

**ACADEMIC FREEDOM IN AFRICA: A CASE FOR THE INTERPRETATION OF THE
AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS AS PROVIDING
PROTECTION FOR THE HUMAN RIGHT TO ACADEMIC FREEDOM**

**A DISSERTATION SUBMITTED TO THE CENTRE FOR HUMAN RIGHTS, FACULTY
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DECLARATION

I, **Thabang Masingi**, do hereby declare that this dissertation is my own original work and that it has never been presented or submitted to any other educational institution for the award of a degree or any other qualification. I also declare that any secondary information used has been duly acknowledged in this dissertation.

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DEDICATION

This dissertation is dedicated to the following persons:

My Grandfather: **Mr. Frank Mkhathshani Masingi**

My Grandmother: **Mrs. Maria Khonzaphi Masingi**

My Mother: **Ms. Gladys Rukanani Masingi**

Thank you for having been there through all the years and for raising me into the person that I am. Thank you for giving me the greatest gift in the world, the gift of education.

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LIST OF ABBREVIATIONS

AAC	Association of American Colleges
AAUP	American Association of University Professors
ACHPR	African Charter on Human and Peoples' Rights
AC	African Commission on Human and Peoples' Rights (African Commission)
AHS	Assembly of Heads of State
AU	African Union
CESCR	International Covenant on Economic, Social and Cultural Rights
CP	Communist Party
CRSA	Constitution of the Republic of South Africa
GC	General Comment
GFC	German Federal Constitution
HRC	United Nations Human Rights Committee
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
KDIFSR	Kampala Declaration on Intellectual Freedom and Social Responsibility
OAU	Organization of African Unity

PDAF	Poznan Declaration on Academic Freedom
UDHR	Universal Declaration of Human Rights (Universal Declaration)
UN	United Nations Organisation
UNCESCR	United Nations Committee on Economic, Social and Cultural Rights (Committee on ESCR)
UNESCO	United Nations Educational, Scientific and Cultural Organization
US	United States of America
USC	United States Constitution
USSC	United States Supreme Court
USSR	Union of Soviet Socialist Republics
VDPA	Vienna Declaration and Programme of Action

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CHAPTER 1

INTRODUCTION

1.1 Background to the study

The right to education is provided for in various international human rights instruments as a human right¹ and is further recognised as essential in the realisation of other human rights.² In this regard, Veriava and Coomans provide that such rights as the right to vote, 'the right to choose work or to take part in cultural life can only be exercised meaningfully once a minimum level of education has been achieved.'³ The realisation of the right to education is also further regarded as a general tool for encouraging a culture which respects human rights and fundamental freedoms.⁴

In elaborating on the importance of education, the Committee on ESCR has noted that:⁵

Increasingly, education is recognised as one of the best financial investments states can make. But the importance of education is not just practical: a well educated, enlightened and active mind, able to wander freely and widely is one of the joys and rewards of human existence.

The right to education is recognised as entailing the provision of education in all its forms, primary education, secondary education, technical and vocational education and higher education.⁶ The provision and full realisation of this right is regarded as being only possible in an environment conducive to the realisation of

¹ Art 26, UDHR ;' art 13-14, ICESCR ;' art 17, ACHPR ;' art 13 PACESCR.

² F Veriava & F Coomans 'The right to education' in D Brand & C Heyns (eds) *Socio-Economic Rights in South Africa* (2005) 57 ;' para1, UNCESCR, GC No 13 on the right to education (1999).

³ Veriava & Coomans 'The right to education' in D Brand & C Heyns (as above).

⁴ Para 33, VDPA.

⁵ UNSCESCR (n 2 above).

⁶ Para 8-16, UNSCESCR (n 2 above).

a further right which is recognised as a sub-right of the right to education⁷ and in certain cases, freedom of expression⁸, that is, the right to academic freedom for academic staff, students and educational institutions.⁹

Having thus alluded to the fact that educational institutions are accorded the right to academic freedom it becomes necessary to define what this right entails. In this regard, Mazrui provides that the essentials of academic freedom are, firstly, that universities have freedom to decide what to teach and at some certain level who to teach; secondly, freedom for academics to prioritise research and the manner of conducting such research, to publish research determinations and to publicise their scholarly views; thirdly, freedom of expression for academics.¹⁰

On the other hand, the Committee on ESCR provides that at the core of the right to academic freedom is the right of individual academics to do research, publish and disseminate learning through teaching.¹¹ Accordingly, the right to academic freedom vests in individual academics and institutions such as universities.¹² With regard to universities, the right demands a certain amount of autonomy to be accorded to them for its realisation.¹³

The right to academic freedom also demands that academic staff in universities be guaranteed against persecution, harassment or intimidation for reasons only of inter alia, their intellectual work and opinions.¹⁴ This is ensured by giving academic staff security of tenure and prohibiting arbitrary dismissal or removal

⁷ Para 38-40, UNCESCR (n 2 above).

⁸ Art 16, CRSA.

⁹ Although the right to academic freedom is accorded to all educational institutions, in this study, focus is placed on the right to academic freedom in relation to higher educational institutions, with a specific focus on universities. In this regard, although academic freedom accords benefits to students, teachers and educational institutions, this study pays particular attention to academic freedom insofar as it relates to teachers and universities.

¹⁰ A Mazrui 'Academic freedom in Africa: the dual tyranny' (1975), 297 *African Affairs*, 393.

¹¹ n 7 above.

¹² As above ' ;' I Currie & J de Waal *The bill of rights handbook* (2005) 370-371.

¹³ As above.

¹⁴ n 7 above ' ;' art 3, KDIFS.

from employment except for reasons of proven misconduct and incompetence incompatible with the academic profession.¹⁵ Even in this context, disciplinary proceedings for dismissal or removal are required to be in accordance with duly set procedures according a fair trial before a duly constituted body of academic peers.¹⁶

Given that the above partly reflects what this right to academic freedom entails the question then arises as to the extent to which it is guaranteed from a human rights perspective in Africa. In this regard, Hoden has written as follows as regards the state of literature on academic freedom as a human right in Africa:¹⁷

It is something of a paradox, amidst the growing volume of literature on human rights in Africa, that none deals with the specific question of academic freedom as a right. This is even more puzzling given the serious infringements the right has suffered in most African countries in the post-independence era.

This study is thus an attempt to close the gap that exists in Africa as regards the state of literature addressing itself to the issue of academic freedom as a human right from an African perspective.

The right to academic freedom is relevant in terms of its protection and guarantee in Africa, in that, being a poor continent, the only hope that Africa has for its regeneration is mainly through educating its population.¹⁸ This can only be achieved in an environment which secures for academic professionals who are teachers of the African population, the most necessary of freedoms in pursuit of their academic work.¹⁹ Thus an elaboration on the right to academic freedom and its content as well as the extent of its protection as a human right in Africa is necessary.

¹⁵ n 7 above ; art 8 KDIFS.

¹⁶ As above.

¹⁷ R Hoden 'Academic Freedom in Africa' in R Cohen et al (eds) on *Human rights and governance in Africa* (1993) 237.

¹⁸ n 7 above.

¹⁹ As above.

1.2 Scope of the study

This paper thus primarily proposes to assess the state of academic freedom in Africa and the extent to which it is protected. In this regard, an analysis of the right to academic freedom and the extent of its protection in the primary text for the protection of human rights in Africa, the ACHPR shall be undertaken. Thereafter, it shall further be sought to draw on the experience of international law as it relates to the topic and on those of other jurisdictions which have been successful in affording protection of the right to academic freedom in order to assess the level to which, the protection of the right to academic freedom in Africa can be improved upon, by drawing guidance from such experiences. This will involve developing a case for the interpretation of the ACHPR as providing protection for the right to academic freedom.

1.3 The objectives and significance of the study

As has already been illustrated, there is an urgent need for the development of literature and jurisprudence dealing with the human right to academic freedom from an African perspective. Thus the general objectives of this study are:

- To determine the historical development of academic freedom.
- To outline the extent to which academic freedom is guaranteed and protected internationally and in Africa as a human right.
- Making out a case for the African Commission to adopt an interpretation of the ACHPR as encapsulating protection of the human right to academic freedom.
- To advance recommendations aimed at proposing for a much broader and more proactive approach towards the protection of the right to academic freedom in Africa.

1.4 Literature review

Kirk discusses academic freedom as it developed in the US.²⁰ Hofstadter does like wise but also devotes a substantial part of his study to the European development of academic freedom.²¹ Busia discusses academic freedom as an integral aspect of the right to education and Gorbeleitner discusses academic freedom within the context of existing human rights protection and provides arguments as to how existing rights can be used to find protection of various claims of academic freedom.²² Busia and Gorbeleitner also discuss the manner in which the ACHPR can be used to provide protection of academic freedom.²³ In addition there are a number of civil society and non-governmental organisation declarations on the right to academic freedom. These have been strengthened by the elevation of academic freedom to a legally binding human right in the international legal plane with the interpretation of the CESCRC as encapsulating the right to academic freedom.²⁴ Rajagopal discusses academic freedom as a human right from an internationalist perspective with his primary focus being on the implications of this for the US.²⁵

1.5 Research methodology

The method of research to be employed in formulating the study will involve a review of current literature addressing the problem posed in this paper. The

²⁰ R Kirk *Academic freedom: an essay in definition* (1977).

²¹ R Hofstadter *Academic freedom in the age of the college* (1996).

²² G Oberleitner 'The right to education, academic freedom, and the African charter on human and peoples' rights' in X Erazo & M Kirkwood *Academic freedom 4: education and human rights (1996)* “;” NKA Busia 'Towards a legal framework for the protection of academic freedom: perspective on the African human rights system' in CODESRIA (eds) *The state of academic freedom in Africa 1995* (1996).

²³ As above.

²⁴ UNCSESCR, GC 13.

²⁵ B Rajagopal 'Academic freedom as a human right'
<<http://www.aaup.org/publications/Academe/2003/03mj/03mjiraja.htm>> (accessed 26 May 2006).

literature will largely be drawn from library texts and journal articles, internet and media sources.

1.6 Outline of chapters

Chapter one sets out the content of the research, identifies the problem and outlines the research methodology. Chapter two provides an exposition of the historical development of the right to academic freedom.

Chapter three deals with the right to academic freedom as a human right by drawing from international and other sources on the right to academic freedom. Chapter four focuses on the extent to which, drawing from international experience, the ACHPR can be interpreted to include protection of the right to academic freedom. Chapter five provides a conclusion and makes recommendations.

CHAPTER 2

ACADEMIC FREEDOM AND ITS DEVELOPMENT: A HISTORICAL OVERVIEW

2.1 Introduction

This second chapter provides an exposition of the historical development of academic freedom in a number of selected jurisdictions. An outline of the development of academic freedom in Europe is provided with thereafter an exposition of the concept in its modern sense within Germany. In the European context, the paper looks at the development of the concept in the middle ages because this period is considered as the root development of academic freedom.²⁶ The paper considers Germany in that the Germanic conception of academic freedom is regarded as being the most developed and one which other jurisdictions have sought to emulate.²⁷

The paper thereafter looks at the development of academic freedom in the US, in most part because of a sophisticated USSC jurisprudence recognising and interpreting the concept as deserving constitutional protection.²⁸ The paper then concludes with providing an exposition of the development of academic freedom in Africa. This is thought appropriate given the theme of this study.²⁹

2.2 The European experience: The case of the medieval academic and university

The struggle for academic freedom dates as far back as the middle ages in the Athens Academy of the Greek philosophers, Plato and his mentor, Socrates.³⁰

²⁶ Kirk (n 20 above) 2 ;' R J Meyer 'Academic freedom in the United States' (1967) 15 *British Journal of Educational Studies*, 28 ;' S R Dongerkery *University autonomy in India* (1967) 2.

²⁷ DM Rabban 'A functional analysis of individual and institutional academic freedom under the first amendment' (1990) 53 *Law and Contemporary Problems*, 232 ;' Meyer (as above) 30.

²⁸ Rabban (as above) 236.

²⁹ The primary focus of this dissertation is set out in the first chapter hereof.

³⁰ Hofstadter (n 21 above) 3 ;' Kirk (n 20 above) 11.

The Academy was committed and existed in dedication to the pursuit of truth.³¹ The Academy and those who constituted it were not necessarily engaged in teaching in service to the community but were rather engaged in it solely for its own sake, for their own personal pleasure and the pursuit of truth.³² The Academy was not established by the community, but was rather established by scholars in their personal capacities for the primary purpose of pursuing truth and the teaching of it, even though the community did benefit from the work of the Academy, albeit indirectly.³³

In pursuit of truth for its own sake, the Academy was at times willing to be against the larger community, even as this meant being condemned to death, exile and persecution.³⁴ In this regard, Socrates, up against a charge of having corrupted 'the youth of Athens' through his teachings, proclaimed as follows in his defense:³⁵

Men of Athens, I honor and love you, but I shall obey God rather than you, and while I have life and strength I shall never cease from the practice and teaching of philosophy, exhorting anyone whom I meet after my manner, and convincing him, saying: O my friend, why do you who are a citizen of the great and mighty and wise city of Athens care so much about laying up the greatest amount of money and honor and reputation, and so little about wisdom and truth and the greatest improvement of the soul, which you never regard or heed at all? And if the person with whom I am arguing says: Yes, but I do care, I do not depart or let him go at once; I interrogate and examine and cross-examine him, and if I think that he has no virtue, but only says that he has, I reproach him with undervaluing the greater, and overvaluing the less. And this I should say to everyone whom I meet, young and old, citizen and alien, but especially to the citizens, inasmuch as they are my brethren. For this is the command of God, as I would have you know, and I believe that to this day no greater good has ever happened in the State than my service to the God. For I do nothing but go about persuading you all, old and young alike, not to take thought for your persons and your properties, but first and chiefly to take care about the greatest improvement of the soul.

³¹ A Loizou *Ethos, community and academic freedom* (1988) 3-4 ‘;’ Kirk (as above) ‘;’ Meyer (n 26 above).

³² Kirk (as above) ‘;’ Loizou (as above).

³³ Kirk (n 20 above) 12.

³⁴ Hofstadter (n 21 above) 3 ‘;’ Kirk (n 20 above) 11-12.

³⁵ Hofstadter (as above) ‘;’ Kirk (n 20 above) 33.

Because of the aforementioned characteristics of the Academy, Kirk writes thus of it that, the 'Academy, for twenty-three centuries, has been to scholars the grand model of freedom to pursue the truth.'³⁶ Kirk writes further that, 'this idea of intellectual freedom, the freedom of the Academy, has ever since been the model for all men trained in the classical disciplines.'³⁷

The aforementioned therefore constitute the characteristics of the Academy which are of importance in that the Academy represents the root development of academic freedom as well as the most extreme defense of it. However, at this juncture the question may deserve posing as to what of the general development of universities and academic freedom across Europe.

In this regard, the initial formation of universities in Europe occurred in the middle ages.³⁸ The universities emanated mainly from church schools designated for the training of clerics as a reaction to the numerical growth of students and teachers in these institutions.³⁹

From this development, two traditions of university formations arose as typified by the ancient universities of Bologna and Paris.⁴⁰ The universities emerging from the Bologna tradition were established by students who employed their teachers.⁴¹ On the other hand, the universities emerging from the Paris tradition were established by teachers who were mostly clerics.⁴²

With regard to the state of academic freedom in these institutions it can be described as having been of the following nature. The universities enjoyed a large measure of independence in the running of internal affairs and also with

³⁶ Kirk (n 33 above).

³⁷ Kirk (n 20 above) 12-13.

³⁸ Hofstadter (n 34 above).

³⁹ DW Wuerl 'Academic freedom and the university' in GS Worgul Jr (ed) *Issues in academic freedom* (1992) 69 ;' Hofstadter (as above) ;' Kirk (n 20 above) 13-15.

⁴⁰ Hofstadter (as above).

⁴¹ HS Commager 'The university and freedom: "Lehrfreiheit" and "Lehrnfreiheit"' (1963) 34 *The Journal of Higher Education*, 363 ;' Hofstadter (n 21 above) 3-4 ;' Kirk (n 20 above) 14.

⁴² Hofstadter (n 21 above) 4 ;' Kirk (as above).

regard to academic matters.⁴³ The universities were independent and so were their faculties.⁴⁴

Occasional intrusions into academic freedom did however occur from ecclesiastical and government sources.⁴⁵ These were however fought off by appealing to one authority against another intruding authority.⁴⁶ In extreme cases of intrusions the universities reacted by ceasing or suspending teaching and whenever deemed necessary, as a measure of last resort, they relocated with their students to other localities.⁴⁷

In conclusion therefore, it can be said of the state of academic freedom in Europe during the middle ages that:⁴⁸

There was considerable liberty in the medieval universities. The range of that liberty was much narrower than that which exists in universities reared under the modern democracies and in the spirit of modern scientific inquiry.

With the complete and/or semi complete transformation of European society into secular society after the French Revolution, academic institutions lost much of their independence and were subsumed into the state structure, thus becoming state institutions.⁴⁹ With that thus being the fate of much of European universities, we shall now turn to looking at the evolvement of academic freedom in that form the university had assumed by examining a European model of

⁴³ Hofstadter (n 21 above) 6 ‘;’ Meyer (n 26 above).

⁴⁴ There was however a measure of state control in the awarding of teaching licenses in that a teacher was only allowed to practice his/her teaching craft without restriction as to institution after having obtained a license entitling him/her to do so from a state designated authority. Hofstadter (n 21 above) ‘;’ Meyer (n 26 above).

⁴⁵ E van den Haag ‘Academic freedom in the United States’ (1963) 28 *Law and Contemporary Problems*, 515 ‘;’ Hofstadter (n 21 above), 7-8 ‘;’ Meyer (n 26 above).

⁴⁶ As above.

⁴⁷ As above.

⁴⁸ Hofstadter (n 21 above) 16.

⁴⁹ Kirk (n 20 above) 17.

academic freedom that is regarded as the grand model of academic freedom in its modern sense, that is, the Germanic conception of academic freedom.⁵⁰

2.3 The Germanic conception of academic freedom

German education was a primary concern of the state and thus universities were state institutions.⁵¹ The academic at a German university was therefore a public servant whose terms and conditions of service were however more than those of the ordinary public servant in that they were akin to those of a judge in a democratic state.⁵² Thus inasmuch as the judge was subject only to the law so was the academic subject only to the truth.⁵³

Academic freedom as accorded to German universities constituted of the concepts of Lernfreiheit and lehrfreiheit.⁵⁴ The former concept inferred the non-existence of management intrusions in a student's educational experience and pursuits.⁵⁵ Accordingly, students were granted the freedom to choose courses as they wished and to choose the university in which to pursue such courses.⁵⁶ On the other hand, the latter concept granted to the professor the liberty to inquire into any area of interest and also to teach on or publicize the results of such inquiry.⁵⁷ In practice the situation was such that there was freedom for the students to learn and freedom for the universities and its professors to conduct teaching free from intrusions.⁵⁸

⁵⁰ Academic freedom < http://en.wikipedia.org/wiki/Academic_freedom> (accessed 26 September 2006). For a general overview of the current state of academic freedom in the constituent countries of present day Europe, see H Penneman et al (eds) *Autonomy in Education: Yearbook of the European Association for Educational law (2000)*.

⁵¹ F Veit 'Academic freedom in Germany before and after 1933 "Under the Republic of Weimar and under Hitler"' (1937) 15 *Peabody Journal of Education*, 36 ;' Dongerkery (n 26 above) 8.

⁵² Veit (as above) 37-38 ;' Meyer (n 26 above) 31.

⁵³ Veit (as above).

⁵⁴ Commager (n 41 above) 364 ;' Meyer (n 52 above).

⁵⁵ S Hook *Academic freedom and academic anarchy (1970)* 44, 34 ;' Commager (as above) ;' Meyer (as above).

⁵⁶ Veit (n 51 above) 40.

⁵⁷ Commager (n 41 above) 20 ;' Dongerkery (n 26 above) 2 ;' Meyer (n 52 above).

⁵⁸ Veit (n 51 above) 39.

In this regard, academic freedom as it existed in German universities was primarily a freedom which obtained within the universities themselves.⁵⁹ The universities were granted freedom in shaping and determining the curriculum.⁶⁰ There was thus no political interference in academic matters and universities were practically left to pursue their business as they determined best.⁶¹

The academic staff was granted the right to freely conduct research and publish research findings. Furthermore, academic staff was granted freedom to teach and express themselves as they deemed appropriate within the confines of the classroom and there were no prescriptions on them with regard to syllabus and subject. However, outside the university the academic was prohibited from expressing his views particularly where these were related to political matters.

The academic freedom of the professor was restrained only by an obligation to behave in a professionally ethical manner.⁶² Thus conduct which was considered unethical for a person in the academic profession could be reason for censure against an academic.⁶³

Even in present day Germany there continues to be strong protection of academic freedom. The autonomy of universities in Germany is currently guaranteed under article 5 (3) of the GFC.⁶⁴ The GFC accords academic freedom and autonomy to those persons involved in scientific research and teaching.⁶⁵ The idea and basis for this protection is the Germanic conception of academic freedom as is described above.⁶⁶

Having thus described the features that make up academic freedom in Germany we shall now turn to looking at its development in the US.

⁵⁹ Meyer (n 57 above).

⁶⁰ Veit (n 58 above).

⁶¹ As above.

⁶² Veit (n 51 above) 40.

⁶³ As above.

⁶⁴ Art 5 (3) GFC.

⁶⁵ H Penneman 'Synoptic review of country reports' in H Penneman et al (n 50 above) 41, 43-44.

⁶⁶ As above.

2.4 The development of academic freedom in the US

In the US there is a mixture between privately owned universities and state universities.⁶⁷ In the private universities the professors' employment is regulated by a contract of employment while the professors in the state universities are public servants.⁶⁸

With regard to the development of academic freedom, there appears not to have been much concern over it, at least not before the American war of independence.⁶⁹ Before the war, most institutions, were linked to and had been established by particular church organisations.⁷⁰ Thus most teachers seeking to teach at such institutions were attracted to a particular institution and joined it primarily because they shared in the faith espoused by that institution.⁷¹ This left little room for breaches upon the freedom of the teacher.⁷² This thus explains the dearth of cases and concern over the issue of academic freedom before the war.⁷³

In the period between 1830 to the 1880's there were many cases of breaches upon academic freedom in that many academics were dismissed from academic institutions for holding unpopular views on such issues as slavery, secession and darwanism.⁷⁴ This continued throughout much of the years with a growing number of cases of academics being dismissed from their positions, towards the close of the 20th century and the initial years of the 21st century for holding views at variance with those held by those in authority, such as university governing boards and trustees, etc.⁷⁵

⁶⁷ Veit (n 51 above) 36.

⁶⁸ As above.

⁶⁹ Kirk (n 20 above) 21 ; Meyer (n 26 above) 30 ; Rabban (n 27 above) 237.

⁷⁰ Kirk (as above) ; Rabban (as above).

⁷¹ Kirk (as above).

⁷² As above.

⁷³ As above).

⁷⁴ Commager (n 41 above) 367 ; Kirk (n 20 above) 22 ; Meyer (n 26 above) 30.

⁷⁵ Kirk (as above) ; Meyer (as above).

There continued to be various cases of alleged violations of academic freedom throughout much of the early 21st century leading to the cold war. With the dawn of the cold war the world was divided into two opposing ideologies, with the US and the former USSR being the main antagonists respectively advocating for a capitalist world outlook and a communist world outlook. There grew a substantial number of cases involving the dismissal of professors who were members of the CP or were suspected of being communists.⁷⁶ There were even advocates for the automatic barring from academic hire of any candidate determined to be a member of the CP.⁷⁷ The main objection against communists was that they were prone to inculcating communist ideology in their lessons and were submissive to the discipline of the CP.⁷⁸ The AAUP was of the view that unless there was evidence of CP activity in the university which could be provided no professor should be dismissed for this reason.⁷⁹

There had been, prior to this period, various initiatives which had been undertaken in the period after 1870 for more effectively defending academic freedom when US academics and universities became increasingly aware of the Germanic conception of academic freedom.⁸⁰ This eventually led to the incorporation in 1915 of the AAUP.⁸¹ The reason behind the incorporation of the AAUP was the observation made that there was a need for an association of university professors through which their professional grievances and concerns may be articulated.⁸²

⁷⁶ Meyer (n 26 above) 34-35.

⁷⁷ Meyer (as above).

⁷⁸ Meyer (n 26 above) 35.

⁷⁹ E Schrecker 'Academic freedom: The historical view' in C Kaplan & E Schrecker (eds) *Regulating the intellectuals: perspectives on academic freedom in the 1980s* (1983) 34-37 ';;' as above ';;' van den Hag (n 45 above) 519-524.

⁸⁰ Kirk (n 20 above) 22-23 ';;' Meyer (n 26 above) 30-31.

⁸¹ FS Deibler 'The principles of academic freedom and tenure of the American Association of University Professors' (1922) 101 *Annals of the American Academy of Political and Social Science*, 127.

⁸² As above ';;' Meyer (n 26 above) 28.

At the first meeting of the AAUP (January 1915) it was decided to take up the issue of academic freedom.⁸³ The AAUP then formed a committee on Academic Freedom and Tenure.⁸⁴ The committee considered the issue of academic freedom and formulated a report thereon.⁸⁵ This report was submitted by the committee to the AAUP and it was accepted and approved at the annual meeting of the AAUP (December 1915).⁸⁶

The report was adopted by the AAUP in collaboration with the AAC in its revised form termed the 1925 Statement of Principles on Academic Freedom and Tenure (Principles) which were updated in 1940 and 1950 as a basis for the non-legal regulation of academic freedom in the US.⁸⁷ These were also adopted by the AAC.⁸⁸ The AAUP works with academic institutions for the enforcement of the Principles as a basis for employment and legal relationships with institutions and their faculties. Academic institutions determined to be in breach of any of the provisions of the Principles are censured through listing as violators of academic freedom.⁸⁹ The AAUP introduced a system of due process and that of holding trials for the dismissal of recalcitrant academics.⁹⁰ The AAUP assumed the role of investigating cases of alleged violations of the Principles by appointing subcommittees to undertake this task. In the investigation of specific cases of alleged violations of the Principles, the subcommittees making the inquiry are required to consider the facts in the light of the Principles.⁹¹

In brief, the Principles articulate academic freedom as being as follows: within the university there must be freedom from institutional restraints as regards research and publication of research results and presentation on subject matter of

⁸³ Rabban (n 27 above) 229.

⁸⁴ Deibler (n 81 above).

⁸⁵ Deibler (as above) 127-128.

⁸⁶ Deibler (as above) 128.

⁸⁷ Academic freedom < http://en.wikipedia.org/wiki/Academic_freedom> (accessed 26 May 2006) ;
Meyer (n 26 above) 32.

⁸⁸ Meyer (as above).

⁸⁹ As above.

⁹⁰ As above.

⁹¹ n86 above.

competence in the classroom.⁹² Outside the university, freedom from institutional censorship or discipline when a teacher or researcher speaks or writes as a citizen.⁹³ The only restriction imposed is that arising from conduct considered to be unethical for academic professionals.⁹⁴

The role played by the AAUP in trying to inculcate a culture which respects academic freedom in the US received a much needed boost, in 1957 with the USSC in the case of *Sweezy v New Hampshire*⁹⁵ indirectly recognizing the right to academic freedom in the following words:⁹⁶

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 straight 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 this 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.

The USSC had another opportunity to look at the issue of academic freedom. This time it was in the case of *Keyshian v Board of Regents*⁹⁷ in which the court held that 'Academic freedom is a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.'⁹⁸ This was followed by the case of *Regents of the University of California v Bakke*⁹⁹ in which the court further affirmed that the First Amendment of the USC enshrines protection of the principle of academic freedom as a human right.¹⁰⁰ The first

⁹² JS Coleman 'The academic freedom and responsibilities of foreign scholars in African universities' (1977) 7 *A Journal of Opinion*, 14.

⁹³ As above.

⁹⁴ Meyer (n 26 above) 31-32.

⁹⁵ 354 U.S. 234 (1957).

⁹⁶ 354 U.S. 234, 251 (1957).

⁹⁷ 385 U.S. 589 (1967).

⁹⁸ As above, 603.

⁹⁹ 438 U.S. 265, 312. (1978).

¹⁰⁰ Coleman (n 92 above) 20.

amendment to the USC enshrines freedom of speech and applies to state institutions, including state universities.¹⁰¹ The provision provides that ‘Congress shall make no law... abridging the freedom of speech, or of the press...’¹⁰² In this regard, in elaborating on the concept the USSC held that the principle meant that a university can ‘determine for itself on academic grounds: who may teach; what may be taught ; how it should be taught, and who may be admitted to study.’¹⁰³

With the USSC recognizing protection of academic freedom as a human right enshrined within the first amendment of the USC, the struggle for the protection of academic freedom in the US had traversed from the adoption of the Germanic conception of academic freedom, its remodeling to fit American circumstances, the non-legal regulation of academic freedom by the AAUP and finally leading to the legal recognition of academic freedom as a human right deserving protection of the USC.

That is thus how the development of academic freedom in the US evolved. With that evolvment having been outlined, it is now with keen interest that this paper now turns its focus into exploring the development of academic freedom in Africa.

2.5 The development of academic freedom in Africa

2.5.1 Pre-colonial period

African pre-colonial society practiced a system of traditional education which involved a number of stages which were linked to an individual’s physical development, ranging from infancy to puberty.¹⁰⁴ The stage that the educational process reached at a particular time and the seniority of those who provided it was linked to the physical and cognitive development of a person

¹⁰¹ Academic freedom and the first amendment < http://en.wikipedia.org/wiki/Academic_freedom> (accessed 26 May 2006).

¹⁰² As above.

¹⁰³ Academic freedom for colleges and universities < http://en.wikipedia.org/wiki/Academic_freedom> (accessed 26 May 2006).

¹⁰⁴ BW White ‘Talk about school: education and the colonial project in French and British Africa, (1860-1960)’(1996) 32 *Comparative Education*, 10.

and the roles they played in the community as they progressed.¹⁰⁵ Education was conducted mainly through institutions common to many pre-colonial African societies, such as games, story-telling, apprenticeship and initiation practices.¹⁰⁶ Because of the fact that the learning process took place in a communal framework, there were usually a various number of teachers at each specific stage of a person's development.¹⁰⁷

As regards freedom in the field of teaching, there seems not to have been much individual freedom in early African societies with the focus mainly having been on achieving communal cohesion.¹⁰⁸ It is therefore assumed that teaching would have been oriented towards this goal and such interference with teaching as there would be was to ensure non-deviation from it. This is because there was a particular focus on the community as opposed to the individual.¹⁰⁹

In addition to the aforementioned form of traditional education, there was also a much more developed system of formal education prevailing in some parts of Africa, such as in Cairo, Egypt and in Timbuktu, Mali.¹¹⁰ Thus in Egypt there flourished such universities as the University of Al Azhar in Cairo and in Timbuktu, Mali there was the University of Sankore.¹¹¹ It is thus appropriate to now focus on the functioning of these pre-colonial African universities. To this end, it is provided as follows, a description of the learning culture that characterised the University of Timbuktu.

In this regard, it is worth noting that the University of Timbuktu, dating as far back as the 12th century is one of the earliest universities in Africa of which there is

¹⁰⁵ As above.

¹⁰⁶ As above.

¹⁰⁷ As above.

¹⁰⁸ S Saunders *Freedom, the universities, and the future* (1987) 4.

¹⁰⁹ As above.

¹¹⁰ n 104 above ;' WB Harvey *Freedom, university and the law: The legal status of academic freedom in the universities of black Africa* (1976) 22.

¹¹¹ n 104 above.

much knowledge of.¹¹² The students of the University were taught academic courses as well as Islamic doctrine.¹¹³ In the 12th century, the University was composed of 25, 000 students.¹¹⁴ The student population of the university constituted of students hailing from all across the African regions.¹¹⁵

The curriculum of the university had four levels, firstly, the primary degree level, which required the memorisation of the Holy Qur'an, learning the Arabic language, communication and writing skills and learning the basics of other academic disciplines.¹¹⁶ Secondly, there was the secondary degree level which introduced students to various strands of Islamic knowledge, *inter alia*, grammar, jurisprudence, mathematics, geography, history, physics, astronomy, chemistry, etc.¹¹⁷ Then thirdly and lastly there was the superior degree level in which advanced studies and research work was undertaken.¹¹⁸ Since the entire learning process revolved around the Islamic religion and its mastery, the awarding of the degree was in addition to academic excellence dependent on a student demonstrating personal mastery of Islam in character and theory.¹¹⁹

The university was composed of autonomous institutions which were managed by single teachers with whom students associated.¹²⁰ There was thus no authoritative structure which imposed its will on the running and management of the university and its various institutions.¹²¹ There was an advanced culture of research, publishing and writing of books and

¹¹² University of Timbuktu <<http://www.timbuktufoundation.org/university.html>> (accessed on 18 September 2006).

¹¹³ As above.

¹¹⁴ As above. The city of Timbuktu had around 100 000 inhabitants.

¹¹⁵ As above.

¹¹⁶ As above.

¹¹⁷ As above.

¹¹⁸ As above.

¹¹⁹ As above.

¹²⁰ Timbuktu <<http://timbuktu.search.ipupdater.com/>> (accessed 19 September 2006).

¹²¹ As above

manuscripts.¹²² At the height of scholarship there were 120 libraries in which were housed various manuscripts.¹²³

2.5.2 The colonial and post-colonial universities

African universities established during the colonial period were modeled on those in existence in the colonising country.¹²⁴ They were autonomously managed institutions run by bodies composed of academics and lay persons.¹²⁵ Just like their foreign counterparts the intention was that they would evolve into institutions of intellectual excellence.¹²⁶ These colonial universities existed mainly for the provision of skills training to African natives for servicing the manpower needs of colonial economies.¹²⁷

Thus in the early years of gaining independence in many African countries there were established new universities.¹²⁸ These universities were established prior to independence while some were formed thereafter.¹²⁹

These universities were governed and institutionalised in exactly the same pattern as the universities of the departing coloniser and thus enjoyed a level of institutional autonomy and were guaranteed academic freedom.¹³⁰ For instance, the statute establishing the former university of East Africa¹³¹ explicitly gave

¹²² As above

¹²³ The Timbuktu libraries<<http://www.sum.uio.no/research/mali/timbuktu/privates/description.html>> (accessed 19 September 2006).

¹²⁴ Africa Watch *Academic freedom and human rights abuses in Africa* (1991) 9 ;' Commager (n 41 above) 368 ;' A T Porter 'University development in English-speaking Africa: problems and opportunities' (1972) 71 *African Affairs* 79.

¹²⁵ Porter (as above).

¹²⁶ As above, 79-80.

¹²⁷ As above.

¹²⁸ Harvey (n 110 above) 1.

¹²⁹ As above.

¹³⁰ Africa Watch (n 124 above) 10 ;' Coleman (n 92 above) 16.

¹³¹ Which later dissolved into the Universities of Dar Es Salaam – University of Nairobi - Makerere University.

affirmation to the principle of academic freedom.¹³² The statute stated that the object of the university was 'to preserve academic freedom and, in particular, the right of a university, or a university college, to determine who may teach, what may be taught, how it shall be taught and who may be admitted to study therein.'¹³³ This guarantee was omitted in the statutes setting up the constituent universities succeeding the university of East Africa.¹³⁴

The universities were state institutions and were financially dependent on the state for their upkeep.¹³⁵ According to Coleman this made it easy later on for authorities to intrude into the autonomy of the university to administer its own affairs.¹³⁶

The universities were viewed as being in existence to direct their functions in aiding the developmental needs of the country.¹³⁷ In this regard it was the view of many leaders as exemplified by former President Nyerere that:¹³⁸

The university colleges which comprise this university cannot be islands, filled with people who live in a world of their own, looking on with academic objectivity or indifference at the activities of those outside. East Africa cannot spend millions of pounds, cannot beg and borrow for the university, unless it plays a full and active part in the urgent tasks of East Africa. Even if it were desirable, we are too poor in money and educated manpower to support an ivory tower existence for an intellectual elite.

Our problems will not wait. We must, and do, demand that this University take an active part in the social revolution we are engineering.

The former President of Kenya, President Kenyatta reasserted the same sentiments when he stated that:¹³⁹

¹³² Porter (n 124 above) 81.

¹³³ As above.

¹³⁴ As above.

¹³⁵ Africa Watch (n 124 above) 12 ;' Coleman (n 130 above).

¹³⁶ As above.

¹³⁷ Africa Watch (as above) ;' Harvey (n 110 above).

¹³⁸ Porter (n 124 above) 75 ;' Harvey (n 110 above) 11.

¹³⁹ Porter (as above).

The primary object of higher education in the difficult early years of a new country is to produce the technical and professional manpower needed to promote and control all aspects of development.

The former President of the Ivory Coast, President Houphouët-Boigny joined this chorus of voices when he also expressed the following views:¹⁴⁰

But our tasks are too pressing and our time too limited for us to rely on the slow process of the creation of an elite through universal and largely disinterested methods of instruction. Problems of political, economic and cultural development of our societies, and the raising of the standard of living constitute immediate objectives which require us to enlist the help of all the institutions of our states and, more particularly, those whose mission is to prepare the finest elements of the young for the immense tasks expected of them.

Our university must, then, in addition to its traditional role, put at the disposal of the nation men and women who possess the technical knowledge that will permit them to participate fully and usefully in the economic and social development of the country.

This orientation was viewed by some as having the potential to turn African universities into just producers of civil servants and labourers while neglecting scholarly activity into disciplines considered as deviating from that determined orientation.¹⁴¹ There was also a growing trend amongst the ruling parties in Africa of viewing universities as training ground on party ideology and policy.¹⁴² For example, in the university of Dar es Salaam there was introduced a compulsory module on development studies which taught the regime's socialist ideology.¹⁴³

Within a decade or more years of independence, the regimes of many countries soon deteriorated into an authoritarian and dictatorial character with the consequence of there being also an accompanying deterioration in the level of university autonomy.¹⁴⁴ Because of the nature the regimes had assumed they were insecure and intolerant of any independence on the part of universities and

¹⁴⁰ Harvey (n 110 above) 11-12.

¹⁴¹ Porter (n 124 above) 76 ;' Harvey (n 110 above) 4.

¹⁴² Porter (n 124 above) 80 ;' Harvey (n 110 above) 14.

¹⁴³ Porter (as above).

¹⁴⁴ Coleman (n 92 above) 15.

any claim to such independence built up to tensions which resulted in their reprimand.¹⁴⁵ Amongst the reasons for these developments are that many regimes were concerned over security and ensuring their sustenance in power and perceived universities as a threat to achieving that state of affairs.¹⁴⁶ In order to remedy this situation the regimes resorted to replacing university management structures with persons sympathetic to them and their policies.¹⁴⁷ In addition, the appointment of academic staff increasingly became based on political grounds.¹⁴⁸ The result was, in the words of Coleman, 'greater questioning of the fundamental purposes of universities, and a deeper penetration by regimes into vital areas of decision making previously within the sacrosanct realm of university autonomy.'¹⁴⁹

With the regimes having become dictatorial and having taken steps to extend their tentacles into the governing structures of universities. There accumulated an increasing number of cases of academics being sanctioned for expressing views incompatible with those held by those in power.¹⁵⁰ Thus in 1989, Dr. Farouk Ibrahim of the University of Khartoum, Sudan, was arrested, detained and tortured for teaching Darwinism as the contents of his teaching were considered to be at variance with those of the Islamic religion.¹⁵¹ This is just one amongst a legion of cases of human rights abuses that in the years since the independence of many African countries have been committed against those in academia.

However with the end of the cold war in the late 80s and early 90's and with it the collapse of the former USSR and an emergence thereafter of one world superpower in the form of the US, there was pressure on many African regimes to democratise. Heeding to this pressure, many regimes adopted new constitutions containing bills of human rights, introduced systems of

¹⁴⁵ Coleman (as above)16.

¹⁴⁶ As above.

¹⁴⁷ As above.

¹⁴⁸ Africa Watch (n 124 above) 12.

¹⁴⁹ Coleman (n 145 above).

¹⁵⁰ Africa Watch (n 124 above) 1.

¹⁵¹ As above.

multiparty elections and ushered in new reforms aimed at transforming the political systems in their countries into democratic ones.

However, even with this democratisation avalanche, there has been no dramatic decrease in the number of human rights abuses continuing to be committed against academics considered hostile to governing regimes. There thus continues even presently to be a lot of reported cases of intrusions into academic freedom.

2.6 Conclusion

The concept of academic freedom as we know it today owes much of its development from the institutions and scholars of the middle ages. In the middle ages, European universities constituted of those which were either formed by students or those formed by clerical teachers. These universities were accorded a large measure of independence. However, occasionally there were intrusions into that independence.

The Germanic conception of academic freedom consisted of the freedom of the student to learn and to choose a course of study and the institutions in which to pursue such studies. It also consisted of the freedom of the professor to teach and to research and publicise the findings of such research.

In the US there is non-legal regulation of academic freedom in the form of existing measures for its protection as adopted and enforced by the AAUP in collaboration with a number of US universities. This non-legal regulation exists alongside the legal protection accorded to academic freedom by the USC first amendment provisions as interpreted by the USSC.

The pre-colonial African education was characterised by a traditional system of education and a sophisticated regime of universities providing education to their students. The colonial period saw the limited establishment of universities aimed at easing the manpower needs of the colonial power. With the granting of independence or shortly before there was established in many countries new

universities. In the initial years of independence these institutions seemed to have enjoyed a certain measure of independence. However the independence regimes soon turned authoritarian and dictatorial resulting in the erosion of academic freedom in many African universities. Due to changes in the global political and economic arena, many of these regimes sought to democratise and introduce new political reforms. There continues to be violations against members of the academic community. The democratisation avalanche that swept through Africa in the late 80's and the early 90's has however helped to ease the level of intrusions into academic freedom.

Having considered the historical development of academic freedom, we shall now proceed in the next chapter to deal with the current international framework for its protection.

CHAPTER 3

THE PRINCIPLE OF ACADEMIC FREEDOM: A HUMAN RIGHTS PERSPECTIVE

3.1 Introduction

Having provided a historical overview of academic freedom in the preceding second chapter, this third chapter provides an exposition of the concept as a human right. From a human rights perspective there are at least two approaches for the protection of academic freedom.¹⁵² Firstly, it is protected as a free speech right as is the case in the US where the USSC has interpreted academic freedom as finding protection in the first amendment of the USC, which enshrines the right to free speech.¹⁵³ This is also the case in the CRSA which provides in article 16, which deals with freedom of expression, for the protection of academic freedom.¹⁵⁴ Secondly it is protected as part of the right to education as is the case in the CESC.R.¹⁵⁵

As regards the character of a human right, Rajagopal contends that, 'to say that something is a human right is to assert...that protecting such a right does not depend on national legal systems, but on international law.'¹⁵⁶ Therefore an analysis of the provisions of various international treaties, general comments, declarations providing for the protection of academic freedom as a human right is undertaken. The documents analysed range from legally binding documents and those that are not legally binding whose value lies in serving a persuasive function. Within the latter category is included declarations, recommendations adopted by intergovernmental organisations and declarations adopted by civil society and non-governmental organisations. The primary purpose of this study is to make out a case for the interpretation of the ACHPR as encapsulating protection of academic freedom. The framework set out in this chapter shall form

¹⁵² Rajagopal (n 25 above).

¹⁵³ As above.

¹⁵⁴ Art 16, CRSA.

¹⁵⁵ n 152 above.

¹⁵⁶ As above.

part of the basis upon which the argument for the adoption of the aforementioned interpretation of the ACHPR is advanced.

Thus an exposition of the framework provided by the CDESCR and GC No 13 of the Committee on ESCR on the issue of academic freedom particularly as it relates to the freedom of the teacher and to autonomy for higher education institutions is set out. This is followed by an assessment of the protection provided by the ICCPR. A Draft UNESCO Declaration on Academic Freedom (otherwise commonly referred to as the PDAF) and the UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel and the framework they respectively propose and recommend to be adopted by states for the protection of academic freedom is also set out.

Having provided the framework set out in the aforementioned conventions, declaration and recommendation it is thereafter set out a framework for the protection of academic freedom provided for in the following declarations adopted by non-governmental and civil society organizations involved in the field of education and human rights: The Lima Declaration on Academic Freedom and Autonomy of Institutions of Higher Education, adopted by the World University Service in 1988 (Lima Declaration); The 1940 Statement of Principles on Academic Freedom and Tenure of the American Association of University Professors; The Dar es Salaam Declaration on Academic Freedom and Social Responsibility of Academics proclaimed in 1990 by the Staff Associations of Institutions of Higher Education in Tanzania (Dar Declaration) and The Kampala Declaration on Intellectual Freedom and Social Responsibility of 1990.

A conclusion summarising the salient features arising out of these various documents is in finality provided.

3.2 International legal framework for the protection of academic freedom

3.2.1 International Covenant on Economic Social and Cultural Rights

The CESCR in article 13 thereof provides for the right to education.¹⁵⁷ The body tasked with enforcing and interpreting the provisions of the CECSER, the Committee on ESCR, in its twenty-first session, held in Geneva, from 15 November to 3 December 1999, issued GC No 13 on the right to education.¹⁵⁸ The Committee on ESCR issues GCs from time to time on particular provisions of the CESCR as a means of elaborating on the contents of such provisions and on what is demanded of states in the course of realising the demands of the CESCR.¹⁵⁹ In GC No 13 the Committee on ESCR provides as follows on the importance of education:¹⁶⁰

Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.

On the issue of academic freedom and its link to the right to education, it is expressed the view that even though article 13 does not expressly provide for it, the latter right can only be realised when it comes with the guarantee of academic freedom.¹⁶¹ The GC No 13 is confined to higher education institutions while affirming that academic freedom is an entitlement accorded to all those involved in the education sector.¹⁶²

As regards the freedom of teaching staff, the GC provides that they are at liberty to develop, impart and transfer knowledge through research, teaching, study and

¹⁵⁷ Art 13, CESCR.

¹⁵⁸ UNCESCR GC 13.

¹⁵⁹ M Nowak *Introduction to the international human rights regime* (2003) 81-83.

¹⁶⁰ n 158 above, para 1.

¹⁶¹ As above, para 38.

¹⁶² As above.

publication.¹⁶³ Academic freedom is also said to include freedom of expression within organisation in which academic work is conducted, the freedom to conduct work without intrusions from the state and an entitlement to all such other human rights as are accorded to other persons within the territory of the state in question.¹⁶⁴

However, as much as there are benefits flowing from an entitlement to academic freedom, there also exists obligations which run parallel with such entitlement. In this regard, there are corresponding duties to respect the entitlements of others to the benefits of academic freedom and to respect free expression rights of others.¹⁶⁵

The Committee on ESCR provides in addition that incumbent in the principle of academic freedom is that there must be guaranteed the autonomy of higher education institutions. The autonomy required is defined as:¹⁶⁶

That degree of self governance necessary for effective decision-making by institutions of higher education in relation to their academic work, standards, management and related activities. Self-governance, however, must be consistent with systems of public accountability, especially in respect of funding provided by the State.

Then lastly GC No 13 provides that a level of equilibrium must be achieved as regards the independence of institutions on the one hand and their accountability to the state on the other.¹⁶⁷

The GC No 13 is not the only guarantee of academic freedom in the CDESCR. There is also article 15 (3) and (4) of the CDESCR which enjoin state parties to the CDESCR to accord the necessary liberty necessary for the conduct of scientific research and creative activity.¹⁶⁸

¹⁶³ n 158 above, para 39.

¹⁶⁴ As above.

¹⁶⁵ As above.

¹⁶⁶ n 158 above, para 40.

¹⁶⁷ As above.

¹⁶⁸ M Nowak 'The right to education' in A Eide et al *Economic, Social and Cultural Rights* (2001) 267.

3.2.2 International Covenant on Civil and Political Rights

As already provided above, from a human rights perspective one of the ways in which academic freedom is protected is through free speech rights.¹⁶⁹ Accordingly, Nowak has asserted that the protection of academic freedom is adequately provided for in articles 18, 19, 21 and 22 of the ICCPR which respectively guarantee freedom of thought, conscience and religion; freedom of opinion and expression; freedom of assembly and freedom of association.¹⁷⁰ The specific provisions that are of concern to us in the context of our current discussion are those contained in article 19 which provides for freedom of opinion and expression, which is partly analogous to the provisions of the USC which have been interpreted as granting protection of academic freedom and those of the CRSA which expressly integrate academic freedom as a free expression right.¹⁷¹

The ICCPR in article 19 accords everyone the right to hold opinions without interference and thus imposes no limitations on the exercise of this right.¹⁷² The ICCPR in the same article 19 further provides for the right to free expression which is said to include the freedom to seek, receive and impart information and ideas of all kinds in whatever form.¹⁷³ The ICCPR subjects the right to free expression to limitations considered necessary to accord protection to the rights and reputations of others, the protection of national security and public order, health or morals.¹⁷⁴

Based on article 19 a professor can thus be said to be entitled to freely express himself in the conduct of his work within the subject area of his teaching,

¹⁶⁹ n 152 above.

¹⁷⁰ n 168 above.

¹⁷¹ n 152 above.

¹⁷² M Nowak *U.N. Covenant on civil and political rights: CCPR commentary* (2005) 440; art 19(1) ICCPR.

¹⁷³ Art 19(2), ICCPR.

¹⁷⁴ Art 19(3),(a), (b), ICCPR.

in the classroom and the university.¹⁷⁵ It also provides a basis for the protection of the professor in that he can freely express himself outside the confines of the university when he does so as an ordinary citizen, provided he does not conduct himself in a manner unbecoming of an academic professional. This article also guarantees autonomy for higher education institutions, albeit indirectly. This it does in that intrusions into that autonomy is usually aimed at restricting the free expression of particular ideas and thus would undermine the right to free expression, which means that free expression in an academic institution can only prevail when accompanied by the requisite autonomy.

The HRC which is tasked with enforcing the provisions of the ICCPR by considering state reports and individual communications has given more flesh to the provisions of article 19 in a series of individual communications submitted to it for adjudication.¹⁷⁶ One of those communications is that of *Kang v Republic of Korea*, wherein the complainant was imprisoned for over a decade for holding Communist political views.¹⁷⁷ The HRC reached a decision in which it held that such action constituted a violation of the complainant's right to hold opinions as enshrined in article 19 (1).¹⁷⁸

This decision is important in that many intrusions into academic freedom pertain to the dismissal of professors for holding views at variance with those held by those in authority. This decision affirms the right of everyone to hold opinions and thus any sanction against a member of the academic community for holding unpopular views would be a violation of article 19(1).

¹⁷⁵ See for example the dissenting opinion of Judge Jose A. Cabranes in *Vega v State University of New York (New York Maritime College)* U.S. 2ND Circuit Court of Appeals (2001) in which it is provided with respect to the first amendment of the US Constitution that: The First Amendment, with its "special concern" for academic freedom, *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967), must protect all college teachers, especially in the performance of their most important duty-teaching in the classroom.

¹⁷⁶ n 159 above, 80-81.

¹⁷⁷ Nowak (n 172 above) 442.

¹⁷⁸ As above.

3.2.3 Draft UNESCO Declaration on Academic Freedom (PDAF), World Congress on Education for Human Rights and Democracy held in March 1993

There have been various calls by organizations working with human rights in the area of education for the adoption of an international covenant on academic freedom based on declarations already adopted by civil society organisations on the issue of academic freedom.¹⁷⁹ To this end the Draft Declaration on Academic Freedom was adopted at the Poznan Seminar on Academic Freedom (Poznan, Poland, January 1993) (Draft Declaration).¹⁸⁰ This was further adopted as a Draft UNESCO Declaration on Academic Freedom under the auspices of the World Congress on Education for Human Rights and Democracy held in March 1993.¹⁸¹ This declaration was submitted and failed to pass for adoption, to the General Conference of UNESCO held in November 1993.¹⁸²

The Draft Declaration makes provision for persons to have access to membership of the academic community on merit.¹⁸³ Those members of the academic community engaged in research are accorded the right to freely choose their research topics and research methods and to communicate and freely publish their research findings.¹⁸⁴

Those members of the academic community whose functions encapsulate teaching are accorded the right to decide what to teach and how to teach it.¹⁸⁵ The Draft Declaration also accords students the freedom to learn and freely choose their course of study and educational institution for pursuing such

¹⁷⁹ n 168 above.

¹⁸⁰ As above, read with the UNESCO General Conference Twenty- Seventh Session *Report by the Director General on the work of the international congress on education for human rights and democracy and follow-up in member states to the world plan of action on education for human rights and democracy* (1993), section B, para 23-26.

¹⁸¹ As above.

¹⁸² n 168 above.

¹⁸³ Art 1, PDAF.

¹⁸⁴ Art 2, PDAF.

¹⁸⁵ Art 3 (1), PDAF.

studies.¹⁸⁶ They are also guaranteed participation in decision making processes within the educational institution.¹⁸⁷

The Draft Declaration lastly affirms that benefits accruing from academic freedom require that higher education institutions be guaranteed the requisite autonomy.¹⁸⁸

3.2.4 UNESCO Recommendation concerning the Status of Higher-Education Teaching Personnel, 11 November 1997

The Recommendation on Teachers (Recommendation) was adopted at the General Conference of UNESCO, meeting in Paris from 21 October to 12 November 1997.¹⁸⁹ The Recommendation expresses concern at the vulnerability of the academic community to political intrusions which are of such a character that they may undermine academic freedom.¹⁹⁰

The Recommendation accords academic freedom to teaching personnel and provides the following definition for it:¹⁹¹

The right, without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express freely their opinion about the institution or system in which they work, freedom from institutional censorship and freedom to participate in professional or representative academic bodies. All higher-education teaching personnel should have the right to fulfil their functions without discrimination of any kind and without fear of repression by the state or any other source.

¹⁸⁶ Art 4 (1), PDAF.

¹⁸⁷ Art 4 (2), PDAF.

¹⁸⁸ Art 8, PDAF.

¹⁸⁹ Preamble, para 1, Recommendation concerning the Status of Higher-Education Teaching Personnel, 1997 (RSHETP).

¹⁹⁰ Preamble, para 8, as above.

¹⁹¹ Art 27, as above.

The right to education and the performing of research and teaching functions is said to require an atmosphere of academic freedom and autonomy for institutions of higher education.¹⁹²

The autonomy of higher education institutions is affirmed as essential for academic freedom to prevail.¹⁹³ The Recommendation defines autonomy as follows:¹⁹⁴

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. However, the nature of institutional autonomy may differ according to the type of establishment involved.

Thus autonomy is regarded as a prerequisite for the performance of the functions required of teaching personnel and institutions of higher education.¹⁹⁵ The Recommendation thus enjoins states to protect higher education institutions against any form of potential intrusion into their autonomy, wherever it may emanate.¹⁹⁶

With regard to gaining access to the academic community this should be based on merit.¹⁹⁷ Teachers as with other citizens are affirmed to be entitled to the benefits flowing from international conventions guaranteeing civil, political, social and cultural rights and the exercise of such rights should be respected by states and not be interfered with.¹⁹⁸

The Recommendation accords teachers rights to participate in the governing structures of higher education institutions and to constitute the majority in such

¹⁹² Preamble, para 8, as above.

¹⁹³ Art 17, as above.

¹⁹⁴ As above.

¹⁹⁵ Art 18, RSHETP.

¹⁹⁶ Art 19, as above.

¹⁹⁷ Art 25, as above.

¹⁹⁸ Art 26, as above.

structures.¹⁹⁹ The right of teachers to criticise the management and running of higher educations in general is also affirmed.²⁰⁰

It is also imposed responsibilities and duties on teachers to respect the academic freedom of others and to conduct their work in compliance with the appropriate professional standards and ethics required of them and to direct their work to helping alleviate problems faced by their societies.²⁰¹

The Recommendation calls for safeguards for teachers in the form of security of tenure in employment and affirms that such tenure is crucial to the achievement of academic freedom in higher education institutions.²⁰²

Thus teachers should only be liable for dismissal from employment only for professional reasons.²⁰³ Furthermore such a dismissal should be procedurally and substantively fair.²⁰⁴

3.3 Non-legal framework advancing for the protection of the human right to academic freedom

3.3.1 Lima Declaration on Academic Freedom and Autonomy of Institutions of Higher Education, adopted by the World University Service in 1988

The Lima Declaration was adopted by the Sixty-Eighth General Assembly of the World University Service in September 1988.²⁰⁵ In the preamble, the Lima Declaration asserts that the right to education can only be realised in an environment which guarantees academic freedom and the independence of higher education institutions.²⁰⁶

¹⁹⁹ Art 31, as above.

²⁰⁰ As above.

²⁰¹ Art 33, RSHETP.

²⁰² Art 45-46, as above.

²⁰³ As above.

²⁰⁴ As above.

²⁰⁵ Preamble, para 1, Lima Declaration on Academic Freedom and Autonomy of Institutions of Higher Education, 1988 (LDAFAIHE).

²⁰⁶ Preamble, para 5, LDAFAIHE.

The Lima Declaration defines academic freedom and autonomy in the following terms:²⁰⁷

Academic freedom means the freedom of members of the academic community, individually or collectively, in the pursuit, development and transmission of knowledge, through research, study, discussion, documentation, production, creation, teaching, lecturing and writing.

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.

It also provides that academic freedom is a prerequisite for research and other functions that institutions of higher education are required to perform and thus that members of the academic community must be free from intrusions either from the State or from wherever else.²⁰⁸ States are further enjoined to respect and to accord members of the academic community human rights as enshrined in various international covenants.²⁰⁹ The ability for any person to be part of the academic community whether as a researcher, teacher, etc, on the basis of ability without restraints, except legally justifiable ones, is provided for as requiring realisation.²¹⁰

Those members of the academic community engaged in research and teaching are granted freedom in the performance of their functions with the only limitation on that freedom being that they are expected to conduct themselves in accordance with the principles and ethos of their professions.²¹¹ The freedom of students to learn, and to choose their own courses of study and the relevant educational institution in which to pursue their study is provided for.²¹²

²⁰⁷ Art 1(b),(d), as above.

²⁰⁸ Art 3, as above.

²⁰⁹ Art 4, as above.

²¹⁰ Art 5, as above.

²¹¹ Art 7, as above.

²¹² Art 9, as above.

Lastly, the autonomy of institutions of higher education is reaffirmed as being of cardinal importance, with the requirement of self government by members of the academic community in the management and running of such institutions.²¹³ Such self governing structures are required to be elected democratically and to be composed of members emanating from all the different components of the academic community.²¹⁴ The autonomy is expressed as being especially important in the exercise of decisions concerning research, determinations of education policies and such other related matters.²¹⁵

3.3.2 1940 Statement of Principles on Academic Freedom and Tenure of the American Association of University Professors

In 1940, the AAUP and the AAC restated the 1925 Statement of Principles on Academic Freedom and Tenure and adopted the 1940 Statement of Principles on Academic Freedom and Tenure (1940Principles).²¹⁶

The 1940Principles affirm that higher education institutions exist for the common good and that the achievement of such common good demands the free search and exposition of truth.²¹⁷ The 1940Principles regard academic freedom as important for higher education institutions to fulfil their functions and asserts that it is of relevance to the teaching and research functions of these institutions.²¹⁸ The enjoyment of security of tenure by teaching and research staff in economic and employment terms is regarded as essential in ensuring academic freedom.²¹⁹

With regard to the issue of academic freedom the 1940Principles provide that teachers have an entitlement to as much liberty in conducting research and in

²¹³ Art 18-19, as above.

²¹⁴ Art 19, as above.

²¹⁵ As above.

²¹⁶ 1940 Statement of Principles on Academic Freedom and Tenure
<www.aaup.org/AAUP/pubsres/policydocs/1940statement.htm> (accessed 16 October 2006).

²¹⁷ As above.

²¹⁸ As above.

²¹⁹ As above.

ensuring that their research determinations are publicised.²²⁰ Teachers are also granted as much freedom in performing their teaching functions and are entitled to free expression in the classroom insofar as such expression relates to the subject matter of their teaching.²²¹ They are also accorded the right, outside the confines of the institution in which they teach, to freely express themselves on issues which concern them as citizens.²²² The only limitation being that they should conduct themselves with the integrity that the academic profession demands and also separate their institutions from their personal utterances.²²³

Those persons engaged in research and teaching functions are accorded security of tenure when confirmed as employees, with their employment only eligible to be terminated for good reason.²²⁴

3.3.3 Dar es Salaam Declaration on Academic Freedom and Social Responsibility of Academics proclaimed in 1990 by the Staff Associations of Institutions of Higher Education in Tanzania

The Dar Declaration was adopted by delegates of the Staff Associations of Institutions of Higher Education in Tanzania, on the 19th of April, 1990.²²⁵ The preamble to the Dar Declaration notes that the Constitution of Tanzania provides for the right to education and the right to opinion and expression, which rights, according to the Dar Declaration, include academic freedom.²²⁶

In the Declaration, academic freedom is defined as meaning the freedom of members of the academic community to pursue the enlargement and transfer of knowledge by research, study, and teaching, etc.²²⁷ The autonomy of higher

²²⁰ n 69 above.

²²¹ As above.

²²² As above.

²²³ As above.

²²⁴ As above.

²²⁵ Last para, Dar es Salaam Declaration on Academic Freedom and Social Responsibility of Academics (DDAFSRA).

²²⁶ Preamble, para 5, as above.

²²⁷ Art 53, as above.

education institutions is defined as constituting of the independence of such institutions and other groupings within such institutions from the state.²²⁸

The Dar Declaration accords members of the academic community the right to perform their functions of, *inter alia*, teaching and research, free of intrusions from the State.²²⁹ The Dar Declaration further enjoins States to facilitate the enjoyment by members of the academic community of all such other human rights as are enshrined in various international covenants.²³⁰ There is further asserted that the basis for access to and joining the academic community, either as a researcher, teacher, etc, should be merit, without restraints, except such as are legally justifiable.²³¹

Related to these is that those academic members involved in research and teaching functions upon employment, their employment should be accompanied by the requisite security of tenure.²³² Thus such members are given the benefit of the prohibition against being dismissed from employment other than for reasons related to their having been proven to have conducted themselves in a manner grossly departing from that expected of an academic professional.²³³ Even in circumstances where it is found that a member of the academy has committed misconduct, their dismissal for any such reason should follow from a hearing conducted on the basis of stipulated rules guaranteeing a fair trial before a duly constituted tribunal of the academic community.²³⁴

The right to conduct research and teaching functions by members of the academic community free from any interference is provided, with that right being only capable of limitation in so far such functions must be performed in accordance with universal principles and methods of teaching or scientific enquiry and for reasons related to public health and morality, or, in

228 As above.

229 Art 14, DDAFSRA.

230 Art 15, as above.

231 Art 17, as above.

232 Art 29, as above.

233 As above.

234 As above.

circumstances of clear, present, and imminent danger to the nation and its independence.²³⁵ The freedom of students to learn, and to choose their own courses of study and the relevant educational institution in which to pursue their study is provided for.²³⁶

There is a prohibition against the deployment of armed personnel on the territory of institutions of higher education other than for reasons related to a clear, present, and imminent danger to the life or property of the institution which cannot be averted without their intervention and in circumstances where the Head of the concerned institution of higher education has after having conferred with a committee constituting of members of the academic community for that purpose, in writing called for such intervention.²³⁷

As regards the autonomy of higher education institutions it is required that they be guaranteed their independence from the State, which is under an obligation to refrain from intruding into that independence, in their management and functioning particularly as relates to academic matters.²³⁸ In addition, there is also guaranteed the self government of such institutions by members of the academic community.²³⁹ Such self governing is required to be carried out by structures duly composed of members emanating from all the different components of the academic community.²⁴⁰

Lastly the Dar Declaration imposes social responsibilities on members of the academy and higher educations institutions to conduct their affairs with the utmost integrity and to focus their work on such tasks as would help with the realization of the civil, political, social and economic rights of their immediate communities.²⁴¹

²³⁵ Art 19, DDAFSRA.

²³⁶ Art 23, as above.

²³⁷ Art 40, as above.

²³⁸ Art 38, as above.

²³⁹ Art 39, as above.

²⁴⁰ As above.

²⁴¹ Chapters 1 and 2, DDAFSRA.

3.3.4 Kampala Declaration on Intellectual Freedom and Social Responsibility, 1990

The KDIFSR was adopted on the 29th of November, 1990.²⁴² The KDIFSR affirms the right of every person to education and to take part in intellectual activities.²⁴³ The KDIFSR further enjoins states to facilitate the enjoyment by members of the intellectual community of all such other human rights as are enshrined in various international covenants, particularly, the CDESCR, ICCPR and the ACHPR.²⁴⁴ This is followed by a prohibition against the undue sanctioning of intellectuals for reasons related only to, *inter alia*, their intellectual work and opinions.²⁴⁵

Every intellectual is accorded the right to conduct intellectual activities such as research and teaching free from any interference with the only limitation on that right being that such activities must be performed in accordance with universal principles and methods of ethical professional standards or scientific enquiry.²⁴⁶

The employment of intellectual members involved in research and teaching is required to be accompanied by the requisite security of tenure.²⁴⁷ There is thus a prohibition against dismissals based on reasons other than conduct grossly departing from that expected of a professional undertaking research and teaching functions.²⁴⁸ The KDIFSR makes provision for due process rights before a dismissal can be initiated and provides for the holding of a hearing on the basis of rules guaranteeing a fair trial before a tribunal of the academic community.²⁴⁹ The right to free speech for members of the intellectual community is also affirmed in the KDIFSR.²⁵⁰

²⁴² Preamble, para 4, KDIFSR.

²⁴³ Art 1, as above.

²⁴⁴ Art 2, as above.

²⁴⁵ Art 3, as above.

²⁴⁶ Art 6, as above.

²⁴⁷ Art 8, as above.

²⁴⁸ As above.

²⁴⁹ As above.

²⁵⁰ Art 9, KDIFSR.

The autonomy of institutions of higher education from the state in managing their affairs through self-government in which all members of the academic community take part is provided for.²⁵¹

The KDIFSR prohibits the presence of armed personnel on the territory of institutions of higher education other than for reasons related to a clear, present, and imminent danger to the life or property of the institution which cannot be averted without their intervention and in circumstances where the Head of the concerned institution of higher education has after the approval of a committee constituting of members of the academic community for that purpose, in writing called for such intervention.²⁵²

The state is prohibited from censoring any of the works of members of the intellectual community.²⁵³ Lastly, the KDIFSR imposes social responsibilities on the intellectual community to contribute to the social and economic uplifting of their immediate communities and to conduct their work with the highest integrity.²⁵⁴

3.4 Conclusion

The principle of academic freedom as a human right finds protection as a sub-right of the rights to education and free speech. The Committee on ESCR has affirmed in its GC on the right to education, that academic freedom is an integral part of the right to education without which it cannot be realised. In addition to the CDESCR, the ICCPR and a number of its provisions, particularly those providing for freedom of opinion and expression, indirectly accord protection to academic freedom and can thus be invoked whenever intrusions into it occur.

Various documents ranging from UNESCO declarations and recommendations to civil society declarations affirm the right to academic freedom and accord

²⁵¹ Art 11-12, as above.

²⁵² Art 14, as above.

²⁵³ Art 15, as above.

²⁵⁴ Art 22-23 and 25, as above.

members of the academic community, rights of joining institutions of higher education and the academic profession on the basis of merit. Having joined such institutions they are entitled in conducting research and teaching to do so without any undue restrictions except professionalism in their work. The freedom of students to learn, and to choose their course of study and the institutions in which to pursue such studies is also guaranteed. Those institutions involved in higher education are accorded autonomy in their governance and are protected against interference from the state or any such similar source. They are also accorded prohibition against being dismissed for no adequate cause and are afforded due process rights.

These documents though not legally binding may serve a persuasive function in a sense of serving as a consultative guide for domestic courts and international legal bodies in their attempt to define the content of the right to academic freedom.

CHAPTER 4

THE RIGHT TO ACADEMIC FREEDOM AND THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS

4.1 Introduction

The ACHPR like other international human rights treaties provides for the right to education²⁵⁵ and free expression²⁵⁶ and does not expressly make provision for the protection of academic freedom.²⁵⁷

However, despite this lack of express protection of academic freedom in international human rights treaties, there have been interpretations of such treaties which regard their provisions as encapsulating protection of academic freedom.²⁵⁸ In this regard, in interpreting the right to education in the CDESCR, the Committee on ESCR provides that, included in that right is protection of academic freedom and goes on to describe the content of that protection as encapsulating protection of academic staff in conducting research and teaching and of higher education institutions by according them autonomy in their management and functioning.²⁵⁹

With the emergence of democratic and/or semi-democratic regimes in Africa in the early 90's there has been a level of improvement in the human rights records of many states, with some of their constitutions even expressly mentioning the protection of academic freedom in their provisions.²⁶⁰ However, despite this

²⁵⁵ Art 17, ACHPR.

²⁵⁶ Art 9, as above.

²⁵⁷ Busia 'Towards a legal framework for the protection of academic freedom: perspective on the African human rights system' in CODESRIA (n 22 above) 14.

²⁵⁸ UNCESCR GC 13.

²⁵⁹ As above.

²⁶⁰ Art 16, CRSA.

optimistic development there continues to this day to be a large number of encroachments on academic freedom in many states.²⁶¹

The ACHPR may however possibly provide hope with regard to this gloomy situation around Africa as regards the daily encroachments upon academic freedom that are prevalent. In understanding why this contention is made it is thought appropriate to set out the regime for human rights protection provided for in the ACHPR. Having thus set it out, an outline of how it can be used to advance the protection of academic freedom drawing from international experience is provided.

Thus in this chapter, it is first briefly set out the level of protection accorded to academic freedom in the constitutions of African states. Thereafter the regime for the promotion and protection of human rights in the ACHPR in the form of the African Commission and its mandate and how such mandate can be utilised to extend the protection of the ACHPR to encapsulate academic freedom is dealt with. Thereafter a conclusion will be provided. The discussion is underpinned by the two approaches towards the protection of academic freedom as a human right in the form of the right to free speech and the right to education.

4.2 African constitutional law protection of academic freedom

A majority of the constitutions of African states do not expressly provide for the right to academic freedom.²⁶² There are however a few constitutions which provide for academic freedom. In this regard, the 1993 Constitution of the Republic of Ghana, provides in article 21 (1),(b) that 'all persons shall have the right to freedom of thought, conscience and belief which shall include academic freedom.' The 1994 Malawi Constitution in article 33 provides that, 'Every person has the right to freedom of conscience, religion, belief and thought and to academic freedom'. The 1996 CRSA also provides in article 16(1),(d), that, 'Everyone has the right to freedom of expression, which includes academic

²⁶¹ See Human Rights Watch's world human rights report section on Africa <<http://www.hrw.org>> (accessed 20 October 2006).

²⁶² African Constitutions are available at <<http://www.chr.up.ac.za>> (accessed 6 October 2006).

freedom and freedom of scientific research.’ The Constitution of Algeria in article 38 (1) provides that, ‘Freedom of intellectual, artistic and scientific innovation is guaranteed to the citizen.’ The 1990 Constitution of Namibia in article 21 (1) also provides protection for academic freedom by stating that:

(1) All persons shall have the right to: a) freedom of speech and expression, which shall include freedom of the press and other media; b) freedom of thought, conscience and belief, which shall include academic freedom in institutions of higher learning.

Those constitutions that do not provide protection to academic freedom, nevertheless provide for free speech rights and some make provision for the right to education. Through judicial activism these provisions can be extended, by drawing guidance from other jurisdictions and from international law, to provide protection of academic freedom.

4.3 The African system for the protection and promotion of human rights

The ACHPR enshrines human rights standards and rules for observance by states in Africa and thus constitutes the main channel for human rights protection in Africa.²⁶³

The ACHPR was adopted in 1981 by the AHS of the then OAU at Nairobi, Kenya and entered into force in 1986.²⁶⁴

The ACHPR provides for the protection of a combination of human rights ranging from civil, political, economic, social and cultural rights to solidarity rights.²⁶⁵ Instead of following the trend of making rights other than civil and political rights non-justiciable, the ACHPR places all of the rights enshrined in it on an equal

²⁶³ Busia ‘Towards a legal framework for the protection of academic freedom: perspective on the African human rights system’ in CODESRIA (n 22 above) 15.

²⁶⁴ *Compendium of key human rights documents of the African Union* (2005) 26.

²⁶⁵ GJ Naldi ‘Future trends in human rights in Africa: the increased role of the OAU’ in M Evans & R Murray (eds) *The African charter on human and peoples’ rights: the system in practice 1986-2000* (2002) 8 ;’ R Murray ‘The African charter on human and peoples’ rights 1987-2000: an overview of its progress and problems’ (2001) 1 *African Human Rights Law Journal* 2.

footing and accords to all of them justiciability.²⁶⁶ In addition, the ACHPR inasmuch as it places obligations on states also enshrines duties for observance by individuals.²⁶⁷

In terms of article 1 of the ACHPR state parties undertake to recognise the rights enshrined therein and to adopt legislative and other measures to give effect to them.

To ensure that states comply with their obligations, the ACHPR establishes the African Commission which is tasked with the promotion and protection of human rights as enshrined in the ACHPR.²⁶⁸

With regard to the mandate of the African Commission of protecting human rights, there is established an inter-state and an individual communications procedure in terms of which either another state party to the ACHPR or persons other than states may file a complaint against a state party to the ACHPR alleging a violation of any of the rights enshrined in the ACHPR.²⁶⁹ Insofar as individual communications are concerned the ACHPR stipulates a number of conditions to be complied with before a complaint against a state party to the ACHPR may be eligible for consideration by the African Commission. These conditions are stipulated to be as follows:²⁷⁰ [1] The communication must indicate its authors; [2] It must be compatible with the Charter of the OAU or with the ACHPR; [3] It should not be written in disparaging or insulting language directed against the state concerned and its institutions or to the OAU; [4] It should not be based exclusively on news disseminated from the mass media; [5] It should be

²⁶⁶ GJ Naldi 'Future trends in human rights in Africa: the increased role of the OAU' in M Evans & R Murray (as above).

²⁶⁷ As above, 7-8.

²⁶⁸ As above, 9.

²⁶⁹ The African Charter. para 5

http://www.chr.up.ac.za/centre_publications/ahrs/african_charter.html#comm (accessed 20 August 2006).

²⁷⁰ Art 56 ACHPR'; *Interrights and Others (on behalf of Bosch) v Botswana* (2003) AHRLR 55 (ACHPR 2003) 57'; F Viljoen 'Admissibility under the African Charter' in M Evans & R Murray *The African charter on human and peoples' rights the system in practice, 1986-2000* (2002) 66-97.

sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged; [6] It should be submitted within a reasonable period from the time local remedies are exhausted or from the date the African Commission is seized of the matter; and [7] It should not deal with a case which has been settled by the states involved in accordance with the principles of the Charter of the UN, or the Charter of the OAU or the provisions of the ACHPR.

Having considered a communication the African Commission issues recommendations in the form of a decision in terms of which it sets out whether the allegations against the state constitute a violation of the ACHPR and if so the remedial action that the state must take.²⁷¹ The decisions of the African Commission are then submitted to the AHS of the AU whereupon it is decided whether to publicise them.²⁷²

In addition to the consideration of communications against state parties, the African Commission also considers reports from state parties on the measures they have undertaken to comply with the provisions of the ACHPR and then also makes recommendations to states suggesting areas in which they need to improve their levels of compliance with the ACHPR.²⁷³

This is thus the framework of the ACHPR for the protection of human and peoples' rights in Africa. The question thus arises as to the manner in which such framework can be utilised for the protection of academic freedom. In this regard, the ACHPR provides in article 17 (1) that 'Every individual shall have the right to education'. Additionally, in article 9, the ACHPR in turn provides for the right to receive information and to express and disseminate opinions within the law.

²⁷¹ Rule 101 & 120, Rules of Procedure of the ACHPR (06/10/1996).

²⁷² Art 59, ACHPR; Individual complaints, para 7
<http://www.chr.up.ac.za/centre_publications/ahrs/indiv_complaints.html> (accessed 20 August 2006).

²⁷³ Art 62, ACHPR.

These rights have been enshrined to include and interpreted in varying degrees in other systems and jurisdictions to encapsulate protection of the right to academic freedom and it is thus argued in this paper that such protection may be extended to apply in the ACHPR. Thus we now deal with our basis for making such an assertion.

4.4 Protecting the right to academic freedom through the African Charter on Human and Peoples' Rights

As has already been demonstrated, academic freedom benefits from two approaches in terms of its protection as a human right.²⁷⁴ It is firstly, protected as a free speech right and secondly, as being part of the right to education.²⁷⁵ However, irrespective of the approach taken, the content of the protection accorded to academic freedom is similar and concerns itself with similar issues. Therefore, as to which approach is taken for its protection, is insignificant as the protection is in the end similar. The only exception relates to the limitations that may legally apply to either the right to education or the right to free expression, which limitations become important in formulating the extent of the protection that may be accorded to academic freedom using either of these rights as a platform.

When scholars and academics raise concerns over the protection of their right to academic freedom they are in essence expressing a desire to be beneficiaries of:²⁷⁶

The power of acting, in the character of a moral personality, according to the dictates of the will, without other check, hindrance or prohibition than such as may be imposed by just and necessary laws and the duties of social life.

The aforementioned description, which is in essence a definition of freedom in its bare terms, has been echoed by John Locke in, 'The Second Treaties on

²⁷⁴ B Rajagopal 'Academic freedom as a human right'
<<http://www.aaup.org/publications/Academe/2003/03mj/03mjraja.htm>> (accessed 26 May 2006).

²⁷⁵ As above.

²⁷⁶ B Maripe 'Freezing the press: freedom of expression and statutory limitations in Botswana' (2003) 3 *African Human Rights Law Journal* 55.

Civil Government' where he describes the relation between law and freedom in the following terms:²⁷⁷

The end of law is not to abolish or restrain but to preserve and enlarge freedom. For in all states of created beings capable of laws, where there is no law there is no freedom. For liberty is to be free from restraint and violence from others and is not, as we are told, a liberty for everyman to do what he lists.

The afore-referred to quotations constitute a definition of freedom in its bare sense. Thus as a freedom, academic freedom accords its beneficiaries the power to conduct research and teaching as freely as possible, with the only accepted restrictions to such freedom being those that arise from just and necessary laws and the dictates of professional ethics.

Within the context of this discussion, which limits itself to dealing with academic freedom insofar as it seeks to accord freedom for teachers in higher education institutions in conducting their research and teaching work and to such institutions in their management, functioning and governance. It becomes necessary to define in exact terms the contents of the academic freedom of the teacher and the institutional autonomy for higher education institutions that we contend for in this paper.

The description of freedom for the teacher and that of autonomy for higher education institutions provided for by the Committee on ESCR in its interpretation of the right to education in the CDESCR are the only clearly legally binding formulations of academic freedom at the level of international law. This is thus the reason that for our purposes we have adopted such formulations in the course of advancing our argument in this paper.

Turning to the CDESCR, in its interpretation of the right to education, the Committee on ESCR articulates academic freedom as it relates to the freedom of teaching staff, as according the latter the liberty to develop, impart and transfer knowledge through research, teaching, study and publication.²⁷⁸ Academic

²⁷⁷ S Saunders *Freedom, the universities, and the future* (1987) 3.

²⁷⁸ UNCESCR (n 2 above) para 39.

freedom is also said to include freedom of expression as regards the organisation in which academic work is conducted, the freedom to conduct work without intrusions from the state or from any other like or similar source and an entitlement to all such other human rights as are accorded to other persons within the territory of the state in question.²⁷⁹

What this therefore means is that teaching staff at higher education institutions have as much freedom in conducting their research, choosing the orientation for such research, and in the teaching and publication of its results. This further means that insofar as such teaching staff is engaged in teaching within the classroom they are accorded freedom to express themselves as they desire as regards the subject matter for which they have been engaged to teach. They are also accorded the right, within the confines of the institution, to be critical of the management and the running of the institution without thereby incurring censure. Departing from the Germanic conception of academic freedom and adopting the US conception, the above articulation goes further and accords teachers the rights enjoyed by other citizens in that they may express themselves as freely as they desire as regards matters of concern to them as citizens, however, always clearing confusion between their personal and professional views and acting with the necessary professional decorum.

The Committee on ESCR further provides that academic freedom encapsulates that the independence of higher education institutions must be guaranteed in that they must be allowed such degree of self governance as is necessary for effective management of such institutions.²⁸⁰

The ACHPR just like the CDESCR guarantees and enshrines within its provisions, the right to education.²⁸¹ However, whereas the CDESCR has broad and lengthy provisions on education which have been further elaborated upon by the Committee on ESCR through its GCs, this is not so when it comes to the ACHPR.²⁸² This is because the ACHPR simply provides that, 'Every individual

²⁷⁹ As above.

²⁸⁰ UNCDESCR (n 2 above) para 40.

²⁸¹ Art 17, ACHPR.

²⁸² Art 13 CDESCR read with UNCDESCR, GC13.

shall have the right to education' without stating anything further.²⁸³ Thus we remain clueless as to the content and exact meaning to be attached to the statement, 'Every individual shall have the right to education.' Thus we are not even sure whether the right to education as enshrined in the ACHPR encapsulates protection of the right to academic freedom. There is however a held view to the effect that the provision on education in the ACHPR is so framed so as to provide the broadest possible protection that can emanate from such a provision.²⁸⁴ Thus there is no formulation of content as such formulation was seen as having the potential to limit the protection provided by the provision to certain predetermined areas.²⁸⁵

That notwithstanding, there is still hope for the ACHPR. This is because it is an accepted practice that where legal stipulations don't provide definitions of their scope, guidance may be sought from judicial decisions in expanding the scope and meaning of such stipulations.²⁸⁶ Alternatively, judges in one country can seek guidance from judgments of courts from other countries dealing with the interpretation of similar stipulations.²⁸⁷

For our purposes this may be extended to mean that where an international or regional treaty or covenant contains provisions whose content and scope is not clear, the body tasked with interpreting that treaty may seek guidance in formulating and defining its scope from the decisions and interpretations accorded to the same provisions in other treaties and even in domestic constitutions by bodies analogous to it or by domestic courts.

This is more relevant when one considers that the ACHPR enjoins the African Commission in the course of its work, such as in the consideration of communications, to take into consideration, general principles of law recognised

²⁸³ Art 17, ACHPR.

²⁸⁴ Oberleitner (n 22 above) 33.

²⁸⁵ As above.

²⁸⁶ Maripe (n 276 above) 59.

²⁸⁷ As above .

by African states, as well as legal precedents and doctrine.²⁸⁸ In addition, the African commission is enjoined to:²⁸⁹

Draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights, as well as from the provisions of various instruments adopted within the specialised agencies of the United Nations of which the parties to the present Charter are members.

The African Commission has itself also coined its duties as not only encapsulating the promotion and protection of human and people's rights, but as also requiring it to interpret and give more flesh to the provisions of the ACHPR.²⁹⁰ Thus the African Commission has in the past adopted resolutions explaining in detail the meaning and the interpretation that should be accorded to particular provisions of the ACHPR.²⁹¹

Should the African Commission ever be tasked with considering a matter which involves violations of academic freedom it should take the opportunity to interpret the provisions of the ACHPR as broadly as possible and as providing protection of academic freedom. In this regard, since the African Commission has not as yet developed any jurisprudence on the issue of academic freedom nor issued an interpretive resolution on the issue, it would be appropriate for the African Commission in attempting to formulate the provisions of the ACHPR to draw guidance from international and domestic sources dealing with similar issues.

One such international source from which guidance may be sought is the CESCR which through the interpretation accorded to its provision on the right to education by the Committee on ESCR guarantees the right to academic freedom.²⁹² The CECSR accords the right to academic freedom to teachers in

²⁸⁸ Art 61, ACHPR.

²⁸⁹ Art 60, ACHPR.

²⁹⁰ Murray (n 265 above) 2.

²⁹¹ n 264 above, 187-234.

²⁹² n 7 above.

higher education institutions in the course of their duties in conducting research and teaching and also accords such protection to higher education institutions themselves, granting them the benefit of institutional autonomy in their functioning.²⁹³ The CDESCR also accords academic staff freedom of expression within the higher education institution, in the classroom and outside the confines of the institution, with the only requirement being compliance with professional ethics.²⁹⁴

The African Commission may thus, drawing from the right to education in the CDESCR and its articulation by the Committee on ESCR as providing for the right to academic freedom also adopt an interpretation of the right to education in the ACHPR that encompasses the right to academic freedom.

The African Commission may also in the course of its work take into consideration, general principles of law recognised by African states, as well as legal precedents and doctrine.²⁹⁵

With regard to legal precedent, the USSC has had an opportunity to consider academic freedom. This was the case in *Keyshian v Board of Regents*²⁹⁶ in which the court held that 'Academic freedom is a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.'²⁹⁷ This was followed by the case of *Regents of the University of California v Bakke*²⁹⁸ in which the court further affirmed that the First Amendment of the USC enshrines protection of the principle of academic freedom as a human right.²⁹⁹ The First Amendment to the USC enshrines freedom of speech and applies to state institutions, including state universities.³⁰⁰ The provision

293 As above.

294 As above.

295 Art 61, ACHPR.

296 385 U.S. 589 (1967).

297 As above, 603.

298 438 U.S. 265, 312. (1978).

299 Coleman (n 92 above) 20.

300 Academic freedom and the first amendment < http://en.wikipedia.org/wiki/Academic_freedom> (accessed 26 May 2006).

provides that 'Congress shall make no law... abridging the freedom of speech, or of the press....'³⁰¹ In this regard, in elaborating on the concept the USSC held that the principle meant that a university can 'determine for itself on academic grounds: who may teach; what may be taught ; how it should be taught, and who may be admitted to study.'³⁰²

These decisions from the USSC can also be considered by the African Commission in articulating the protection to be accorded by the ACHPR to academic freedom. This is more so when a matter is brought to the African Commission alleging a violation of academic freedom on the basis of the right to free expression provided for in article 9 of the ACHPR.

This shouldn't prove difficult for the African Commission to undertake as the African Commission has in the past been bold enough to adopt liberal interpretations of provisions of the ACHPR by drawing guidance from international legal provisions dealing with the same issues dealt with in such provisions. Thus in a communication involving the *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria*³⁰³ in considering the allegation that the Nigerian government had violated the right to a healthy environment, as guaranteed under article 24 of the ACHPR, the African Commission also sought guidance from the provisions of the CESCRC providing for environmental rights.³⁰⁴ In this communication the complainants had further alleged that the Nigerian government had violated the right to adequate housing and relied on article 14 and as well on the implied recognition of such right in articles 16 and 18 (1) of the ACHPR.³⁰⁵ Despite relying on these provisions, it should be noted that none of these provisions and any provision in the ACHPR provides expressly for the right to housing.³⁰⁶ However, the African Commission did not allow this to stand in a way of finding a violation of the right

³⁰¹ As above.

³⁰² Academic freedom for colleges and universities < http://en.wikipedia.org/wiki/Academic_freedom> (accessed 26 May 2006).

³⁰³ (2001) AHRLR 60 (ACHPR 2001).

³⁰⁴ Para 50-54, as above.

³⁰⁵ Para 59-63, as above.

³⁰⁶ As above.

to housing on the basis of the ACHPR. The African Commission thus held that the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health and family life are adversely affected.³⁰⁷ The African Commission further held that the combined effect of articles 14, 16 and 18(1) reads into the ACHPR a right to shelter or housing which the Nigerian government had been found to have violated.³⁰⁸ The African Commission also found that a violation of the right to adequate housing as implicitly protected in the ACHPR also encompasses the right to protection against forced evictions.³⁰⁹ The African Commission then went on and adopted the definition of forced evictions articulated by the Committee on ESCR.³¹⁰

Thus on the basis of the SERAC decision, the African Commission can use the GCs on the right to education of the Committee on ESCR as a basis to adopt an interpretation of article 17 of the ACHPR as encapsulating the right to academic freedom. Alternatively, the African Commission may on the basis of the SERAC decision extend the reasoning in that case to lead it into the finding that an implicit protection of academic freedom is provided for by article 17. This is even more important when one considers that whereas the ACHPR provides for the right to education this right can only be enjoyed and is thus only meaningful if accompanied by the academic freedom of staff, students and autonomy for institutions of higher education as provided for in the GC on the right to education by the Committee on ESCR.³¹¹ Thus since the provision of the right to education without the requisite academic freedom makes the right to education meaningless it must thus be considered implicit that in the right to education is the protection of the right to academic freedom.

307 As above.

308 As above.

309 As above.

310 As above.

311 UNCESCR, GC 13.

In addition to the above interpretation which the African Commission can adopt when considering communications, it is respectfully provided that the African Commission can adopt a resolution setting out the provisions in the ACHPR that in its view provide a framework for the protection of the right to academic freedom. In this regard, the African Commission can draw guidance from international law, and the jurisprudence of domestic courts and the provisions of domestic law providing for the right to academic freedom. The African Commission can also use its mandate of consideration of state reports to require states to provide in their reports information on the extent to which academic freedom is guaranteed in their territories.

4.5 Conclusion

There is no international treaty providing expressly for the right to academic freedom. However, the CESCRC has been interpreted as providing protection of the right to academic freedom in its provisions on the right to education. The African Commission has a mandate to enforce the ACHPR by promoting and protecting human and peoples' rights provided for in the ACHPR. The African Commission thus also has the power to interpret the ACHPR. The ACHPR like other international treaties does not expressly provide for the right to academic freedom. In interpreting the ACHPR the African Commission is enjoined to consider international law and legal precedent. The African Commission should thus use its interpretive mandate to interpret the provisions of the ACHPR as providing protection of the right to academic freedom. This it can do by drawing inspiration from the CESCRC and legal precedent providing for academic freedom and from the fact that a number of African constitutions recognise and thus also provide protection to academic freedom.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

There has for many years up to now been no international human rights treaty or covenant concerning itself with the protection of academic freedom as a human right. This however partly changed in 1999, when the Committee on ESCR affirmed the essentiality of academic freedom for the proper and effective functioning of higher education institutions. The Committee accomplished this by issuing GC No 13 on the right to education. The Committee on ESCR in substantiating its reasoning as to why academic freedom, though not expressly provided for in the CDESCR finds protection in the CDESCR, provided that the right to education is meaningless and thus cannot be realised, in particular where it relates to higher education, without the requisite guarantee of academic freedom for the academic staff at institutions of higher education and the requisite autonomy for such institutions in running their affairs.

The Committee on ESCR is the body tasked with the enforcement of the provisions of the CDESCR. Thus it monitors state compliance with their obligations under the CDESCR. In this regard, the Committee on ESCR has interpretive powers in terms of which it can elaborate on the obligations incumbent on states arising from a particular provision of the CDESCR by issuing GCs as and when deemed necessary from time to time. The Committee on ESCR was thus acting in the latter capacity when it adopted GC No 13, thus leading it to affirm that academic freedom is an integral part of the right to education without which the right to education is meaningless.

The ACHPR just like the CDESCR provides for the right to education, although in not as detailed terms as does the CDESCR. The body tasked with interpreting and enforcing the provisions of the ACHPR, the African Commission, has not as yet had an opportunity to pronounce itself with regard to the ACHPR's protection of the right to academic freedom. The African Commission is enjoined to draw

inspiration from international law, legal precedent and from documents adopted by the special agencies of the UN in the course of its work of protecting human and peoples' rights. The Commission has in the past drawn direct inspiration from the GCs of the Committee on ESCR in elaborating on particular provisions of the ACHPR. It is thus respectfully provided that should the African Commission ever have the opportunity to consider the extent to which the ACHPR provides protection of academic freedom it should draw guidance in elaborating on the ACHPR from the Committee on ESCR GC No 13 and from the recommendations of UNESCO on the status of teaching personnel. The USSC has pronounced itself very elaborately on the issue of academic freedom and it is thus also provided that its judgments pronouncing on academic freedom should also be taken into account in such an exercise. The adoption of such a liberal interpretation of the ACHPR with regard to its protection of academic freedom is even more urgent when one considers that only a few states provide constitutional protection of academic freedom in their constitutions. Thus a regional standard on this issue needs to be adopted from which states can emulate in developing domestic protection regimes for academic freedom.

5.2 Recommendations

African States should take steps towards the adoption of an African treaty addressing itself specifically to the issue of the protection of academic freedom from a human rights perspective. In drawing such a treaty inspiration can be sought from the Lima Declaration, Dar Declaration and the KDIFSR.

The African Commission should require states in providing state reports to it to provide information on the state of academic freedom in their territories. The various issue addressed by the Committee on ESCR in its GC No 13 as regards the freedom of teaching staff in conducting research, teaching and freely expressing themselves and additionally the level of autonomy enjoyed by higher education institutions in managing their academic affairs should be assessed.

The African Commission should adopt an interpretive resolution elaborating on the protection provided by the right to education and such resolution should provide for protection of academic freedom drawing guidance from the Committee on ESCR GC No 13.

The African Commission should when presented with an opportunity of deciding a case raising the issue of a violation of academic freedom use such opportunity to draw guidance from, *inter alia*, the GC No 13 of the Committee on ESCR and interpret the ACHPR as providing protection of academic freedom.

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