

McGarvie, The Hon. Mr Justice Richard (1991), 'The Function of a Degree: Core Subjects', paper presented at Law Council of Australia Legal Education Conference, Bond University, Queensland, 13-16 February 1991.

Menkel-Meadow, Carrie (1988), 'Feminist Legal Theory, Critical Legal Studies and Legal Education or "The Fem-Crits Go to Law School"', *Journal of Legal Education*, 38, pp 61-85.

Morgan, Jenny (1989), 'The Socratic Method: Silencing Cooperation', *Legal Education Review*, 1, pp 151-164.

Naffine, Ngaire (1990), *Law and the Sexes: Explorations in Feminist Jurisprudence*, Sydney, Allen & Unwin.

Nash, Gerald (1991), 'Should Law Schools produce Lawyers?', paper presented at Law Council of Australia Legal Education Conference, Bond University, Queensland, 13-16 February 1991.

Note (1982), 'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship', *Harvard Law Review*, 95, pp 1669-1690.

Pearce, Denis (1991), 'Admission to Law School', paper presented at Law Council of Australia Legal Education Conference, Bond University, Queensland, 13-16 February 1991.

Pearce, Denis, Campbell, Enid and Harding, Don (1987), *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission*, Canberra, Australian Government Publishing Service.

Peden, John (1972), *Professional Legal Education and Skills Training for Australian Lawyers*, Sydney, Law Book.

Reich, C.A. (1964), 'Toward the Humanistic Study of Law', *Yale Law Journal*, 74, pp 1402-1408.

Sadurski, Wojciech (1987), 'Research in Australian Law Schools', *Bulletin of the Australian Society of Legal Philosophy*, 11, pp 144-153.

Sampford, Charles (1989), 'Rethinking the Core Curriculum', *Adelaide Law Review*, 12, pp 38-62.

Sampford, Charles and Wood, David (1987), 'The Place of Legal Theory in the Law School', *Bulletin of the Australian Society of Legal Philosophy*, 11, pp 98-119.

Sampford, Charles and Wood, David (1988), "'Theroetical Dimensions' of Legal Education - A response to the Pearce Report", *Australian Law Journal*, 62, pp 32-52.

Sampford, Charles and Wood, David (1989), 'Legal Theory and Legal Education - The Next Step', *Legal Education Review*, 1, pp 107-134.

Schlegel, John (1984), 'Langdell's Legacy Or, The Case of the Empty Envelope', *Stanford Law Review*, 36, pp 1517-1533.

Stevens, R. (1971), 'Two Cheers for 1870: The American Law School', in D. Fleming and B. Bailyn (eds) *Law in American History*, Boston, Little Brown & Co., pp 403-548.

Stone, Julius (1950), *The Province and Function of Law: Law as Logic, Justice and Social Control, a Study in Jurisprudence*, Sydney, Maitland.

Stone, Julius (1964), *Legal System and Lawyers' Reasonings*, Sydney, Maitland.

Stone, Julius (1966), *Social Dimensions of Law and Justice*, Sydney, Maitland.

Tay, Alice (1987), 'Aimless Perspectives', *Bulletin of the Australian Society of Legal Philosophy*, 11, pp 154-158.

Thornton, Margaret (1990), *The Liberal Promise: Anti-Discrimination Legislation in Australia*, Melbourne, Oxford University Press.

Twining, William (1989), 'Access to Legal Education and the Legal Profession: A Commonwealth Perspective', in R. Dharan, N. Kibble & W. Twining (eds) *Access to Legal Education and the Profession*, London & Edinburgh, Butterworths, pp 1-38.

Twining, William (1967), 'Pericles and the Plumber', *Law Quarterly Review*,

Weisbrot, David (1990), *Australian Lawyers*, Melbourne, Longman Cheshire.

Wieruszowski, H. (1966), *The Medieval University: Masters, Students, Learning*, Princeton, Van Nostrand.

Wilkins, R.K. (1987), "'The Person You're Supposed to Become': The Politics of the Law School Experience", *University of Toronto Faculty of Law Review*, 45, pp 98-152.

Worden, K.C. (1985), 'Overshooting the Target: A Feminist Deconstruction of Legal Education', *American University Law Review*, 34, pp 1141-1156.

Yeatman, Anna (1990), *Bureaucrats, Technocrats, Femocrats: Essays on the Contemporary Australian State*, Sydney, Allen & Unwin.

Ziegert, Klaus (1987), 'What Law Professors know and what they think they know about the Performance of Law Schools', *Bulletin of the Australian Society of Legal Philosophy*, 11, pp 127-143.

## Footnotes

1. The tensions arising from an attempt to strike a balance between the theoretical and the practical are very apparent in an article by Professor John Goldring (1987). For a critique, see Kerruish (1988).

2. The desire is rational as the evidence indicates that lawyers spend most time in business law, property law and civil litigation (see, for example, Law Institute of Victoria 1990).

3. *Milirrup v Nabalco Pty Ltd & The Commonwealth of Australia* (1971) 17 FLR 262.

4. This scenario is replicated all over the world (see, for example, Dhavan *et al* 1989).

5. The Law Society of New South Wales *Issues Paper* has adverted to the way in which present selection criteria for admission to law school "has resulted in law students becoming an elitist group unrepresentative of the community at large" (Law Society of New South Wales 1991:5). The concern of the Law Society is directed towards the expected lack of provision of services for suburban and country clients as students of privileged status tend to favour highly paid positions in city commercial law firms. La Trobe University proposes to break the nexus between law school admission and the extremely high Higher School Certificate aggregate for law by not admitting students into the LLB until after at least two years of university study have been completed. It is hoped that this admissions policy will contribute to greater socio-economic diversity amongst law graduates, although it has been suggested that no change in admission based on previous academic performance is likely to have a significant impact on the socio-economic group who study law (Pearce 1991).

6. The attack culminated in a recommendation by the Pearce Committee that the School either be phased out or reconstituted (Pearce *et al* 1987). For critiques of the Committee's Report, see Sadurski, Tay, Ziegert 1987, Sampford 1988).

7. Sponsored by the Law Council of Australia and held at Bond University, Queensland, 13 to 16 February, 1991. The theme of this conference was "the compleat lawyer".

8. Solicitors may now be accredited as specialists in particular fields of practice in some jurisdictions, an accreditation which is based largely on practical experience (see, for example, Dunn 1991, Chesterman 1991).

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# Academic freedom in South Africa\*

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Academic freedom is a matter of great controversy in South African universities. There are a number of very different views of academic freedom and they correspond to competing conceptions of the nature and function of the university. (The following renderings of these conceptions are necessarily crude and somewhat unfair, but they serve my purpose here. It also needs to be noted that in what follows I am concerned only with universities that are state funded - as all South African universities are).

Some extol academic freedom as a fundamental right in the service of the disinterested pursuit of knowledge, and a right to be defended against interference from the state and other movements or organisations outside the university. This view often goes with, what is sometimes called, the Ivory Tower model of the university. On this model the pursuit of knowledge is an intrinsically valuable activity which ought to be undertaken for its own sake and quite independently of the day to day concerns of the outside society. There are, however, held to be (often unforeseen) spin-offs from this activity which do in fact benefit the outside society.

On a second view academic freedom is only a privilege extended in order that knowledge be acquired for the good of the community, and a privilege behind which elitist educational institutions have in fact in South Africa hid their fundamental activity of serving the political and economic interests of the white elite. This view often goes hand in hand with, what might be called, the People's University conception. On this account universities must be democratised and made 'relevant'. Very crudely, the idea here seems to be to wrest control of the university from the forces of reaction (typically administrators and academics) and place it in the hands of the progressive forces (mainly students and workers) so as to make a university education available to the broad mass of the people, and to ensure that research programmes are pursued which benefit this broad mass.

Yet a third position views academic freedom as a sometimes useful, but often distracting, fetish that academics have as they go about what it is held ought to be their main business, namely the training of students to service the economy. This view of academic freedom accords well with, what might be called, the Supermarket model of the university. According to this conception universities are in the final analysis shops or factories in which what is really at issue is the buying, selling and producing of commodities; in this case education. A good university is one in which there is a supply of courses for which students and employers have a demand. In this way employers have a supply of skilled labour and students have a (remunerative) career path.

Now my concern in this paper is not specifically with the question of the nature and proper function of the university, but rather with academic freedom, and more specifically academic freedom in South Africa. However this latter question cannot be answered completely independently of the former. Accordingly, I need to make clear, albeit in suitably general terms, which conception of the university I favour, and which, therefore, I will take as given for the purposes of my discussion of academic freedom.

I suggest that each of these three models is seriously deficient.

The Ivory Tower model fails to give due weight to the fundamental needs of the society in terms of which its existence must ultimately be justified. And this failure is especially obvious in a country as unjust and as impoverished as South Africa.

The People's University model, by contrast, fails to acknowledge the fact that universities are necessarily elitist institutions, both in respect of their student intake, and in respect of the relationship between staff and students. It is only possible for a minority to be provided with a university education; and this is especially so in a relatively poor country such as South Africa. Moreover the relationship between staff and students is necessarily undemocratic; it is that of master to apprentice.

Finally, the Supermarket model, in construing knowledge and learning as commodities, misunderstands their nature and role in society. Universities are, or ought to be, centres of rational inquiry and of knowledge acquisition and dissemination, and as such their focus is necessarily wider than the purely economic, and their role not merely instrumental, but also critical and transformative of society. This model also ignores the fact that in South Africa - due to prior economic and educational imbalances - the operation of market forces alone will not lead to the satisfaction of the needs of the whole society, and especially the needs of its huge impoverished sector.

I will therefore take it as given in what follows that none of these models is adequate. At the same time I will take it as given that each of them highlights something of central importance.

The Ivory Tower model emphasises the necessarily elitist nature of universities, and their specialist function as centres of knowledge acquisition and of rational inquiry. The People's University conception justifiably draws attention to the role that universities in South Africa have in fact had in serving the interests of white power and privilege, and correctly redefines that role as one of serving the community as a whole, and more specifically, in South Africa at this time, of contributing to the removal of material and social deprivation, and political and economic inequality. Moreover it is a model which by building in democratic power sharing at least tries (albeit unsuccessfully) to deal with the fact that in any society, and especially in highly inegalitarian societies such as South Africa, scarce goods - including university education and intellectual skills and advanced knowledge - are not given away, they are acquired by those powerful enough either to take them or to insist on a share of them. The Supermarket model rightly stresses the importance of the university in contributing, in particular, to economic development.

I will take as my point of entry into the specific issue of academic freedom in South Africa, the meaning or definition that has in fact been given to that term in discussions of academic freedom in South Africa. In much of the discussion academic freedom has been implicitly taken to mean freedom of expression - in the sense of freedom to communicate and be communicated to - and relatedly, intellectual freedom - the freedom to develop and express ideas - for academics and students. On the other hand the explicit definitions in currency are in terms of the freedom of academics to determine what is taught and researched, and to determine who is taught by whom, and who is to receive a degree, and who to fail. If this is what is meant then academic freedom is in large part an aspect of institutional autonomy.

In so far as a person is free to communicate with others they have freedom of expression, whether they are freely communicating in the institutional setting of a university or not. To insist on such freedom of expression within the university is to insist on (a constituent part of) academic freedom. However, freedom to determine who is to be taught and by whom, and who is to be awarded a degree, is not freedom of expression. Nor is freedom to

\* Thanks to Ian Macdonald for comments on earlier versions of this paper.

determine the subject areas to be taught - as distinct from the actual content of lectures and tutorials within those areas - freedom of expression. Rather these things constitute (in effect) a demand by the university to have autonomy in respect of determining the membership (staff and student) of the university, and of subject areas and educational standards within the university.

So freedom to determine membership, subject areas and standards, is not the same thing as freedom of expression; rather it is an aspect of institutional autonomy. However, as is the case with freedom of expression, these matters of academic staff and student membership, subject area and educational standard pertain to the university as an educational and research institution. Moreover, like freedom of expression they are quite capable of being interfered with. Accordingly, the university, in insisting on exercising control over them, is insisting on a vulnerable aspect of its autonomy, and an aspect it has qua educational and research institution.

Clearly the university ought to have control over the awarding of degrees and the methods of teaching and researching to be deployed. This follows from the fact that it is the pre-eminent authority in the sphere of knowledge acquisition and rational inquiry. It is that institution charged with acquiring knowledge, testing claims to knowledge and inducting members of the society (students) into the procedures whereby knowledge can be acquired and tested.

The university's authoritative status in matters of knowledge acquisition and rational inquiry also provides the main justification for the university exercising control over who should be employed as a teacher/researcher. Only the university is competent to judge who among candidate teachers and researchers is of the required or highest academic standard and who is not.

This is not to say that the university ought not to be subject to certain strictures. The university ought not, for example, be allowed to exclude applicants on the basis of race. Nor is it to say that there might not be under certain circumstances considerations other than academic merit in play. For example, if there are two candidates of roughly academic merit but hiring the first rather than the second will save the university a great deal of money, then the university may well prefer the first. Or perhaps weighting is given to the fact that one candidate is a South African and another not. Another non-academic consideration in South Africa at the present time is the racial composition of its universities' staff. The racial composition of staff at Rhodes reflects the massive (especially) educational privileging of whites at the expense of blacks in this country. In South Africa academics have not, and do not, secure their positions under conditions of fair competition. So there are and ought to be certain non-academic considerations in the appointment of academic staff.

The matter of subjects to be taught and areas to be researched is more difficult. Clearly the university ought to have a considerable amount of control in this area. Once again there is the justification in terms of the authoritative status of the university in matters of education and of knowledge acquisition. However, it would not follow from this consideration alone that the university ought to have full-blown autonomy in this matter. For the wider society not only has an interest in the subjects to be taught and areas to be researched but also has some capacity to make rational judgements as to what ought to be taught and researched. For example, in South Africa a government may rationally judge that there is a need for more and better educated school teachers or for more research into the learning of English as a second language.

Accordingly, the universities' demand for complete autonomy in these matters would require further justification. (Here it needs to be noted that to have autonomy is not the same thing as to be free from external influence. Clearly the latter is impossible, but it is the former that is in question. Of course once an 'influence' becomes irresistible then autonomy is undermined. The financial dependence of universities on the state may be a resistible influence given the dependence of the state and the economy on

university trained personnel.) This further justification rests on the conception of the university as not simply an educational instrument existing to meet the needs of the community as the community understands those needs, but as a centre and custodian of rational inquiry, and of knowledge acquisition and dissemination, within the society; and therefore responsible for, and best able to judge, what knowledge and which inquiries are the most fitting to be pursued and transmitted.

Now no doubt knowledge and understanding are good in themselves, and no doubt some knowledge is intrinsically more valuable than other knowledge i.e. more valuable independently of its contribution to the satisfaction of ordinary human needs. However if the university is to be maintained by the state as a centre and custodian of rational inquiry and knowledge acquisition within the society it must not only pursue knowledge of its own sake, it must pursue that knowledge which will benefit society as a whole.

Moreover it is clear that in a society such as present day South Africa, the pursuit of knowledge for the sake of the whole society - and especially the impoverished sections of that society - overrides the pursuit of knowledge for its own sake. It follows that the university ought to be consciously and actively engaging in the process of determining and pursuing the educational/informational etc. needs of the community as a whole, and not simply pursuing knowledge for its own sake, and certainly not pursuing it in a manner that benefits only certain sections of the community. To fail to do so is to forfeit its right to autonomy in matters of subject areas to be taught and research to be undertaken. Historically the universities in South Africa have not in fact - for whatever reason - purposefully pursued the educational/informational etc. needs of the community as a whole.

Finally there is the matter of who ought to be taught. Clearly the university ought to have a significant say in this; candidates who would be unable to learn ought not to be allowed to enter, and the university is the best judge in this matter. Moreover if the university is to reproduce its stock of teachers/researchers it has to be able to attract and select students of high intellectual ability, and only the university is competent to make the required judgements here. However it would not follow from this that: (a) other bodies or groups ought not to have some say in the determining of student intake, and (b) purely academic criteria ought to be the only criteria for determining admission.

In practice in the modern university, student intake (as well as in fact subject areas to be taught and researched) have become increasingly subject to the pressures of the marketplace, to student desires on the one hand, and corporate and state needs and funding on the other. Notwithstanding the rhetoric - which is often the rhetoric of what I have called the Ivory Tower model - universities have largely become instances of (what I have called) the Supermarket model. In so doing, and given the prior economic and educational imbalances between white and black in South Africa, universities in South Africa have to a large extent reproduced, and therefore further entrenched, the wider apartheid society characterised, as it is, by white power and privilege. It is obviously in this context that the issue of student intake needs to be addressed. (In fact it is in this context that the whole issue of the role of the university in South Africa and of academic freedom needs to be addressed. But this is perhaps most obviously so in relation to student intake, since it is only by providing more black students with university education that the matter of the imbalance of white to black academic staff and of the imbalance of wealth and power in the wider society can begin to be addressed [in so far as they are able to be addressed by the actions of universities].)

The issues of the extent of, and the mechanisms of enabling, black intake into universities cannot be resolved independently of knowledge of financial constraints, the needs of the economy, the numbers and quality of black school leavers, and a variety of other considerations. Certainly it is by no means clear that it is simply a matter of expanding universities to accommodate more and more

black students. For it is possible that the problem with South African universities - aside from lack of finance - is not particularly that there are too few university students; South Africa compares favourably in this regard with the main western countries. (Though care would need to be taken here, given that some of the subjects taught at some South African universities would standardly be taught at non-university tertiary institutions e.g. polytechnics, in some overseas countries.)

Rather the problem might be, firstly, that many of the (especially black) universities are of a very low standards, and, secondly, that there are too many white university students and too few black students in the (relatively high quality) universities historically set aside for whites. For example, the number of white South African university students is six times the number of British university students, relative to population size. At any rate these are complex matters that I cannot go into here. Rather I want to make the following points.

Firstly, no group (white or black) and no individual no matter what their prior school or other academic achievements or their parents' ability and willingness to pay fees, has a right to a university education. University education (in so far as it is state funded) is a scarce good distributed to a select number of individuals for the good of the society as a whole. (Under the present system parents pay a portion of the overall cost of the university education of their offspring. This system is very unjust. It effectively excludes those too poor to afford the fees, and then lavishes public money in the form of government subsidy on those who are rich enough to afford the fees. So the rich, but not the poor, are subsidised so that they can gain an education which will provide them with further opportunities - in the form of career paths - to become even richer.) Accordingly, university education ought to be distributed on the basis of the beneficial results it has for the society as a whole and this is not what has been taking place in South Africa.

It is sometimes argued - and this argument is understandably popular amongst white South Africans - that university education (and social benefits more generally) ought to be distributed on the basis of its source of funding e.g. the taxpayer. This is a bad argument. For in the first place, it fails to consider the socio-economic system under which these taxpayers acquire that taxable wealth. In the second place, the ultimate providers of university education are not the taxpayers per se, but those who create wealth in the society, whether they pay tax or not. In the third place, from the fact that someone provides a resource it simply does not follow that he or she is entitled to some reciprocal benefit or is entitled to determine how that resource is to be distributed or to what end. If it did follow, compassion, for example, would be a logical impossibility. (It may be that, other things being equal, the more intellectually able ought to get university education rather than the less able, since if this were so the benefits to society would be greater. But at the moment able blacks are in effect being excluded to allow less able [though better educated] whites to attend.)

Secondly, and following from the above, the criteria for admission to university ought to be determined on the basis of whether or not applying these criteria will be to the overall benefit of the society. Obviously academic merit - in the sense of past academic performance as well as ability - is one such criterion, and an important criterion. But it is by no means the only one. Other criteria would include: likelihood that the applicant once trained will remain in South Africa; utility of the applicant as a role model for members of unjustly disadvantaged groups; utility of the applicant as a member of a social group (African) likely to assume political power.

Thirdly, a distinction needs to be made between the question of the appropriate criteria of admission and the question as to which body - the university or the government or whatever - ought to determine the criteria. For some body other than the university

to fix the criteria would be an infringement of university autonomy. But ought the university have this autonomy? Once again presumably it ought if it is discharging the responsibilities to the wider society as a centre of rational inquiry and knowledge acquisition and transmission.

Let me now turn to the other component of academic freedom, namely freedom of expression, or more precisely, intellectual freedom. By freedom of expression it is generally meant freedom to communicate and be communicated to. This is freedom to transmit and receive information, to discuss, to argue, to instruct and be instructed, and so on. Freedom of expression in this sense is tied closely to freedom of thought; the freedom not simply to hold particular beliefs but to think through particular positions, to construct theories, to imagine possibilities and so on. Freedom of communication and of thought in respect of ideas is intellectual freedom, and intellectual freedom is a basic human good and a right which all people have whether within or without the university. It follows that academics in defending the right to intellectual freedom ought to be defending it not only for themselves, but for the whole society.

It is inconsistent for academics to protest when their right to intellectual freedom is infringed yet remain silent when that very same right is violated outside the university. Moreover since intellectual freedom is a right it cannot simply be overridden when its exercise is in conflict with the collective good. If an individual has a right to speak out - and individuals do have this right - then he or she must be allowed to speak out even if this speaking out is in conflict with the collective good. (There are of course certain exceptions to this rule, but they are just that, exceptions.)

However within the context of the university intellectual freedom takes on additional significance. In the first place the chief ends of the university are rational inquiry, the pursuit of knowledge and understanding, and the dissemination of this knowledge and understanding for the general good of the society. But intellectual freedom within the university is a necessary condition for realising these fundamental ends. Knowledge and understanding are difficult to come by in the most favourable of circumstances. In a context of censorship or intimidation or pervasive ideology their attainment becomes a near impossibility.

In the second place, such knowledge and understanding must consist in part in knowledge and understanding of the society, and therefore of powerful interest groups and entrenched ideologies which will resist scrutiny, analysis and criticism. Witness the efforts of the South African State to prevent itself and its activities being known and understood. In the discharging of its duty to pursue knowledge and understanding, and to make known such understanding to the wider society, the university will almost certainly come into conflict with powerful groups and ideologies outside - and perhaps within - the university. This is especially so in the case of a highly repressive and profoundly unjust society such as South Africa. Indeed the absence of such conflict would almost certainly indicate the abandonment by the university of its duty to pursue and disseminate knowledge and understanding in these areas. Such conflict will inevitably generate resistance to the process of rational inquiry and dissemination of findings on the part of the university on these matters. In short, there will inevitably be groups and ideologies which will seek to undermine intellectual freedom within the university.

It follows that insofar as academic freedom embraces, as it does, intellectual freedom: (a) it is a fundamental right which all people have; (b) it is a necessary condition of the pursuit of the general aims of the university by academics and students - the aims of rational inquiry, and the acquisition of knowledge and understanding, and; (c) it presupposes, and is (in part) justified by, the duty that academics have to the wider society, to acquire and disseminate knowledge and understanding of the society, and do so for the benefit of that society.