection with the right to education, this right finds expression in Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>64</sup> and also in Article 26 of the Universal Declaration of Human Rights. The Constitution of the Republic of Malawi (Constitution) also provides for the right to education in section 25. In interpreting the right to education, the Committee on Economic, Social and Cultural Rights (CESCR) has stated that while academic freedom is not expressly mentioned in Article 13 of the ICESCR, the right to education can only be enjoyed where both staff and students enjoy academic freedom.<sup>65</sup> It has also been confirmed by UNESCO that the right to education can only be fully enjoyed in an atmosphere of academic freedom and autonomy for institutions of higher education.<sup>66</sup> Domestically, in *Council for the University of Malawi & others v Jessie Kabwila-Kapasula & others*, the High Court of Malawi also confirmed that academic freedom and the right to education are intertwined and that any meaningful interpretation ought to consider both rights.<sup>67</sup> In the Court's view, it would be pointless to attempt to pit the students'

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<sup>59</sup> Beiter (2016) 120.

<sup>60</sup> Beiter (2016) 120-121.

<sup>61</sup> For a comprehensive expose of the human rights foundations of academic freedom, see Beiter, (2016) 107 - 190.

<sup>62</sup> Warbrick C "Human rights and academic freedom" CEPES Papers on Higher Education (1993) 98-104.

<sup>63</sup> *Kenneth Good v The Republic of Botswana* Communication No 313/2005 available at [http://www.achpr.org/files/sessions/47th/comunications/313.05/achpr47\\_313\\_05\\_eng.pdf](http://www.achpr.org/files/sessions/47th/comunications/313.05/achpr47_313_05_eng.pdf) (accessed 4 October 2017).

<sup>64</sup> Malawi acceded to the ICESCR on 22 December 1993. See [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-3&chapter=4&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&lang=en) (accessed 7 July 2017). Article 15 of the ICESCR can also be used to found academic freedom in so far as it protects the liberty necessary for the conduct of scientific research and creative activity.

<sup>65</sup> *General Comment No 13: The right to education* (article 13) (1999) available at [http://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/d\)GeneralCommentNo13TheRighttoEducation\(article13\)\(1999\).aspx](http://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/d)GeneralCommentNo13TheRighttoEducation(article13)(1999).aspx) (accessed 7 July 2017).

<sup>66</sup> Preamble to UNESCO (1997).

<sup>67</sup> High Court, Principal Registry, Civil Cause No 84 of 2011 (HC) (Unreported).

right to education against the academics' freedom of expression since the rights are mutually reinforcing.

Secondly, freedom of expression, and several other civil and political rights, have also been used to justify academic freedom. Freedom of expression is protected in Article 19 of the International Covenant on Civil and Political Rights (ICCPR)<sup>68</sup>, but Articles 18 (freedom of thought, conscience and religion), 21 (freedom of assembly) and 22 (freedom of association) of the ICCPR have also been used to justify academic freedom.<sup>69</sup> In Malawi, the Constitution guarantees freedom of conscience (section 33), freedom to hold and impart opinions (section 34), and freedom of expression (section 35). As jurisprudence from the United States of America proves, however, it is the freedom of expression which offers the most robust basis for protecting academic freedom. Courts in the United States of America have consistently held that academic freedom is protected by the First Amendment and that this is a protection with which the government should be very slow to interfere.<sup>70</sup>

There have also been several international declarations that have affirmed the protection of the academic freedom and institutional autonomy of universities. First, the Lima Declaration affirms that the right to education can only be fully enjoyed in an atmosphere of academic freedom and autonomy for institutions of higher learning. Secondly, the Kampala Declaration on Intellectual Freedom and Social Responsibility (Kampala Declaration)<sup>71</sup> provides for: a range of intellectual rights and freedoms that must be enjoyed by academics; the obligations that the State must discharge with respect to protecting academic freedom; and the social responsibilities that members of the intellectual community owe their communities. For example, in Article 11 the Kampala Declaration provides that "institutions of higher learning shall be autonomous of the State or any other public authority in conducting their affairs", and in Article 13 the State is obliged to take prompt and effective measures in respect of any infringement of the rights and freedoms of members of the intellectual community. Thirdly, the Dar es Salaam Declaration on Academic Freedom and Social Responsibility of Academics (Dar es Salaam Declaration) proceeds from an express understanding of the relationship between the right to education and academic freedom, and in Part II outlines numerous rights and freedoms that academics must enjoy. The Dar es Salaam Declaration confirms that institutions of higher learning must be guaranteed their autonomy. Notwithstanding the preceding, it must be pointed out that declarations are, in international law, regarded as "soft law" and often considered as non-binding.<sup>72</sup> Nevertheless, they remain important as a means of generating pressure for more effective action in the interaction with States.<sup>73</sup> Soft law instruments retain a normative

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<sup>68</sup> Malawi acceded to the ICCPR on 22 December 1993, See [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-4&chapter=4&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-4&chapter=4&lang=en) (accessed 7 July 2017).

<sup>69</sup> Nowak M *UN Covenant on Civil and Political Rights: CCPR Commentary* (Strasbourg: NP Engel 2005) 440.

<sup>70</sup> *Sweezy v New Hampshire* 354 US 234 (1957); *Keyishian v Board of Regents* 385 US 589.

<sup>71</sup> Available at <http://hrlibrary.umn.edu/africa/KAMDOK.htm> (accessed 6 July 2017).

<sup>72</sup> Shaw M *International law* (Cambridge: Cambridge University Press 2008) 117-118.

<sup>73</sup> Rendel (1988) 78.

character in their intent and represent an international consensus on the subject matter that they cover.<sup>74</sup>

Insofar as the interrelationship among law, academic freedom and institutional autonomy in Malawi is concerned, section 33 of the Constitution deserves special attention. In its entirety, the provision stipulates as follows: “Every person has the right to freedom of conscience, religion, belief and thought, and to academic freedom.”<sup>75</sup> Unlike in many of the international instruments where academic freedom has to be read into other rights, the Constitution has expressly provided for academic freedom, and also made it non-derogable.<sup>76</sup> By constitutionalising the right to academic freedom, the Constitution has valorised academic freedom and made its defence a constitutional imperative.<sup>77</sup> It is also notable that while in much of the literature academic freedom is associated with claims by members of higher education institutions, in the Constitution, the right is guaranteed to “every person”. There is, therefore, nothing, on a plain reading of section 33, which prevents extending academic freedom to persons other than members of higher education institutions.<sup>78</sup> The fact that the right to academic freedom has been clustered together with conscience, belief, religion and thought entails that it must not be interpreted as a stand-alone right but in the context of other rights in the Bill of Rights and also the entire Constitution.<sup>79</sup> Nevertheless, and as demonstrated by Higgins, the individualisation runs the risk of severing or marginalising the “complex institutional setting in which alone the practice of academic freedom makes sense”.<sup>80</sup> The preceding, therefore, requires constant alertness especially in the translation and implementation of the right in policies and practice. In the next section of the article, a stocktaking exercise is conducted to unearth the trends that have marked academic freedom and institutional autonomy in the University.

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<sup>74</sup> Beiter (2016) 122.

<sup>75</sup> This formulation is strikingly similar to s 14(1) of the Interim Constitution of the Republic of South Africa which provided 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.”

<sup>76</sup> Section 45(2)(h) of the Constitution provides as follows: “There shall be no derogation with regard to – the right to freedom of conscience, belief, thought and religion and to academic freedom.” It is also pertinent to note that s 33 of the Constitution is entrenched and cannot be amended except following an affirmative vote in a national referendum, see Chapter XXI of the Constitution and the Schedule to the Constitution.

<sup>77</sup> Higgins J “The constitutional imperative for academic freedom in South Africa” in Varnham S & Gladman A (eds) *Europa world of learning 2015* (London and New York: Routledge 2014) 38.

<sup>78</sup> Kruger R “The genesis and scope of academic freedom in the South African Constitution” (2013) 8 *Kagisano* 5.

<sup>79</sup> Kruger (2013) 21.

<sup>80</sup> Higgins (2014)35.

### 3 TAKING STOCK: ACADEMIC FREEDOM AND INSTITUTIONAL AUTONOMY IN THE UNIVERSITY OF MALAWI SINCE 1994

The University was established with a federal structure. As currently constituted, the University has four constituent colleges located in various parts of the country.<sup>81</sup> The governing law for the University is the University of Malawi Act of 1972 as amended in 1998 (Act).<sup>82</sup> According to the Act, the University was established to “advance knowledge and to promote wisdom and understanding by engaging in teaching and research and by making provision for the dissemination, promotion and preservation of learning”.<sup>83</sup> Like many other African universities established in the immediate aftermath of independence, the University was established as a “developmental university”. The University was, therefore, expected to help in building Malawi’s capacity to develop and manage its resources, alleviate the poverty of its people, and close the gap between the country and other developed nations.<sup>84</sup> Unfortunately, and again quite like many African universities, the University was quickly captured by the governing elite and its autonomy was seriously undermined.<sup>85</sup>

The governing body of the University, established under section 8 of the Act, is the Council of the University of Malawi (Council) which is responsible for the management and administration of the “university and its property and revenues”.<sup>86</sup> It exercises “general control and supervision over all the affairs of the University.” The Council also has power to “demand and receive fees, subscriptions, deposits, fines and such other payments”<sup>87</sup> due to the University as well as to determine salary scales and general rates of payment for all categories of staff employed by the University.<sup>88</sup> By virtue of section 10(3) of the Act, the Council is enjoined not to discriminate against anyone in respect of the appointment of staff in the university, registration of students, or the right of any person to hold a privilege or advantage within the University.

In terms of its composition, the Council is headed by a Chairperson who is appointed by the President of the Republic of Malawi (President) and the bulk of the other members of Council are ex-officio members.<sup>89</sup> By virtue of section 13 of the Act,

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<sup>81</sup> These are Chancellor College, the Polytechnic, the College of Medicine and the Kamuzu College of Nursing. Historically, there was a fifth constituent college – Bunda College of Agriculture – but this was delinked from the University and now operates as a separate university. In August 2017, the President of Malawi approved the “unbundling” of the University with the result that processes are currently underway to make each of the constituent colleges stand-alone universities, see, “Peter Mutharika approves UNIMA dissolution” available at <http://www.times.mw/peter-mutharika-approves-unima-dissolution/> (accessed 4 October 2017).

<sup>82</sup> Chapter 30:01 Laws of Malawi.

<sup>83</sup> Section 5 of the Act.

<sup>84</sup> See Sawyerr A “Challenges facing African universities: selected issues” (2004) 47(1) *African Studies Review* 4-5.

<sup>85</sup> See Appiagyei-Atua (2015) 60-61.

<sup>86</sup> Section 10(1) of the Act.

<sup>87</sup> Section 10(1)(b) of the Act.

<sup>88</sup> Section 10(1)(m) of the Act.

<sup>89</sup> Section 11 of the Act.

the President is the Chancellor of the University.<sup>90</sup> Close scrutiny of section 14 of the Act reveals that the Chancellor is simply the symbolic head of the University as the actual powers for managing the University are vested in the Vice-Chancellor. The Vice-Chancellor is the University's principal academic and administrative officer and is appointed by the Council upon recommendation from a selection committee.<sup>91</sup> The Vice-Chancellor holds office for four years, and on matters concerning the "general conduct of the affairs of the University" he/she must keep the Chancellor and the Minister of Education informed and furnish them with such information as they may request.<sup>92</sup>

Considering that the period from 1994 to date has generated a lot of issues that are relevant for interrogating academic freedom and institutional autonomy, the article will limit the discussion by focussing on five broad areas in order to discern how academic freedom and institutional autonomy have been experienced in Malawi. The following are the broad areas under which the stocktaking will be conducted: admission of undergraduate students, funding for the University, managing increments in students' financial contribution (what other universities refer to as "fees"), academic freedom and institutional autonomy, and the position of the President as Chancellor. These thematic areas will now be discussed individually.

### **3.1 Admission of undergraduate students**

Academic freedom and institutional autonomy require that universities must have control over the enrolment of students. Since universities, invariably, have governing statutes, the admission criterion is first and foremost a question of understanding the imperatives of the law. In the case of the University, the only statement of principle in the Act concerning the admission of students is contained in section 5 of the Act. The University is directed to offer "within the limits of its resources, to persons suitably qualified academically and who, in the opinion of the Council, are able and willing to benefit from the facilities offered by the University, an education of a high university standard". Although section 5 speaks about "the opinion of the Council", it is contended here that this opinion is prescribed by the predicate conditionalities in the section. The Council's opinion as to who qualifies for admission is not an opinion that is at large. Section 5 has circumscribed the factors that the Council must consider in exercising its opinion. Clearly, "suitably qualified", in relation to potential students, speaks to merit. It must also be recalled that the Council is also enjoined by section 10(3) of the Act not to discriminate against any prospective student. Cumulatively, the prescriptions of law require the University to admit students on the basis of an objective criterion that is based on merit.

What has brought the University's admission process into the limelight is not the application of the criteria in section 5 of the Act but attempts to "modify" the application

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<sup>90</sup> The President is Chancellor of all public universities in Malawi. See, for example, s 14, Mzuzu University Act, Chapter 30:09 Laws of Malawi.

<sup>91</sup> Section 15 of the Act.

<sup>92</sup> Section 15(2) of the Act.

of the criteria allegedly for the purpose of making admission to the University more equitable. It is important to understand the attempts to “modify” the admission criteria against the provisions of section 20 of the Constitution. Section 20 provides as follows:

- “(1) Discrimination of persons in any form is prohibited and all persons are, under any law, guaranteed equal and effective protection against discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, disability, property, birth or other status or condition.
- (2) Legislation may be passed addressing inequalities in society and prohibiting discriminatory practices and the propagation of such practices and may render such practices criminally punishable by the court.”

Section 20 of the Constitution does two things. First, in section 20(1), it establishes non-discrimination as a constitutional norm in Malawi. For purposes of the present discussion, it is apposite to highlight that section 20 is relevant to the interpretation and application of section 25, which guarantees the right to education. The result is that in realising the right to education, the State must strive to ensure equal access to educational opportunities and equal enjoyment of educational facilities.<sup>93</sup> Secondly, section 20(2) creates an exception to the norm in section 20(1). Under the exception carved out by section 20(2), the State may introduce legislation addressing past inequalities and prohibiting discriminatory practices. Section 20(2) is applicable to the realisation of the right to education so that the State could legitimately enact legislation, which may be discriminatory on the face of it, designed to address inequalities in society. If, therefore, an otherwise discriminatory admission scheme to the University is duly supported by a law of general application, is reasonable, recognised by international human rights standards, and necessary in an open and democratic society, such admission scheme may be upheld as legal even though, *prima facie*, it “discriminates” amongst potential students of the university.<sup>94</sup>

On at least three occasions, the University’s undergraduate admission policy has ended up before the High Court of Malawi. A focus on these three cases may help illuminate some currents that influence undergraduate admission to the University. The first incident predates 1994 but is included here to help paint a better picture for the discussion. In *Mhango and others v University Council of Malawi*,<sup>95</sup> the applicants challenged the University’s admission policy which was based on one’s district and region of origin rather than merit. The applicants also contended that the Council had implemented the new selection criteria without consulting the Senate, as was required by law for all academic matters, and also that the Council had simply followed a government directive on the matter. The High Court agreed with the applicants holding that admitting students to the University on the basis of their district or region of origin and not merit was discriminatory and did not have any legal foundation. The Court also invalidated the Council’s decisions for having been made in contravention of the Act.

<sup>93</sup> Chirwa D *Human rights under the Malawi Constitution* (Cape Town: Juta & Co Ltd 2011) 261.

<sup>94</sup> Section 44(1) of the Constitution.

<sup>95</sup> [1993] 16 (2) MLR 605 (HC).

The second incident is *Ex parte Zaibula*.<sup>96</sup> In this case, the applicant, who had sat for the University's entrance examinations, challenged a decision of the University to administer a second set of University entrance examinations before the results of the first set of examinations were released. The applicant's challenge was also based on the fact that the University had decided to broaden the qualifying criteria as well as the assessment formula in administering the second set of University entrance examinations. The Court record reveals that the decision to administer the second set of entrance examinations was arrived at by the University following a ministerial directive. The University's Senate, it seems, merely adopted the directive in ordering the administration of the second University entrance examinations. The High Court proceeded to quash the decision of the University for being unreasonable and also made an order prohibiting the University from further implementing the new admission criteria.

The third incident is *The State and the Council of the University of Malawi ex parte Innocent Longwe and Winfred Mkochi*.<sup>97</sup> This was a judicial review application challenging the decision of the University to select students on the basis of their district or region of origin. As the narrative in the Court's judgment reveals, the origin of the litigation lay in a decision by the Council to "widen access to and participation in higher education for disadvantaged groups" in the country. This matter was decided against the applicants on procedural grounds; hence the High Court did not pronounce on the merits or legality of the new admission criterion. Nevertheless, the affidavits that the parties filed, together with the attendant exhibits, are revealing about how the University reached the decision to change its admission criterion. Although the Council contended, in court, that it made the decision to change the admission criterion in consultation with the University's Senate, it is clear that there was a government directive to all tertiary education institutions to the effect that admission to these institutions must be based on one's district or region of origin. Although there were contentions to the effect that the Council had attempted to defer the implementation of the new admission scheme for a year, supposedly to allow further consultation, no proof was actually tendered to establish that the further consultations were conducted.

The three cases reveal one worrying trend for the University. This is the propensity of successive governments to meddle with the recruitment of undergraduate students. Interference with the systems and procedures for selecting undergraduate students, in the manner in which it has been done in the University, is tantamount to the government deciding who must be taught in the University, and this erodes academic freedom.<sup>98</sup> What is more worrying is that the changes in admission policy seem, almost consistently, not to have followed scientific processes but rather political directives. If indeed there is need to broaden access to and participation in higher education in Malawi in order to assist people from supposedly "disadvantaged" districts or regions, it is possible to legally achieve this under the umbrella of section 20(2) of the

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<sup>96</sup> Civil Cause No 34 of 1997 (HC).

<sup>97</sup> Miscellaneous Civil Cause No. 138 of 2009 (HC).

<sup>98</sup> See Jansen (2004).



Constitution. For the avoidance of doubt, an affirmative action programme designed in accordance with a law of general application and applied in its strict legal terms, as a temporary measure for achieving equity, would not, by itself, be illegal.<sup>99</sup> In Malawi, however, the Act, as currently framed, has no provision authorising admission to the University other than on the basis of merit. Neither the Council nor the Senate, acting alone or jointly, can overrule the express provisions of the Act. University authorities have, therefore, compromised academic freedom in Malawi by tampering with the undergraduate admission system without legal backing.

### 3.2 Funding for the University

The University has, throughout its history, been run, predominantly, on government subventions. In the early years of the University, students were fully subsidised and not required to make any financial contribution at all. As part of the economic measures, supported by the World Bank and the International Monetary Fund, implemented in the late 1980s and early 1990s, students were required to make a financial contribution towards their education. In recent years, the University has been encouraged to raise money to support its operations. In truth, the University remains heavily dependent on government funding. The University has, however, continued to receive inadequate funding from successive governments. In the period immediately following the transition to multiparty democracy, government policy deliberately favoured the channelling of resources to primary education and teacher training sectors while ignoring support to the then sole University.<sup>100</sup>

Underfunding compromises academic freedom and the autonomy of the University. The University is directed under section 5 of the Act to, among other things, conduct research that is responsive to the needs of Malawi. To begin with, the underfunding of the University entails that there are hardly any funds to support meaningful research. Many of the significant research projects are, therefore, supported by development partners. While sourcing external funding to support research in the University is not bad, it is also important to realise that a university bereft of funding cannot determine the type of research that must be conducted. In such a situation, scholars end up participating in research projects chosen and designed by others.<sup>101</sup> Inadequate funding undermines the capacity of the University to conduct research that can be responsive to the needs of Malawi. Deprivation of resources within a university, it must be recalled, also leads to a loss of morale and a dearth of intellectual curiosity among scholars.<sup>102</sup> There is also the fact that underfunding makes the University a less competitive employer, and thus it is no longer a prized destination for some of the most creative minds in the country.

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<sup>99</sup> Karran (2009) 172.

<sup>100</sup> Kerr & Mapanje (2002) 87.

<sup>101</sup> Research projects chosen and designed outside of a university run the risk of proceeding on the basis of approval from the funder(s) rather than the recipient university – Kruger (2013) 25.

<sup>102</sup> Sawyerr (1996) 284.

In the end it must be realised that underfunding leaves the University vulnerable to market forces in a way that may compromise the University's mission as established by law. Market forces, be they global or local, should not be allowed to be the dominant force shaping the academic qualifications offered by the University and the research conducted by the University.<sup>103</sup> The University must remain a place open to all manner of research and learning; but to achieve this requires that adequate funding be extended to the University in order that it may determine its own priorities. Against this background it must be recalled that “[a]dvances in higher education, scholarship and research depend largely on infrastructure and resources, both human and material ...underpinned by academic freedom, professional responsibility, collegiality and institutional autonomy”.<sup>104</sup> True autonomy for the University will remain problematic for as long as there is underfunding.

### 3.3 Managing increments in students' financial contributions

As alluded to earlier, while university education was “free” in the early days of the University, students have been required to contribute towards the financing of their education over the years. This has been a very contentious issue and has on many occasions resulted in protests on the University's campuses and sometimes even forcible closure of some constituent colleges. The article's discussion of this matter is limited to how the University authorities have managed students' grievances in respect of increments in the annual financial contribution payable by all students.

Some examples may help illustrate the point here. In 2000, the then Minister of Finance announced that the financial contribution payable by each student at the University would be raised to \$580 per semester from about \$19 per semester.<sup>105</sup> What followed thereafter were massive student protests across the University. Two things can be highlighted here. First, the power to demand and receive fees is vested in the Council.<sup>106</sup> However, being a government funded entity it can be assumed that University authorities work in conjunction with government officials on many financial matters affecting the University. Ideally, one would assume, therefore, that any increment in the financial contribution being announced by the Minister of Finance would have been arrived at with the knowledge and concurrence of the University administrators. Secondly, in the midst of the students' protests the then Minister of Finance, Matthews Chikaonda, travelled to Chancellor College and met with representatives of the University of Malawi Students Union in an attempt to explain/justify the increment in the financial contribution. A compromise was

<sup>103</sup> Council on Higher Education “Academic freedom, institutional autonomy and public accountability in South African higher education” (2008) available at [http://www.che.ac.za/sites/default/files/publications/CHE\\_HEIAAF\\_Report\\_Aug2008.pdf](http://www.che.ac.za/sites/default/files/publications/CHE_HEIAAF_Report_Aug2008.pdf) (accessed 7 July 2017).

<sup>104</sup> UNESCO (1997) para 5.

<sup>105</sup> IRIN “Students riot” available at <http://www.irinnews.org/report/1503/malawi-students-riot> (accessed 6 July 2017); World University Rankings “Students face 3000 per cent hike in fees” available at <https://www.timeshighereducation.com/news/students-face-3000-per-cent-hike-in-fees/156052.article> (accessed 6 July 2017).

<sup>106</sup> Section 10(1)(b) of the Act.

eventually reached whereby the government assured students that in spite of the fee hike, no student would be unable to pursue his/her university education because loans would be extended to all needy students. The direct intervention by a politician to resolve a University dispute, as is demonstrated shortly in the article, is problematic.

Recently, the government also announced an increment of about 300 per cent in the annual financial contribution payable by students. Again, this was met by students' protests across the constituent colleges of the University.<sup>107</sup> Chancellor College was closed indefinitely. Students from the Polytechnic obtained a court order restraining the University from implementing the increment.<sup>108</sup> In the end, the dispute was resolved when the student leadership had an audience with the President, as Chancellor, and he directed that the proposed increment be reduced by MK50 000 across the board.<sup>109</sup>

The manner in which the University has dealt with increments in the students' financial contribution is revealing. In one of the two examples given above, it took a Minister's direct intervention to help resolve the matter, and in the other, the President intervened to resolve the dispute. In the case of the President's intervention, it is pertinent to note that he intervened with a directive reducing the financial contribution when all along the University authorities had argued that the increment was justified and would not be changed.<sup>110</sup> It is also mystifying how the MK50 000 reduction across the board was reached and whether University authorities were consulted before this was communicated to the students. Legitimate questions can also be raised as to whether the President intervened in his capacity as Chancellor of the University or as Head of State. It is contended here that the University, as set up under the Act, has sufficient structures for dealing with such matters. The constant intervention by political leaders renders the University prone to political manipulation. In such a context, clearly, the University cannot be deemed to be enjoying its autonomy

### **3.4 Institutional autonomy and academic freedom**

One incident dominates any discussion of academic freedom in the University especially when viewed from the lecturers' perspective and this is the summoning and interrogation of political science lecturer, Blessings Chinsinga, by the then Inspector General of the Malawi Police Service (IGP) in 2011.<sup>111</sup> Blessings Chinsinga was summoned by the Malawi Police Service on the basis of comments he had allegedly made in one of his lectures. Without a doubt, this was an infringement of academic

<sup>107</sup> "Chaos erupts in Malawi as university announces fee hike" available at <https://www.thedailyvox.co.za/chaos-erupts-malawi-university-fee-hikes-announced/> (accessed 6 July 2017)

<sup>108</sup> Kamtambe, F "Court stops Polytechnic's fee hike" available at <http://www.times.mw/court-stops-polytechnics-fee-hike/> (accessed 6 July 2017).

<sup>109</sup> Mashininga, K "President slashes university fees after student protests" available at <http://www.universityworldnews.com/article.php?story=20160817101205675> (accessed 6 July 2017).

<sup>110</sup> "University Council adamant on fee hike: Says UNIMA students proposal lack basis" available at <http://www.faceofmalawi.com/2016/07/university-council-adamant-on-fee-hike-says-unima-students-proposal-lack-basis/> (accessed 26 July 2017).

<sup>111</sup> For a full discussion of this incident and its implications for academic freedom, see Nkhata (2012) 183-201.

freedom because it amounted to questioning the manner in which Blessings Chinsinga was meant to conduct his classes. Scholars in higher education institutions have the right to teach without any interference, subject only to accepted professional principles and responsibilities.<sup>112</sup> Academic freedom requires that scholars must, first and foremost, be subject to the critique and supervision of their peers in the discharge of their duties. In this case, no attempt was made to internally scrutinise the methods or teaching materials that Chinsinga was using before he was summoned by the IGP. Additionally, the fact that the basis of his summoning was a report, allegedly made by one of his students, also suggested that there were “informers” on the Chancellor College campus of the University and this is also antithetical to academic freedom.

For the present discussion, however, what is important is how the matter was resolved by the University authorities. After the Chancellor College Academic Staff Union (CCASU) learnt of the summoning it wrote a letter to the IGP condemning the summoning and demanding an apology and assurances that its members would not be spied upon as they performed their duties. In his response, the IGP, while acknowledging that he “invited” Blessings Chinsinga for a discussion about the balance between academic freedom and national security, failed to make the apology or give the assurances that were demanded by the CCASU. The result was that the CCASU decided to stage a sit-in alleging that its members could no longer teach because the classrooms were unsafe. This led to a lengthy sit-in, the closure of Chancellor College – and at some point the Polytechnic was closed as well – and lengthy litigation between the CCASU and the Council.<sup>113</sup>

A lot of things happened during the sit-in by the CCASU. For purposes of the present discussion, however, the article only highlights the involvement of the President, as Chancellor of the University, and the possible implications for academic freedom and institutional autonomy. First, as the stalemate between the CCASU and the IGP dragged on, the then President, Bingu wa Mutharika, invited Blessings Chinsinga to State House, allegedly to discuss the matter. Chinsinga declined to meet the President. Subsequently, during a political gathering, the President made statements to the effect that the IGP had done nothing wrong by summoning Blessings Chinsinga and would not be apologising to anyone.<sup>114</sup> In March 2011, the President issued a directive that all lecturers should return to work failing which they would face disciplinary action. This was ignored by the CCASU and thereafter the Council dismissed Blessings Chinsinga and three other lecturers from Chancellor College. The CCASU then obtained an injunction effectively reinstating the four.<sup>115</sup> Eventually, in October 2011, the President directed that the four lecturers who had been dismissed should be reinstated. It was only with

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<sup>112</sup> UNESCO (1997) para 28.

<sup>113</sup> “Malawi: Academic freedom protests close campuses” available at <http://www.universityworldnews.com/article.php?story=20110408184143792> (accessed 7 July 2017).

<sup>114</sup> “Malawi leader weighs in on university teachers-police boss stand off” available at <http://www.panapress.com/Malawi-leader-weighs-in-on-university-teachers-police-boss-stand-off--12-763273-146-lang1-index.html> (accessed 7 July 2017).

<sup>115</sup> “University of Malawi slammed for lack of academic freedom” available at <http://www.researchresearch.com/news/article/?articleId=1055014> (accessed 7 July 2017).

the reinstatement of the four lecturers that a compromise for reopening Chancellor College was reached.<sup>116</sup>

The manner in which Chinsinga's summoning and the CCASU's sit-in were resolved is revealing for several reasons. First, the President, though he is/was the Chancellor of the University, chose to back the IGP when the claim about infringement of academic freedom arose. Secondly, the President intervened to order that lecturers should return to work failing which they would be disciplined. It is hard to decipher the legal basis that the President utilised in directing lecturers to return to class. It is also striking that the President made this directive without at the same time attempting to honestly, and in good faith, engage the lecturers to resolve their concerns. The subsequent dismissals of the four CCASU members, though nominally effected by the Council, clearly, followed the directive of the President. Thirdly, it was only when the President ordered the reinstatement of the four lecturers that the University was able to work out a conciliation to get the lecturers to return to work.

All the above reveals that the University's administration does not have the requisite autonomy to deal with the various challenges that the University faces. Reliance on political interventions to solve problems in the University entails that the University, in truth, has been so compromised that its autonomy is a mirage. The problems that Chinsinga's summoning raised were issues that should all have been resolved within the University's hierarchy. From the CCASU's perspective, the escalation of the dispute was largely because the University's leadership failed to make meaningful interventions and could not be trusted to take the lecturers' side against the Malawi Police Service. It is also to be noted that the interventions by the President during the stand-off served only to exacerbate the differences between the parties, and it is doubtful if the positions the President took were arrived at in consultation with the University authorities. The constant interventions by the President, as Chancellor, and other political leaders, in the management of the University, deprive the legitimate leadership space to make determinations about matters affecting the University.<sup>117</sup>

### 3.5 The position of the Chancellor

Under the Act, the President is the Chancellor of the University. The day to day management of the University, however, is entrusted to the Vice-Chancellor. As pointed out earlier, the Chancellor's position is largely symbolic. However, the Act itself has created room for the involvement of the Chancellor in the running of the University

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<sup>116</sup> "No campus spies' pledge as Malawi university reopens" available at <http://www.researchresearch.com/news/article/?articleId=1135262> (accessed 7 July 2017).

<sup>117</sup> Recently, a strike by lecturers at Chancellor College over salary disparities among the constituent colleges was resolved only after the Minister of Education arranged to meet all representatives of academic staff from the constituent colleges. This notwithstanding that there had been attempts and engagement between University management and the various academic staff unions in an attempt to resolve the dispute for over six months - Kakande, A "Salary disparity impasse resolved: Chanco to open" available at <https://mbc.mw/index.php/news/sports/item/4500-salary-disparity-impasse-resolved-chanco-to-open> (accessed 7 July 2017).

beyond the symbolic roles that ought to be reserved for a titular institutional head. For example, in section 10(4) of the Act, the Council is obliged to keep the Chancellor fully informed of all matters concerning the general conduct of the affairs of the University. In section 14(2), the Act directs the Vice-Chancellor to keep the Chancellor and the Minister fully informed on matters concerning the conduct of the affairs of the University, and to be ready to provide both the Chancellor and the Minister with such information as may be requested.

At a normative level, it may have been apposite when there was only one public university in Malawi to have a law which directed that the President should be the Chancellor of the University. With the proliferation of public universities, this imperative should fall away. It does not make practical sense to insist on making the President the Chancellor of all public universities, as is the case presently. From a practical perspective, experience has shown that retaining the President as Chancellor compromises the autonomy of the University and exposes the administrators to political influence.<sup>118</sup> The provisions of sections 10(4) and 14(2) of the Act, it is argued, open the door for the influence of politicians in decision making in the University. The author is of the view that there is no justification for maintaining the President as the Chancellor of the University, and there is also no justification for retaining sections 10(4) and 14(2) of the Act.<sup>119</sup> The requirement to keep the President and the Minister informed of the general affairs of the University, though seemingly benign, may actually operate to emasculate the Vice-Chancellor's office and could be a contributing factor to the inertia that the office has sometimes demonstrated in solving problems confronting the University. It is not surprising, therefore, that the University has been assessed as being only "partially compliant" with the requirements for institutional autonomy and "non-compliant" with the requirements for institutional self-governance as expounded in the UNESCO Recommendation.<sup>120</sup>

#### **4 REPOSITIONING THE UNIVERSITY OF MALAWI: WHAT CAN BE DONE?**

In response to the trends discussed in part 3 above, it may be retorted that the University is a government owned institution and that, therefore, the influence of government – in this sense the political leadership in the country – is inescapable. This article is fully mindful of the fact that the University is a statutory corporation which entails that the government will always maintain an interest in its operations. As demonstrated above, the University runs on government funding, and absent this

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<sup>118</sup> As long as political influence in the running of the University remains a factor, academic freedom will always be in jeopardy - Steve Sharra "Beyond Malawi's academic freedom debate" available at <https://www.pambazuka.org/governance/beyond-malawi%E2%80%99s-academic-freedom-debate> (accessed 7 July 2017).

<sup>119</sup> In theory, it is possible to have a Chancellor who is also the President who chooses not to interfere with the running of the University. Unfortunately, all the Presidents in Malawi have meddled in the operations of the University in rather undesirable ways. Experience, therefore, strongly motivates against retaining a Chancellor who is also the President.

<sup>120</sup> Appiagyei-Atua A, Beiter K & Karran T "A review of academic freedom in African universities through the prism of the 1997 ILO/UNESCO Recommendation" (2016) 7 *AUUP Journal of Academic Freedom* 7-13.

funding, it may not sustain its operations. Nevertheless, the University, by its nature, is a special type of institution and even when owned by the government there are certain fundamentals that it must comply with in its operations. As correctly observed by Hetherington:

“[W]hatever the statutory relationship between public authority and university, the university has its own corporate life and personality. It has its own internal agency of government to regulate its domestic affairs.... No important business affecting the teaching or research of the university can be transacted without its participation.”<sup>121</sup>

This entails that a university’s authorities must be the primary decision makers on all matters pertaining to a university. This authority cannot be ceded to anyone else or usurped, and must always reside within a university.

To reposition the University in order to reclaim its autonomy and guarantee academic freedom a number of steps may have to be taken. The presentation herein does not pretend to be exhaustive of the required interventions but speaks specifically to the trends earlier discussed.

First, the University must be allowed to retain full control over its undergraduate admission policy. There are already statutory guidelines on the matter which should be followed unless legally changed. If the question of equitable access to higher education, which seems to have motivated changes in the admission policy, needs to be addressed, it is important to ensure procedural propriety as well.<sup>122</sup> While the Council can, acting together with the Senate, take various decisions affecting the University’s policies, in terms of modifying the admission policy, an amendment would be required to the Act before any changes could legally be implemented. Absent legislative intervention, it is very doubtful if the Council, either acting alone or together with the Senate, can modify the admission policy of the University. In any event, attempts to interfere with the admission policy of the University must be viewed with the utmost circumspection because of their possible nefarious effects on academic freedom.<sup>123</sup>

Secondly, it is likely that the government will remain the major financier of the University’s operations for the foreseeable future. Even though the University has been encouraged to raise funds to partly support its operations, the prevailing economic climate entails that it will be a long time before the University can raise funds to fully sustain all its operations without the government’s intervention. Pertinently, experience from across Africa proves that over-dependence on government funding creates centripetal tendencies where the State attempts to bring academic institutions under its bureaucratic domination.<sup>124</sup>

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<sup>121</sup> Hetherington (1965) 8-9.

<sup>122</sup> It is beyond the scope of the present article to dwell on the attempts to broaden access to higher education in Malawi under the guise of equitable access. Nevertheless, if there is inequity in access to education one would expect the government to support comprehensive programmes at all levels of the education system designed to increase access to education in the country, rather than simply changing the admission policy applicable to tertiary institutions.

<sup>123</sup> See Sawyerr (1996) 286.

<sup>124</sup> Sawyerr (1996) 285.

In Malawi, the country's competing priorities will also remain forever daunting. Nevertheless, university education is not a luxury in the modern world. To confront many of the problems that the country is facing, it is necessary to extend university education to as many deserving Malawians as possible. Adequate funding for the University, therefore, must remain a priority. Adequate funding allows the University to put itself in a position where it can more ably fulfil its mandate as stated in the Act. The constitutional right to academic freedom, it is argued, requires that the government must promote teaching and research by providing higher learning institutions with the financial and organisational support necessary to give content to the right to academic freedom.<sup>125</sup>

Thirdly, in the face of ever dwindling government funding to the University, it was correctly recognised that students need to contribute towards the cost of their education. There has often been little dispute about the need for students to contribute to the cost of their education, but the disagreement has been about the appropriate amount thereof. Those that have protested increments in the students' financial contribution have often argued that the University has made unrealistic increments when looked at in the light of the prevailing economic conditions in the country. For the purposes of the present discussion, a dispute about whether an adjustment in the financial contribution to be made by students is appropriate or not, should be a University problem that is amenable to resolution using University structures. It undermines the University authorities to have such problems resolved by the country's political leaders. Such an approach also suggests impotence on the part of the University leadership which in turn undermines academic freedom and continues to deny University autonomy. Properly structured, students' financial contributions could be used to lessen the University's dependence on State funding which in turn could create space for the realisation of academic freedom.<sup>126</sup>

Fourthly, academic freedom and institutional autonomy are not being agitated for simply as ends in themselves. Both academic freedom and institutional autonomy allow a university to fulfil its foundational purpose which is to be a place where teaching, learning and research can be conducted without unnecessary strictures. The first defenders of academic freedom should be the administrators of a university. The University ought to accept its responsibility as a duty bearer in the realisation of the right to academic freedom.<sup>127</sup> It is unfortunate, therefore, as demonstrated in the Chinsinga matter, that when the University was called upon to defend academic freedom it failed to acquit itself properly. This failure epitomises the lack of autonomy that the University labours under. The summoning of Chinsinga involved the head of the Malawi Police Service but the President quickly and publicly weighed in on the side of the Malawi Police Service, thereby making the entire matter very toxic for the University's administrators. In the end, it fell to the country's political leadership to resolve a dispute that should, in the first place, never have spread outside the

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<sup>125</sup> Council on Higher Education (2008) 28.

<sup>126</sup> Mlenga (2016) 198.

<sup>127</sup> Appiagyei-Atua (2015) 51-52.



University. It is important that the University's leadership must accept the mantle as defender of academic freedom in the University.

Fifthly, the role of the Council, as provided for under the Act, requires further introspection. The Council must, as a governing body, champion the development of systems that can strengthen institutional good governance within the University. To achieve this, however, requires that the Council itself must be legally divorced from possible political control or manipulation. The challenges faced by the University, as highlighted in this article, point to a weak and impotent Council that has consistently failed to take charge of University matters at critical moments. A weak Council exposes the University to State intrusion in its operations.<sup>128</sup> It has been shown that the fact that the government is involved in the appointment of members of the Council, as well as in the appointment of some senior staff in the University, irrevocably compromises the senior management of the University.<sup>129</sup> On the part of the State, it must also be constantly recalled that the duty of the State towards the University is not to "control but to regulate and ensure a balance between autonomy and accountability".<sup>130</sup> It is the over-emphasis on "control" by the State and its agents that has compromised the University over the years.

Lastly, there are no imperatives for retaining the President as the Chancellor of the University or of any of the other public universities for that matter. The provisions in the Act, therefore, which require the Vice-Chancellor to appraise the President of the general affairs of the University need to be repealed. By retaining the President as Chancellor, the possibility that the President may intervene in the various operations of the University has been left open. While, in principle, the symbolic head of the institution ought not to be directly involved in the operations of the institution, history in Malawi has proven otherwise. It is very doubtful if any value is added to the operations of the University by retaining the President as Chancellor. This is one change that can be made to the Act without at all negatively affecting the operations of the University. As a matter of fact, the very possibility of presidential superintendence in the day to day running of the University or over matters of policy, may operate to constrain independent decision making within the University.

## 5 CONCLUSION

This article has demonstrated that academic freedom is the broad umbrella under which institutional autonomy of a university must be understood. A university requires academic freedom to properly fulfil its role in society, and at the same time it must operate with the requisite autonomy for academic freedom to be enjoyed. While the preceding statement is true, the article has established that academic freedom and institutional autonomy remain compromised in the University of Malawi. By focussing on the manner in which the University has managed the process of admitting students,

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<sup>128</sup> Jansen (2004).

<sup>129</sup> Mlenga (2016) 193-194.

<sup>130</sup> Appiagyei-Atua (2015) 54.

especially at the undergraduate level; the way in which the University has dealt with increments in students' financial contribution; the manner in which the University is funded; the status of academic freedom and institutional autonomy; and the position of the President as the Chancellor of the University, the article has argued that the University lacks the requisite institutional autonomy which in turn compromises academic freedom within the University. Bearing in mind the vision for the University, as stated in the Act, it remains important that the political influences in the administration of the University be attenuated so that the University can be freed to fulfil its statutory mandate.