THE IMPLICATIONS OF CURRENT LEGISLATIVE CHANGES FOR ACADEMIC FREEDOM AND INSTITUTIONAL AUTONOMY OF SOUTH AFRICAN HIGHER EDUCATION INSTITUTIONS

by

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01 July 2015

DECLARATION

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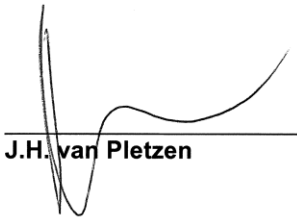

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DECLARATION REGARDING LANGUAGE EDITING

I, Derek Keith Swemmer (BA Hons, MA, D Litt et Phil, TTHD), declare that I have edited the language of this dissertation and that I am suitably qualified to do so. Over and above my qualifications with English as my specialisation, I have also taught English at Christ's Hospital (a famous public school in England) for one year, before lecturing for five years in each of the Departments of English at the University of Pretoria and the University of South Africa. I have further served as the Registrar of both the University of the Witwatersrand, Johannesburg and the University of the Free State for almost two decades, during which service I regularly wrote or edited many important documents. Recently I was appointed to the position of the Chief Executive Officer of the Federation of South African Schools (FEDSAS) Institute for Advanced School Governance.

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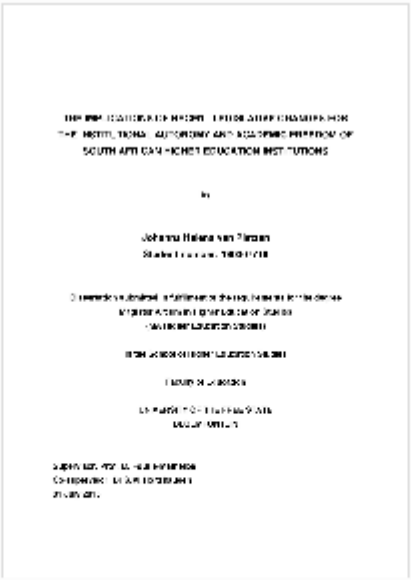

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DEDICATION

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ACRONYMS

The acronyms explained below will be applied throughout this document, unless it is clear from the context that a different meaning should be ascribed to it, in which event the meaning provided by the context will be applied:

ANC	African National Congress
ASSAf	Academy of Science of South Africa
CAS	Central Applications Service
CHE	Council on Higher Education
CHET	Centre for Higher Education Transformation
CUT	Central University of Technology, Free State
DHET	Department of Higher Education and Training
EU	European Union
HBUs	Historically Black Universities
HE	Higher Education
HEI	Higher Education Institution
HEIAAF	Higher Education, Institutional Autonomy and Academic Freedom
HEIs	Higher Education Institutions
HESA	Higher Education South Africa
HET	Higher Education and Training
HEQC	Higher Education Quality Committee (of the CHE)
HEQF	Higher Education Qualifications Framework
HWUs	Historically White Universities

IF	Institutional Forum
IOL	Independent Online
ISI	International Scientific Indexing
LERU	League of European Research Universities
NCHE	National Commission on Higher Education
NP	National Party
NPHE	National Plan for Higher Education
NRF	National Research Foundation
NQF	National Qualifications Framework
PU for CHE	Potchefstroom University for Christian Higher Education
PQM	Programme and Qualification Mix
RAU	Rand Afrikaans University
SA	South Africa
SABC	South African Broadcasting Corporation
SACP	South African Communist Party
SAHE	South African Higher Education
SAPSE	South African Post-Secondary Education
SAQA	South African Qualifications Authority
SRC	Student Representative Council
TUT	Tshwane University of Technology
UK	United Kingdom
USA	United States of America

UCT	University of Cape Town
UJ	University of Johannesburg
UKZN	University of KwaZulu-Natal
UP	University of Pretoria
UPE	University of Port Elizabeth
UNISA	University of South Africa
US	University of Stellenbosch
UNIZULU	University of Zululand
UFS	University of the Free State
UOFS	University of the Orange Free State
VUT	Vaal University of Technology
Wits	University of the Witwatersrand, Johannesburg
WSU	Walter Sisulu University
WPR	“What’s the problem represented to be?”

ABSTRACT

Key words: *Academic freedom, institutional autonomy, Higher Education (HE), relationship between government and Higher Education Institutions (HEIs), Higher Education Act 101 of 1997 (the Higher Education Act), Higher Education and Training Laws Amendment Act 23 of 2012 (the Amendment Act).*

Traditionally HEIs have been places dedicated to the search for the truth, where the truth can be pursued without fear of retribution or interference and where academics can decide what and how they teach and research. This is the essence of academic freedom, one of the principles of HE, but also a prerequisite for well-functioning HEIs and a well-functioning HE system. Equally important is the institutional autonomy of HEIs, because without institutional autonomy, academic freedom cannot exist. In unequivocal terms, should HEIs fail to have autonomy when executing their core functions, the academic freedom of individual academics will be influenced.

Both academic freedom and institutional autonomy are inextricably linked to the relationship between HEIs and government. The nature of the relationship between the government and HEIs is gleaned from legislative and other regulatory documents, and directly impacts on the academic freedom and institutional autonomy of HEIs. Given the importance of academic freedom and institutional autonomy for HEIs, the questions raised by scholars and HEI managers alike regarding the 2012 Higher Education and Training Laws Amendment Act are significant. These critics maintain that the Amendment Act impinges on the academic freedom and institutional autonomy of HEIs.

This qualitative research study, framed within the interpretivist paradigm, was undertaken primarily to research what the real or potential implications of the Amendment Act are for the academic freedom and institutional autonomy of HEIs. The following research methods were applied in this study, namely:

(a) A literature review of the the relationship between the government and HEIs, the principles of academic freedom and institutional autonomy, and the relationship between these principles, was performed,

(b) Bacchi's evaluative policy analysis "what's the problem represented to be?" approach was applied to the Amendment Act, and

(c) Semi-structured interviews were conducted with information-rich participants (two senior officials and one senior academic staff member) of the three participating HEIs. These participating HEIs were selected by applying the classification system of high, medium and low research producing HEIs (one HEI from each category), while the participants were selected because of their intimate knowledge of HE legislation and policy and its implications for HEIs, and to secure a wide range of representativeness. The aim of the semi-structured interviews was to determine the perceptions of the participants regarding whether the relevant provisions of the Amendment Act have any potential or real implications for the academic freedom and institutional autonomy of HEIs. The data obtained from the semi-structured interviews were coded, with the application of the thematic approach.

On completion of all these processes, namely, the literature review, policy analysis of the Amendment Act and the findings of the perception study, the results were integrated and the conclusion was reached that the Amendment Act does impinge on the academic freedom and institutional autonomy of HEIs, with the consequence that the effective functioning of SA HEIs and the SAHE system is at risk.

One of the recommendations that emanate from this study includes that the principles of academic freedom and institutional autonomy should be critically engaged with by HEIs, in order to establish a new definition of academic freedom and institutional autonomy appropriate for the post 1994 period.

SAMEVATTING

Sleutelwoorde: *Akademiese vryheid, institusionele outonomie, Hoëronderwys (HO), verhouding tussen regering en Hoëronderwysinstellings (HOI's), Wet op Hoër Onderwys 101 van 1997 (die Wet op Hoër Onderwys), Wysigingswet op Hoër Onderwys- en Opleidingswette 23 van 2012 (die Wysigingswet).*

Tradisioneel was HOI's plekke wat toegewy was aan die soeke na waarheid, waar die waarheid nagevolg kon word sonder vrees vir vergelding of inmenging, en waar akademici kon besluit oor wat en hoe hulle onderrig en navors. Dit is die wese van akademiese vryheid, een van die beginsels van HO, maar ook 'n voorvereiste vir behoorlik funksionerende HOI's en 'n behoorlik funksionerende HO-stelsel. Ewe belangrik is die institusionele outonomie van HOI's, omdat akademiese vryheid nie sonder institusionele outonomie kan bestaan nie. In ondubbelsinnige terme, indien HOI's nie outonomie het wanneer hulle hul kernfunksies uitvoer nie, sal die akademiese vryheid van individuele akademici aangetas word.

Akademiese vryheid en institusionele outonomie is onlosmaaklik verbind aan die verhouding tussen HOI's en die regering. Die aard van die verhouding tussen die regering en HOI's spruit voort uit wetgewende en ander regulerende dokumente en affekteer akademiese vryheid en institusionele outonomie van HOI's direk. Gegewe die belangrikheid van akademiese vryheid en institusionele outonomie vir HOI's, is die vrae wat geleerdes en HOI-bestuurders ten opsigte van die Wysigingswet op Hoër Onderwys- en opleidingswette van 2012 opper, betekenisvol. Hierdie kritici hou vol dat die Wysigingswet op akademiese vryheid en institusionele outonomie van HOI's inbreuk maak.

Hierdie kwalitatiewe navorsingstudie, binne die raamwerk van die interpretivistiese paradigma, is primêr onderneem om na te vors wat die werklike of potensiële implikasies van die Wysigingswet vir akademiese vryheid en institusionele outonomie van HOI's is. Die volgende navorsingsmetodes is in hierdie studie aangewend:

(a) ’n Literatuurstudie oor die verhouding tusen die regering en HOI’s, die beginsels van akademiese vryheid en institusionele outonomie, en die verwantskap tussen hierdie beginsels, is uitgevoer.

(b) Bacchi se evaluerende beleidsontleding “What’s the problem represented to be?” -benadering is op die Wysigingswet toegepas.

(c) Semi-gestruktureerde onderhoude is met inligtingryke deelnemers (twee senior beamptes en ’n senior akademiese personeellid) van die drie deelnemende HOI’s gevoer. Hierdie deelnemende HOI’s is geselekteer deur die klassifikasiestelsel van hoë, medium en lae navorsingproduserende HOI’s (een HOI in elke kategorie) toe te pas, terwyl die deelnemers geselekteer is van wee hulle diepgaande kennis van HO-wetgewing en –beleid en die implikasies daarvan vir HOI’s, en om ’n wye reeks van verteenwoordiging te verseker. Die doel van die semi-gestruktureerde onderhoude was om die persepsies van die deelnemers oor of die relevante bepalings van die Wysigingswet enige potensiële of werklike implikasies vir akademiese vryheid en institusionele outonomie van HOI’s het, vas te stel. Die data wat uit die semi-gestruktureerde onderhoude verkry is, is deur middel van die toepassing van die tematiese benadering gekodeer.

By voltooiing van hierdie prosesse, naamlik die literatuurstudie, beleidsanalise van die Wysigingswet en die bevindings van die persepsiestudie, is die resultate geïntegreer, en die gevolgtrekking is gemaak dat die Wysigingswet wel op die akademiese vryheid en institusionele outonomie van HOI’s inbreuk maak, met die gevolg dat die effektiewe funksionering van HOI’s en die HO-stelsel in SA in gevaar is.

Aanbevelings wat uit hierdie studie voortspruit sluit in dat HOI’s krities oor die beginsels van akademiese vryheid en institusionele outonomie behoort te besin ten einde ’n nuwe definisie van akademiese vryheid en institusionele outonomie wat geskik is vir die tydperk ná 1994 daar te stel.

CHAPTER 1

ORIENTATION TO THE STUDY

1.1 BACKGROUND TO THE RESEARCH PROBLEM

When the African National Congress (ANC) came into power in 1994 after South Africa's first democratic elections, they inherited a highly fragmented (Bunting 2007:35) and divided higher education (HE) system resulting from the implementation of the apartheid policies of the previous government. The new government then proceeded during 1994 to 1999, a period known as the years of change, to reshape and transform the HE landscape into a single co-ordinated national system (Adams 2006:5). This was achieved by enacting and implementing various policy and legislative measures, such as the White Paper 3: Programme for the Transformation of Higher Education ('the White Paper') (RSA DoE 1997b), the Higher Education Act 101 of 1997 ('the Higher Education Act') (RSA 1997) and the National Plan for Higher Education (NPHE) (RSA DoE 2001).

Foremost amongst these is the White Paper (RSA DoE 1997b) which was deemed to be a broad consensus policy position resulting from the work of the National Commission on Higher Education (NCHE) HEIAAF (Higher Education Institutional Autonomy and Academic Freedom) Task Team 2008:1. This document articulated into the Higher Education Act (RSA 1997; HEIAAF Task Team 2008:1) that has, since its promulgation, provided the primary legislative framework for HE in South Africa (SA) in the post 1994 period (Mubangizi 2005:1122).

The Preamble to the Higher Education Act (RSA 1997:2) contains the broad statement of government's intent to, amongst others, "establish a single co-ordinated HE system which promotes co-operative governance and provides for programme-based HE; to transform programmes and higher education institutions (HEIs) to respond better to the human resource, economic and development needs of the Republic, to contribute to the advancement of all forms of knowledge and scholarship, with due regard to the international standards of academic quality " (RSA 1997:2).

Of considerable significance for this study are the provisions contained in the Preamble to the Higher Education Act (RSA 1997:2), in so far as they relate to government's views on academic freedom and the institutional autonomy of HEIs, and declaring: " … and whereas it is desirable for higher education institutions to enjoy freedom and autonomy in their relationship with the State within the context of public accountability and the national need for advanced skills and scientific knowledge …".

The Higher Education Act (RSA 1997) ushered in a new era for HE in SA, with vast changes such as the establishment of the Council on Higher Education (CHE), a juristic person and statutory body comprising mostly policy experts (Metz 2010:530), to advise the Minister of Education[1] on various HE matters (Bitzer, Botha & Menkveld 2008:1173). Other provisions of the Higher Education Act include those on the establishment of public and private HEIs, governance of public HEIs and funding of public HEIs, whereas Chapter six of the Higher Education Act contains the provisions for independent assessors and administrators (RSA 1997). The Higher Education Act (RSA 1997) has undergone a plethora of amendments over the past 17 years. In fact, amendments to the Higher Education Act (RSA 1997) were enacted during 1999 (RSA 1999), 2000 (RSA 2000a), 2001 (RSA 2001), 2002 (RSA 2002), 2003 (RSA 2003), 2008 (RSA 2008), 2010 (RSA 2010), 2011 (RSA 2011) and 2012 (RSA 2012a). These amendments deal with, amongst others, governance and financial matters (RSA 1999:2; RSA 2000a:2; RSA 2001:2; RSA 2002:2, RSA 2011:2; RSA 2012a:2), regulation of the private HE sector (RSA 1999:2; RSA 2000a:2) and after 2001, the restructuring of the HE landscape by means of mergers and incorporations (RSA 2001:2; RSA 2002:2; RSA 2003:2). The latest amendment to the Higher Education Act (RSA 1997), that is the focus of this study, took place during December 2012 when the Higher Education and Training Laws Amendment Act 23 of 2012 ("the Amendment Act") (RSA 2012a) was enacted. The Amendment Act (RSA 2012a) extended the powers of independent assessors and administrators appointed by the Minister and also provided the Minister with additional powers

[1]Section 1 of the Higher Education Act 101 of 1997 (RSA 1997) was amended by Section 1 of the Higher Education Laws Amendment Act 26 of 2010 (RSA 2010:2,4) that was published on 7 December 2010 (assented to by the President on 3 December 2010) and in terms whereof, the Minister of Higher Education would be known as the Minister of Higher Education and Training and the Department of Education as the Department of Higher Education and Training (RSA 2010:4), with the Department of Basic Education as a separate Department.

relating to the appointment of administrators. In essence, the Minister's powers to intervene with the management and governance of HEIs were extended quite substantially.

The Amendment Act (RSA 2012a) has since its enactment been widely criticized and has even been described as "apartheid-like and draconian, for the wide-ranging powers it will give [Minister] Nzimande to intervene in the running of universities" (*University World News* 2012b:Online).

This comment reflects the level of concern voiced by some of SA's most prominent academic scholars and legal minds regarding the implications of the Amendment Act (RSA 2012a) for academic freedom and institutional autonomy of HEIs in SA. This is apparent when considering the comments made by respectively the Vice-Chancellor of the University of Johannesburg (UJ), Prof. Ihron Rensburg, and a prominent jurist, Adv Jeremy Gauntlett SC.

Rensburg's concerns about the Amendment Act (RSA 2012a) were published in *Business Day Live* (2013:Online) of 31 January 2013 with the heading "Regulatory overkill threatens academic autonomy in South Africa*"*. He argued that not only had the Minister's powers to appoint administrators and assessors been extended by the Amendment Act (RSA 2012a), but also that the control mechanisms to be complied with for such an appointment had been weakened by the Amendment Act (RSA 2012a). He declared that "(t)he erosion of university autonomy in these new legislative interventions is downright perilous. Merely cast an eye to the north of our borders to see the consequences of what happens when universities are simply subjected to the dictates of the state" (*Business Day Live* 2013:Online).

Similar views regarding the Amendment Act (RSA 2012a) are held by Gauntlett (2013:Online) who has declared his opposition to this Act (RSA 2012a) on more than one occasion. Presenting a public lecture at the UJ on 7 May 2013, Gauntlett (2013) declares that the Amendment Act (RSA 2012a) unjustifiably infringes upon a university's right to academic freedom and states that the Amendment Act (RSA 2012a) also violates the right of the role players to a fair procedure (Gauntlett 2013:Online). In addition, Gauntlett (2013) declares that the Amendment Act (RSA

2012a) is impermissibly vague and he states in relation to the Minister's right to intervene at an HEI that "these changes by relative stealth have diminished, in my view academic freedom" (Gauntlett 2013:Online).

The interest in and concern about the Amendment Act (RSA 2012a) and its implications for HE and HEIs in SA are further apparent from the numerous articles regarding the Amendment Act (RSA 2012a) since published in the media. One such article by Ndungane and Price appeared on 30 August 2013 in the *Mail & Guardian* (2013b) in which not only the provisions of the Amendment Act are questioned, but also the processes followed with the enactment of the Amendment Act (RSA 2012a). The authors state that the provisions of the Bill (RSA 2012b), published for comment during March 2012, differed substantially from the provisions of the Amendment Act (RSA 2012a), because the Bill had not contained any reference to suspension of councils or vice-chancellors when Higher Education South Africa (HESA)[2] had been consulted (*Mail & Guardian* 2013b:Online). They also alleged that the Minister had, without consultation, introduced new or further amendments during the Portfolio Committee meetings in September 2012, while comments were being presented and that these amendments were beyond the scope of the original Bill (RSA 2012b; *Mail & Guardian* 2013b). Moreover, Ndungane and Price believed that the period of two weeks granted for interested parties to submit their comments on the provisions of the Bill (RSA 2012b) had been insufficient (*Mail & Guardian* 2013b).

Notwithstanding that HESA and other interested parties had requested an extension of the due date for submission of their comments, the Minister proceeded and the Bill (RSA 2012b) was consequently passed in December 2012 (*Mail & Guardian* 2013b).

Ndungane and Price are furthermore of the opinion that more clarity is needed regarding the procedures for the appointment of independent assessors and administrators for HEIs. They convey their disagreement with the Minister regarding the content of numerous provisions of the Amendment Act (RSA 2012a) with specific reference to the provisions of Section 35A(2)[3] and Section 49A(1) of the Amendment

[2] Higher Education South Africa is a non-statutory body that comprises all the Vice-Chancellors of the public HEIs of SA.
[3] The Amendment Act does not deal with Section 35 and it is believed that it is Section 45(A)2 that Ndungane and Price are referring to.

Act (RSA 2012a; *Mail & Guardian* 2013b). The same authors also argue that Section 35A(2) of the Amendment Act (RSA 2012a) constitutes a violation of the right of those affected by the investigation to respond to allegations and that this could compromise an assessor's investigation (*Mail & Guardian* 2013b). They further state that Section 49A(1) allows the Minister "unwarranted powers to suspend a university council or its vice-chancellor, even when that university has no evidence of being in distress" (*Mail & Guardian* 2013b). Their conclusion is that problems experienced with or identified in the Amendment Act are, in essence, the result of poor drafting of the provisions of the Amendment Act (RSA 2012a; *Mail & Guardian* 2013b).

Even though the Department of Higher Education and Training (DHET) has maintained that "the Bill gives no new powers to the Minister" (*Mail & Guardian* 2012:Online), it appears that most of the criticism relates to the perceived risks that the Amendment Act (RSA 2012a) entails for academic freedom and institutional autonomy of HEIs in SA. Therefore the possibility that the Amendment Act (RSA 2012a) may present a challenge to academic freedom and institutional autonomy of HEIs in SA needs to be investigated. The aim of this study is to determine whether the Amendment Act (RSA 2012a) has any real or potential implications for academic freedom and institutional autonomy of HEIs in SA and if so, what those implications may be (see 1.5).

In this chapter the research problem is defined (see 1.2) and the primary and secondary research questions that have been formulated to address the research problem are specified (see 1.3). The significance of the study (see 1.4), as well as the aims and objectives of the study (see 1.5) are also explored. The demarcation of the study can be found in 1.6, whereafter the clarification of the concepts that are applied in the study follows. The dissertation deviates from the traditional format, as explained in 1.9 where the chapter division is discussed, in that the discussion of the research paradigm and methodology has been incorporated in Chapter one (see 1.8).

1.2 STATEMENT OF THE RESEARCH PROBLEM

Academic freedom is central to the mission of a university and necessary for teaching and research (Altbach 2001:205) (see 1.6). Even though academic freedom and institutional autonomy cannot be equated, these principles are related to each other and the erosion of the one undermines the other (see 3.8). Given the importance of academic freedom and institutional autonomy for HEIs, the concern voiced by prominent jurists and academic scholars regarding the possible implications of the Amendment Act (RSA 2012a) for academic freedom and institutional autonomy of HEIs is understandable (see 1.1). The possibility that the Amendment Act (RSA 2012a) may impinge on academic freedom and institutional autonomy of HEIs needs to be investigated and is the subject of this study. Therefore, the research problem that will be considered by the researcher is whether the Amendment Act (RSA 2012a) has potential or real risks for academic freedom and institutional autonomy of HEIs in SA.

1.3 RESEARCH QUESTIONS

The primary research question for this study is:

- What are the real or potential implications of the Amendment Act (RSA 2012a) for academic freedom and institutional autonomy of HEIs in SA?

In order to answer the primary research question, the following secondary research questions have been formulated:

- What constitutes academic freedom and institutional autonomy?
- What were the Minister's powers to appoint assessors and administrators for HEIs prior to the Amendment Act (RSA 2012a)?
- What were the powers of assessors and administrators appointed for HEIs by the Minister prior to the Amendment Act (RSA 2012a)?
- What are the Minister's powers to appoint assessors and administrators for HEIs after the promulgation of the Amendment Act (RSA 2012a)?

- What are the powers of assessors and administrators appointed for HEIs by the Minister after the commencement of the Amendment Act (RSA 2012a)?
- What are the perceptions of senior officials and academic staff of HEIs in SA with regard to the implications of the Amendment Act (RSA 2012a) for academic freedom and institutional autonomy of HEIs in SA?

1.4 SIGNIFICANCE OF THE RESEARCH

Scholars have a range of views regarding the relationship between HEIs and the government and some of these scholarly contributions are explored in Chapter two (see 2.3). This study may contribute to discussions regarding the relationship between the government and HEIs, especially as there is no agreement as to what the nature of the relationship between government and HEIs in SA should be and what level of institutional autonomy should be afforded to HEIs. Similarly, this study may contribute to discussions about academic freedom and the relationship between academic freedom and institutional autonomy. This study may also increase awareness regarding the implications of the Amendment Act (RSA 2012a) and may further lead to a better understanding of what the provisions of the Amendment Act (RSA 2012a) entail, equipping HE managers, administrators and academics with knowledge to deal more meaningfully with the provisions of the Amendment Act (RSA 2012a), and with future HE legislative and policy changes.

1.5 AIMS AND OBJECTIVES OF THE RESEARCH

The aim of this study is to determine whether the Amendment Act (RSA 2012a) has any potential or real implications for academic freedom and institutional autonomy of HEIs in SA and should such implications exist, what those implications could be.

In order to fulfil this aim, the following objectives have been pursued:

- To determine by means of a literature study what constitutes academic freedom and institutional autonomy, taking into account the various models that could

typify the relationship between government and HEIs (see Chapter two and Chapter three).

- To determine by means of Bacchi's evaluative policy analysis approach "what's the problem represented to be?" (WPR) (Bacchi 2009:x-xi) whether there is a difference in the extent of the Minister's powers when appointing assessors and administrators for HEIs prior to and after the commencement of the Amendment Act (RSA 2012a), including the powers bestowed on such appointed administrators and assessors, prior to and since the promulgation of the Amendment Act (RSA 2012a). The essence of this is to determine whether the Amendment Act (RSA 2012a) extends the powers of the Minister to appoint assessors and administrators and whether the powers of assessors and administrators if appointed are extended (see Chapter four).
- To explore, by means of semi-structured interviews, the perceptions of senior officials and academic staff of HEIs with regard to the potential or real implications of the Amendment Act (RSA 2012a) for academic freedom and institutional autonomy of HEIs (see Chapter five).
- To interpret the literature and research results and present an analysis of the possible implications of the Amendment Act (RSA 2012a) for academic freedom and institutional autonomy of HEIs (see Chapter six).

1.6 DEMARCATION OF THE STUDY

The document that is the core focus of this study is the highly controversial Amendment Act (RSA 2012a) and the questions about the implications of the Amendment Act (RSA 2012a) for academic freedom and institutional autonomy of HEIs in SA.

The provisions of the Higher Education Act (RSA 1997) and the Amendment Act (RSA 2012a), as well as the principles of academic freedom and institutional autonomy (see Chapter three), both of which are closely linked to the relationship that exists between the government and HEIs (see Chapter two), demarcate this study.

The meaning of the principles of academic freedom and institutional autonomy has been debated for many years by a spectrum of scholars (see 3.2). Academic freedom is central to the mission of a university and for fair-minded teaching and scientific research (Altbach 2001:205) (see 3.2). This freedom is also enshrined in Section 16(1)(d) of the South African Bill of Rights that provides that everyone has the right to freedom of expression, which includes "academic freedom and freedom of scientific research" (RSA 1996:1249) (see 3.4.2). Despite academic freedom being enshrined in the Bill of Rights, what the term encompasses is not specified (Bentley, Habib & Morrow 2006:16) (see 3.4.2). As the term 'academic freedom' does not enjoy a universally accepted definition, uncertainty still reigns regarding what it entails (Altbach 2001:206-207) (see 3.2). It is, however, generally accepted that academic freedom refers to the freedom of the academic to teach without external government control in his/her area of expertise and encompasses the freedom of the student to learn. It is acknowledged that the freedom of individual academics can also be impinged upon or threatened by other forces, such as institutional, faculty or departmental management, but this form of infringement is not the focus of this study and is therefore not explored (see 6.2).

When considering academic freedom the principle of institutional autonomy of HEIs inevitably becomes an issue (see Chaper 3). These two concepts are intertwined and their relationship can best be described as one in which they are "webbed together through a variety of mechanisms and agreements that connect individuals, institutions, state and civil society" (Moja, Muller & Cloete 1996:134) (see 3.8). Even though academic freedom cannot be equated with institutional autonomy (Moja *et al.* 1996:134), these principles can also not be separated from each other (Waghid, Berkhout, Taylor & De Klerk 2005:1184) and the erosion of one undermines the other (see 3.8). Scholars worldwide regard the safeguarding of academic freedom and institutional autonomy as important prerequisites for a well-functioning HEI (Altbach 2001:217) and HE system (see 3.2).

Both academic freedom and institutional autonomy fundamentally speak to the relationship between HEIs and government. In fact, a new definition of academic freedom and institutional autonomy "more attuned with the changed relationship between state and university under democracy" should be considered (Lange

2013:62; HEIAAF Task Team 2008:31-46) (see 3.9). Consequently, exploring the relationship between HEIs and the government and defining this relationship in terms of a theoretical framework are also relevant to this study (see Chapter two). This study will therefore analyse the changes in the relationship between HEIs and the government, particularly on account of the Amendment Act (RSA 2012a) and based on that analysis draw conclusions with regard to the implications of the Amendment Act (RSA 2012a) for academic freedom and institutional autonomy of HEIs in SA (see Chapter six). Clearly, this study falls within the ambit of HE studies, and specifically HE policy studies, as it explores HE legislation, various HE policies, the principles of academic freedom and institutional autonomy, and the relationship between government and HEIs.

In demarcating the scope of this study, the eight key themes or key categories in which HE research is categorised by Tight (2004:402) are used as the point of departure. Tight developed this categorization of themes or issues in HE from an analysis of 406 articles in 17 specialist HE journals published in English outside North America during 2000 (Tight 2004:397-398). The key categories distinguished by Tight are:

- Teaching/learning,
- Course design,
- Student experience,
- Quality,
- System policy,
- Institutional management,
- Academic work; and
- Knowledge (Tight 2004:402).

The focus of this study is to determine the potential or actual implications of the Amendment Act (RSA 2012a) for academic freedom and institutional autonomy of HEIs in SA. The two categories identified by Tight (2004:402) that are therefore applicable to this study are:

- System policy which includes studies on mass-education, funding, national policy studies, globalisation and the return on investment in HE; and

- Institutional management covering matters such as institutional autonomy, leadership, departmental management and middle management, institutional organisational structures, mergers, marketisation and the relationship between HEIs and the community.

In fact, this study contains elements from both of these categories, namely national policy studies (as this study relates to HE legislation and policy) (see Chapter two and Chapter four) and institutional management (as the exploration of institutional autonomy is an integral element of this study) (see Chapter three). The location of this study according to Tight's (2004:402) categories and further refined by Bitzer and Wilkinson (2012:388) is illustrated in Figure 1.1.

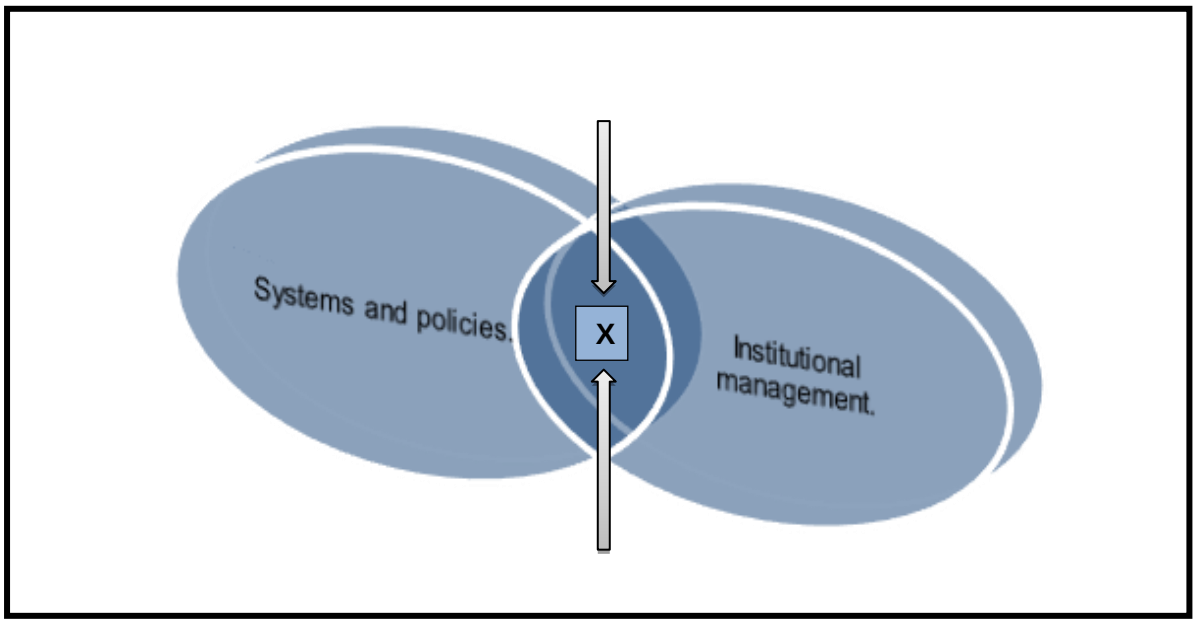

Figure 1.1 Demarcation of the study

Using this rationale it is safe to conclude that this dissertation falls within the ambit of HE studies and is located at the nexus between System and policies, and Institutional management.

1.7 CLARIFICATION OF CONCEPTS

Based on the above demarcation of the study (see 1.6), the following seminal concepts for this work are explicated:

1.7.1 Higher education

In terms of Section 1 of the Higher Education Act (RSA 1997:A-759)[4] higher education is defined as all learning programmes leading to a qualification that meets the requirements of the Higher Education Qualifications Framework (HEQF). Higher education is more comprehensively described in the Introduction to the Green Paper on Higher Education Transformation *(*RSA DoE 1996:1) as follows:

> Higher education is one of the most important activities organised in modern societies. It creates a demanding but rewarding environment in which individuals may realise their creative and intellectual potential. Through high-level training across the disciplines, it equips people with the necessary knowledge, skills and values to play a wide range of social roles and to become effective citizens. Through research and the production of knowledge, higher education provides a society with capacity to innovate, adapt and advance.

1.7.2 Higher education institution

In terms of Section 1 of the Higher Education Act (RSA 1997:A-759) a higher education institution is defined as any institution that provides higher education on a full-time, part-time or distance basis and which is:

- Merged, established or deemed to be established as a public higher education institution under the Higher Education Act (RSA 1997),

[4] In Section 1.7 and Chapter 4 of this dissertation, the Higher Education Act 101 of 1997 (RSA 1997) updated to 2011, is applied.

- Declared as a public higher education institution under the Higher Education Act (RSA 1997), or
- Registered or provisionally registered as a private higher education institution under the Higher Education Act (RSA 1997).

For purposes of this study this definition will be applied, with the exception that private HEIs are excluded from the study. In broad terms, 'HEIs' in this study refer to public institutions which include traditional universities, comprehensive universities and universities of technology.

1.7.3 Academic freedom

It is generally accepted that academic freedom refers to the freedom of the academic to teach without interference in his or her area of expertise and the freedom of the student to learn (Moodie 1996:129) (see 3.2).

1.7.4 Institutional autonomy

This refers to the level of independence that HEIs have in their interactions with external parties, such as students, sponsors, donors and government (Du Toit n.d.:7) (see 3.6).

1.7.5 Legislation

Legislation refers to the Acts or laws promulgated by the relevant legislative bodies of SA and include, in accordance with the provisions of Section 239 of the Constitution of SA (RSA 1996:1331(32)),[5] national and provincial legislation. In terms of Section 239 of the Constitution (RSA 1996:1331(32)) national legislation is legislation made in terms of an Act of Parliament, while provincial legislation is made by a provincial legislature in terms of a provincial Act. Legislation is therefore considered to be a set of legal rules that can be enforced through laws with sanctions resulting from non-compliance therewith or breaches thereof.

[5] In this dissertation, the Constitution of SA (RSA 1996) updated to 2012, is applied.

1.7.6 Policy

The term “policy” is defined in the Chambers Dictionary (2014:1199) as “a course of action, *esp[ecially]* one based on some declared or respected principle”. In the South African HE context a policy is therefore considered to be a document approved by the relevant authority that contains government’s stance in relation to the subject matter of the policy. A policy is therefore considered to be a set of guidelines for how an institution should or could behave and guides the institution to appropriate levels of practices. Consequently, a policy does not have the same legal binding as legislation.

1.8 RESEARCH PARADIGM AND METHODOLOGY

Kuhn (1970) first coins the 15th century term ‘paradigm’ to describe the way the world is seen and reality is understood by individuals. Guba (1990) explains that a paradigm or worldview is a basic set of beliefs that guide action. For the individual researcher there is often a close link between the way he or she sees the world (ontology) and knowledge (epistemology) and how to conduct research (methodology) (Terre Blanche & Durrheim 2006a:6). Research paradigms represent the philosophical dimensions of social sciences research (Wahyuni 2012:69) and these paradigms act as frameworks that provide a rationale for the research and commit the researcher to particular methods of data collection, observation and interpretation, i.e. they are central to the research design (Durrheim 2006:40).

A useful clarification of the positivist, interpretivist and constructionist paradigms and their characteristics, as well as the differences between their ontology, epistemology and methodology, is provided by Terre Blanche and Durrheim (2006a:6). This analysis is contained in Table 1.1.

Table 1.1 Positivist, Interpretivist and Constructionist paradigms

	Ontology	**Epistemology**	**Methodology**
Positivist	Stable external reality Law-like	Objective Detached observer	Experimental Quantitative Hypothesis testing
Interpretivist	Internal reality of subjective experience	Empathetic Observer subjectivity	Interactional Interpretation Qualitative
Constructionist	Socially constructed reality Discourse Power	Suspicious Political Observer constructing versions	Deconstruction Textual analysis Discourse analysis

Source: Terre Blanche and Durrheim (2006a:6)

This study was conducted in an interpretivist paradigm. Interpretivists believe that reality is constructed by social actors and people's perceptions of reality, and they recognise that individuals have different backgrounds, assumptions and experiences that contribute to their perception of reality (Wahyuni 2012:71). They realise and accept that human experiences are subjective and that there may therefore be multiple perspectives of reality (Wahyuni 2012:71). In research contexts, interpretivists favour interaction with the participants and enter into dialogue with them and prefer to work with qualitative rather than quantitative data, as qualitative data provides a rich description of the social constructs (Wahyuni 2012:71). Interpretivists often work from an insider perspective, which means that the study is done from the perspective of the people themselves (Wahyuni 2012:71).

The interpretivist paradigm is applied in this study to establish the implications of the Amendment Act (RSA 2012a) for academic freedom and institutional autonomy of HEIs in SA, because the researcher is interested in the participants' views and opinions regarding the implications of the Amendment Act (RSA 2012a) for academic

freedom and institutional autonomy of HEIs. It is acknowledged and accepted that the participants' views are subjective and formed by their own experiences.

The research methodology refers to the model used to conduct the research within the context of a particular paradigm and it comprises the set of beliefs that guides the researcher to choose one set of research methods over another (Wahyuni 2012:72). This study is a qualitative research study, conducted within the context of the interpretivist paradigm.

Qualitative research is concerned with the social aspects of our world, based on a holistic approach that is rooted in the belief that there is no single reality, that reality is based upon perceptions that are different for each person and that these perceptions may change over time (Joubish, Khurram, Ahmed, Fatima & Haider 2011:2082). This implies that knowledge only has meaning within a specific situation or context (Joubish *et al*. 2011:2082). Qualitative researchers thus want to understand the phenomena being studied as it occurs in the real world and thefore studies it in its natural setting (Kelly 2006:287). The qualities of qualitative research as identified by Joubish and others are (2011:2086):

- Use words rather than numbers;
- Flows from concreteness to abstractness;
- Compared to quantitative research, qualitative research is relatively new and therefore new techniques and strategies are emerging;
- Data collection occurs concurrently with data analysis; and
- Involves the researcher influencing the individuals being studied to varying degrees. In turn, the researcher is influenced by those being studied.

Qualitative research or analysis is defined by Babbie (2013:557) as "… (t)he nonnumerical examination and interpretation of observations, for the purpose of discovering underlying meanings and patterns of relationships … ". The reason why qualitative research was selected for this study is because qualitative research is the most appropriate to attend to a research problem in which the variables are not known and that needed to be explored, as in this case (see 1.2 where the research

problem is described) (Creswell 2014:30). Furthermore, in this study the researcher wants to establish the underlying meanings and patterns of the data gathered during the semi-structured interviews (see Chapter five).

In this study data was gathered, analysed and interpreted by means of the following research methods:

- a literature study of the nature of the relationship between government and HEIs (see Chapter two), as well as the principles of academic freedom and institutional autonomy (see Chapter three);
- policy analysis of the relevant provisions of the Amendment Act (RSA 2012a) by applying Bacchi's WPR approach (see Chapter four);
- conducting, qualitatively analysing and interpreting semi-structured interviews with the participants of the selected HEIs (see Chapter five) in order to determine the meanings and patterns of the data gathered during the semi-structured interviews; and
- integration of the results and data to derive the conclusions regarding the possible implications of the Amendment Act (RSA 2012a) for academic freedom and institutional autonomy of HEIs of SA (see Chapter six).

The research methods applied in this study are reflected in Figure 1.2 below.

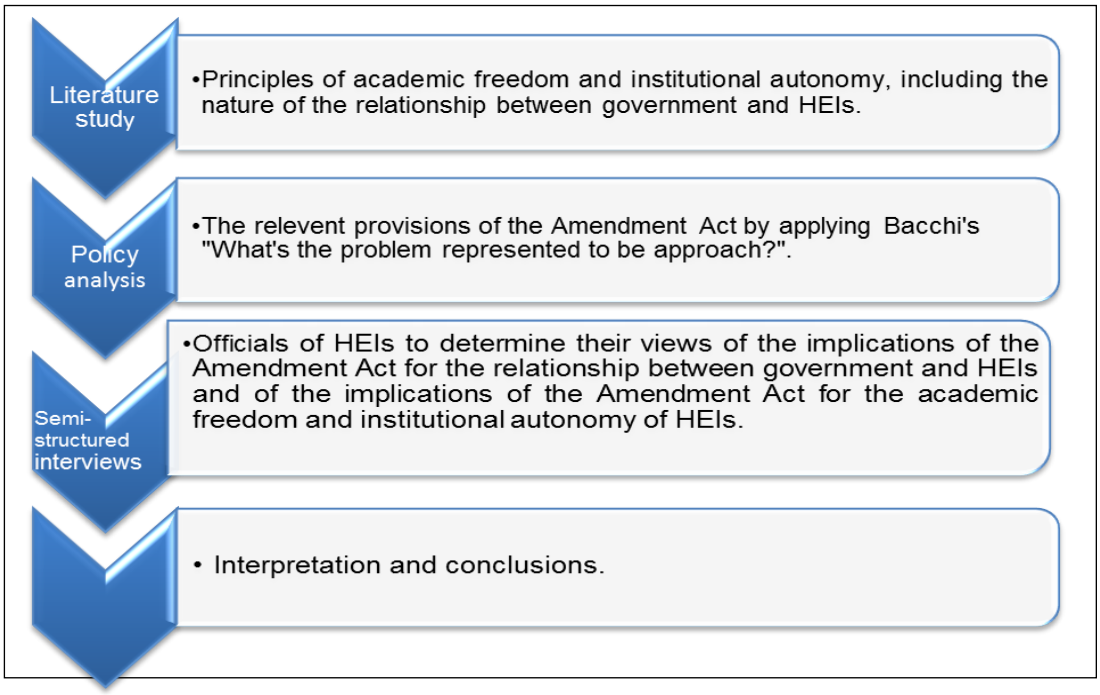

Figure 1.2: The research methods applied in this study.

1.8.1 Population and sample

Due to practical considerations, it was not possible to include all 26 HEIs in SA in the perception study, therefore a sample of three institutions was chosen. The possible criteria for sampling were carefully considered and the researcher decided not to revert to the traditional categories, namely historically white HEIs, historically black HEIs, historically English medium HEIs and historically Afrikaans medium HEIs. Given that, in the differentiation debate, considerable attention is devoted to differentiating between HEIs on the basis of their knowledge production, this approach was adopted as the criterion for selecting the participating HEIs. On this basis three HEIs (one high, one medium and one low knowledge production HEI) were selected to participate in the perception study. Yet, these also represented one historically black HEI, one historically white Afrikaans medium HEI and one historically white English medium HEI. They are also a mix of urban and rural institutions. This means that a broad spread of institutions reflecting the institutional diversity in the SAHE system was covered.

In the selection of the participating HEIs and respondents interviewed purposive sampling was applied, because the HEIs selected and respondents identified are typical of the population being studied and this sampling allows for small, but relevant samples (Terre Blanche, Durrheim & Painter 2006c:563). Three participants at each of the selected HEIs were interviewed. Three interviews per participating HEI were deemed sufficient, because the participants were diverse in terms of the positions they occupy at the respective institutions and they were information-rich participants, hence these interviews provided sufficient data regarding participants' views of the implications of the Amendment Act (RSA 2012a) for academic freedom and institutional autonomy of HEIs in SA (Creswell 2014:231). The participants of the participating HEIs that were selected were two senior officials, namely the Rector and the Registrar, and one senior academic staff member. The academic staff members were purposively selected because of their knowledge of the Amendment Act and their knowledge of the principles of academic freedom and institutional autonomy. In addition, the convenience sampling technique was applied based on these high profile selected participants' availability for semi-structured interviews.

1.8.2 Data collection

The following data collection techniques were applied in the study, namely:

1.8.2.1 Literature study

Seeing that this study focuses on the implications of the Amendment Act (RSA 2012a) for academic freedom and institutional autonomy of HEIs in SA, a literature study of the principles of academic freedom and institutional autonomy was performed (see Chapter three). These concepts *per se* were explored, as well as the relationship between academic freedom and institutional autonomy, and their relationship with accountability. Academic freedom and institutional autonomy of HEIs are inextricably linked to the relationship between government and HEIs, therefore the nature of the relationship between government and HEIs was also explored (see Chapter two). This includes a literature study of the models developed to describe the nature of the relationship between government and HEIs. The literature studies include numerous scholarly contributions, applicable legislation, relevant White and Green Papers, other relevant policy documents and newspaper articles, both in hard copy and *via* the internet. The use of numerous newspaper articles in the policy analysis performed with the application of Bacchi's WPR approach (see 1.8.2.2 and Chapter four) was done to provide elucidation and illustration in the absence of scientific publications regarding the Amendment Act (RSA 2012a).

1.8.2.2 Policy analysis

An analysis of the provisions of the Amendment Act (RSA 2012a), to determine whether they:

- extend the powers of the Minister to appoint administrators and assessors
- extend the powers of such appointed administrators and assessors (see Chapter four),

forms the next part of the study. To this end the Higher Education Act (RSA 1997) was read concurrently with the Amendment Act (RSA 2012a) in order to evaluate the consequences of the latter Act. The Amendment Act (RSA 2012a) is a compilation of changes to the Higher Education Act (RSA 1997) that was, after promulgation, integrated into the Higher Education Act (RSA 1997).

Bacchi's evaluative policy analysis approach of WPR (Bacchi 2009:2) was applied. The WPR approach was selected as the most appropriate one to address the secondary research questions (see 1.3) and the second objective (see 1.5), because this approach gives the researcher the opportunity to consider the Amendment Act (RSA 2012a) within the SAHE context in which it was promulgated (Bacchi 2009:ix). Furthermore, Bacchi's WPR approach proceeds from the assumption that a policy is aimed at improving or correcting a particular situation, which leads to the conclusion that there are implied problems that have to be addressed (Bacchi 2009:1). By applying this approach, the researcher can explore not only the policy change itself, but also what required the change or what implied problems existed that necessitated the enactment of the Amendment Act (RSA 2012a). The WPR approach, where the word 'problem' is used to explore what changes are "implied in a particular policy proposal" (Bacchi 2009:x-xi), enables the researcher to compare the Higher Education Act (RSA 1997) and the Amendment Act (RSA 2012a) so as to determine what the Minister's powers to appoint administrators and assessors were prior to and after the Amendment Act (RSA 2012a). The powers of such administrators and assessors prior to and after the commencement of the Amendment Act (RSA 2012a) are also established in this manner.

Bacchi's approach (Bacchi 2009:2) was also selected as the most appropriate one, because it provides both the theoretical framework (WPR), as well as the practical methodology to analyse policy (in this case the Higher Education Act (RSA 1997) and the Amendment Act (RSA 2012a) by posing the following six questions, namely:

- What is the problem represented to be?
- What are the presuppositions or assumptions that underpin the change?
- How has this representation of the problem come about?

- What is left unproblematic in this problem representation?
- What effects are produced by this representation of the problem?
- How has this representation of the problem been produced, disseminated and defended?

The main features of Bacchi's approach (Bacchi 2012:7) that demonstrate the appropriateness for this study are that it allows "researchers the possibility of getting inside thinking - including one's own thinking - observing how 'things' come to be. It gives access to the spaces within which 'objects' emerge as 'real' and 'true', making it possible to study the strategic relations, the politics, involved in their appearance". In the context of this study, this approach allows not only an analysis of the Amendment Act (RSA 2012a), but an opportunity to consider its background and its context.

1.8.2.3 Semi-structured interviews

Semi-structured interviews lasting between 30 and 90 minutes were conducted with each information-rich participant (two senior officials, namely the Rector and the Registrar and one senior academic staff member) of the three selected HEIs to establish whether in their perceptions the Amendment Act (RSA 2012a) has any implications for academic freedom or the institutional autonomy of HEIs in SA. One of the main reasons for deciding to conduct semi-structured interviews is that, when used carefully, they can provide rich data for qualitative analysis (Pathak & Intratat 2012:9). The main purpose of a semi-structured interview is to facilitate the interviewees' sharing of their experiences, stories and perceptions regarding the phenomenona being investigated by the interviewer – in this case the implications or possible implications of the Amendment Act (RSA 2012a) for academic freedom and institutional autonomy of HEIs in SA (Wahyuni 2012:73). During the interviews there were no undue interruptions, the interviewees were able to express themselves authentically (Kelly 2006:297) and tell the researcher "how it is" (Dearnley 2005:26). The researcher listened, followed up on what the participant said, asked questions to clarify uncertainties, avoided leading questions, did not interrupt the participants and tolerated silences that allowed the participant to be thoughtful (Kelly 2006:299).

A semi-structured interview protocol containing the questions to be asked and topics to be covered during the interviews was utilized (see Annexure C), although additional questions were asked, when necessary, particularly to probe some of the responses of participants. This allowed for some flexibility (Dearnley 2005:22).

Interviews were recorded by means of audio-tape recording, for which the participants gave their consent (see Annexure A), whereafter the data were transcribed *verbatim* (Kelly 2006:298-299) by a professional transcriber who is bound by a suitable Confidentiality Undertaking (see Annexure B). The researcher also made process notes during the interviews, as this enabled the writing down of the questions, answers, impressions and thoughts that occurred during the interview, as well as things that happened during the interview that would not be obvious from the recordings (Kelly 2006:299-300).

1.8.3 Data analysis and reporting

The *verbatim* transcriptions of the recordings of the semi-structured interviews were then interrogated by applying content analysis, which is the study of recorded human communications (Babbie 2013:295). Content analysis is essentially a coding operation (Babbie 2013:300) aimed at breaking down the data into labelled, meaningful pieces (Terre Blanche, Durrheim & Kelly 2006b:325-326). Inductive reasoning was applied, because it allows for moving from the particular to the general to discover any pattern in the data (Babbie 2013:21-22). In fact, general observations are made from specific observations (Babbie 2013:21-22). The categories and possible sub-categories (families) and themes (super-families) were subsequently compiled. The coding or labelling, elaborating and recoding were repeated until saturation was reached (Terre Blanche *et al*. 2006b:326).

1.8.4 Ethical considerations

The word ‘ethics’ is derived from the Greek word ‘*ethos*’, which can be translated as one’s deepest motivation (Lategan 2011:255). Research ethics are the principles, norms and values associated with the conducting of research (Lategan 2011:255).

This differs from research integrity, which is the trustworthiness of the research due to the soundness of the way it is conducted and the honesty and accuracy of its presentation (Lategan 2011:255). The essential purpose of research ethics is to protect the welfare of the research participants, but research ethics involves much more and also includes matters such as plagiarism and scientific misconduct (Wassenaar 2006:61).

Ethical considerations in this study extend to the treatment of the respondents of the participating HEIs, the literature study and policy analysis and the data analysis.

The participants of the selected HEIs were invited to participate in this study by means of a letter of invitation (see Annexure A). In this process, the following ethical practices were followed:

- The participants' free and informed consent to participate in this study was obtained by means of this letter, because mere verbal consent is not sufficient. The consent obtained from the participants met all the requirements, namely, the provision of appropriate information, participants' competence and understanding, voluntary participation and freedom to decline or withdraw after the study commences and formalisation of the consent (in writing) (see Annexure A) (Wassenaar 2006:72);
- Participants were guaranteed anonymity and assured that all data would be kept in a safe and secure location, in the care of the researcher (see Annexure A). In order to ensure that the participants remain anonymous, each participant was assigned a specific symbol that was applied in the data analysis and reporting (see Chapter five);
- Participants granted their written permission for the transcription of the recordings of the semi-structured interviews by a professional transcriber (see Annexure A); and
- The professional transcriber of the recordings of the semi-structured interviews is bound by a Confidentiality Undertaking (see Annexure B) to ensure that the anonymity guaranteed by the researcher to the participants is maintained. It

should be noted that the outsourcing of the transcribing task to a professional transcriber is not unique; in fact, it is a regular occurrence (Wahyuni 2012:75).

In the literature study and policy analysis care was taken by the researcher to indicate all sources and to ensure that all sources were quoted accurately (see Chapter two, three and four).

In the process of the data analysis and interpretation the researcher reflected on how her own involvement in each interaction has influenced the way in which the data has been collected and analysed, if at all (Terre Blanche *et al.* 2006b:326). Special care was therefore taken by the researcher to avoid bias and to ensure that the findings were objectively and accurately reported, including negative or contradictory views (see Chapter five). Finally, it can be concluded that, during this study, the researcher complied with the Ethical Clearance Guidelines for Researchers of the University of the Free State (UFS) (ethical clearance number: UFS-EDU -2013-044) (see Annexure D), that cognisance was taken of all the ethical issues involved and that the researcher exercised sound ethical practices.

1.8.5 Role of the researcher in the investigation

The researcher's role in the research is one of an observer, because the researcher did not actively participate by engaging in debate on any of the points made by individual interviewees. Being aware that her own experiences and values as a manager employed at an HEI (and actively involved with governance issues) might influence the collection and the analysis of the data, the researcher applied rigorous scientific data collection and analysis methods. Furthermore, because the researcher has a legal background, a conserted effort was made during the policy analysis and the study as a whole, not to revert to the traditional legal interpretation methods, but to apply the research methods selected for the study (see 1.8).

1.8.6 Trustworthiness of the research

The traditional measures of reliability and validity are not consonant with the qualitative research landscape, which was adopted for this study. Rather more

appropriate measures of credibility, transferability, dependability and confirmability are apposite. How these were dealt with in this study are discussed below:

- Credibility: This deals with the accuracy of data to reflect the observed social phenomena (Wahyuni 2012:77-78). This is to determine whether the study actually measures or tests what is intended (Wahyuni 2012:77-78). In this sense it parallels internal validity. It is evident (see Chapter six) that this study achieved what it intended to measure, namely the implications of the Amendment Act (RSA 2012a) for academic freedom and institutional autonomy of HEIs in SA (see Chapter six).
- Transferability: This refers to the level of applicability into other settings or situations (Wahyuni 2012:77-78). Transferability resembles external validity. Transferability was enhanced by providing sufficient information regarding the legislation under investigation, i.e the Amendment Act (RSA 2012a) and its implications for academic freedom and institutional autonomy of SA HEIs (see 1.1 and Chapter four). The limitations of the study were specified (see 6.2) and detailed information was supplied regarding the data collection processes (see 8.1).
- Dependability: This corresponds to the notion of reliability which promotes replicability or repeatability (Wahyuni 2012:77-78). Dependability can be achieved by detailed explanation of the research design and process to enable researchers to follow a similar research framework (Wahyuni 2012:77-78). In this study an in-depth explanation of the research paradigm and methodology, as well as the research methods applied are provided (see 1.8), thus satisfying the requirement for dependability.
- Confirmability: This refers to the extent to which others can confirm the findings in order to ensure that the results reflect the understandings and experiences off the participants, rather than the researcher's own preferences (Wahyuni 2012:77-78). The manner in which the research was performed created an audit trail which enables an examination of both the research process and research outputs by tracing the steps that have been taken by the researcher during the course of the research (Wahyuni 2012:77-78). For example, scholarly contributions in the literature study and policy analysis were

recognized, invitations to the participants of the participating HEIs were sent *via* e-mail, the informed consent of the participants to participate in the semi-structured interviews were obtained in writing, the semi-structured interviews were recorded, these interviews were transcribed by a third party, all of which contribute to the creation of an audit trail of the research process and outputs. Throughout the study the researcher was aware that her own preferences could cloud the participants' views and she was therefore continuously guarding against this.

1.9 DIVISION OF CHAPTERS

This study is divided into the following six chapters:

Chapter one: Orientation to the study. This chapter provides the introduction or orientation to the study and places the study within the appropriate HE context. The demarcation of the study, aims and objectives of the study, research questions, research paradigm and methodology, and the significance of the research are also dealt with in this chapter.

Chapter two: Relationship between HEIs and the government. This chapter comprises a discussion of the relationship between HE and the government and the models applied to typify such relationship.

Chapter three: Academic freedom and institutional autonomy. This chapter comprises a study of literature regarding what constitutes academic freedom and institutional autonomy of HEIs, as well as the relationship between the principles of academic freedom, institutional autonomy and accountability.

Chapter four: Policy analysis of the Amendment Act (RSA 2012a). This chapter comprises the application of Bacchi's evaluative policy analysis WPR approach (Bacchi 2009:x-xi) to the Amendment Act (RSA 2012a). The purpose is to determine what the powers of the Minister were before and after commencement of the Amendment Act (RSA 2012a), in so far as it relates to the power to appoint administrators and assessors. The analysis also considers the assessors' and

administrators' powers before and after the commencement of the Amendment Act (RSA 2012a).

Chapter five: Research results and interpretation. This chapter discusses, reflects and reports on the perception study of senior managers and academic staff members at the selected HEIs to determine whether, in their view, the Amendment Act (RSA 2012a) has any implications for academic freedom and institutional autonomy of HEIs in SA and if so, what those implications might be.

Chapter six: Conclusions, limitations of the study and recommendations for future research. This chapter covers the integration of the literature review and the research results and contains the analysis of the implications of the Amendment Act (RSA 2012a) for academic freedom and institutional autonomy of HEIs of SA.

It is evident from the division of chapters, described above, that there is a deviation from the traditional format for the structure of dissertations, as the section dealing with research methodology has been incorporated fully into this first chapter. This was done after serious consideration of the dissertation's structure in order to improve the readability of the dissertation and to ensure a logical and uninterrupted flow in the reasoned argument.

1.10 SUMMATIVE COMMENTS

In this chapter the background to the research problem and the research problem statement, namely whether the Amendment Act (RSA 2012a) has potential or real risks for academic freedom and institutional autonomy of HEIs in SA are introduced (see 1.1 and 1.2). The primary and secondary research questions are formulated (see 1.3) in response to the research problem statement (see 1.2). The aim of the study is also discussed, namely to determine the potential or real implications of the Amendment Act for academic freedom and institutional autonomy of HEIs (see 1.5). The research paradigm and methodology are also explored (see 1.8). In addition reasons for adopting an interpretivist paradigm are presented, as well as why qualitative data has been gathered, analysed and interpreted (see 1.8). Clarity is also provided regarding the research methods applied.

In demarcating the study it was concluded that the study falls within the realm of HE studies and is located at the nexus of studies of System and Policies and studies of Institutional Management (Tight 2004:402). Having clarified the concepts applied in this study, namely HE, HEI, academic freedom, institutional autonomy, legislation and policy (see 1.7), the significance of the study is discussed (see 1.4) and the outline of the six chapters of the study provided (see 1.9). The reasons for deviating from the traditional layout of dissertations in order to improve the readability of the dissertation and to ensure a logical and uninterrupted flow in the unfolding rationale, are enumerated (see 1.9). In essence, Chapter one thus provides the backdrop and an explanation of the structure of the study and the chapters that follow, starting next with the literature study of the relationship between government and HEIs contained in Chapter two.

CHAPTER 2

THE RELATIONSHIP BETWEEN GOVERNMENT AND HIGHER EDUCATION INSTITUTIONS

2.1 INTRODUCTION

The relationship between government and HEIs is influenced by country-specific historical, cultural and socio-economic factors (Wielemans & Vanderhoeven 1991:1). This is especially relevant in a country such as SA, where the political, social and economic changes since the first democratic elections in 1994 have been far-reaching, articulating into all spheres of South African life, including the HE system. HE in SA, like many other domains, has changed and will continue to change in the ongoing transition from apartheid to a dispensation that more accurately reflects the democratic order (Thaver 2003:144). To comprehend the nature of the relationship between government and HEIs fully since SA became a democracy, it is important to also understand the complex relationship between government and HEIs before 1994. This entails an understanding of the radical effect that apartheid had had on HEIs and how this had shaped the HE system that existed and was inherited when the ANC came to power.

In this chapter the relationship between government and HEIs before and after 1994 is explored (see 2.6.1 and 2.6.2.11), applying the models developed by scholars to describe this relationship (see 2.3). Furthermore, the HE system under apartheid and the consequences of apartheid for the relationship between government and HEIs are also explored (see 2.6.1).

2.2 THE USE OF THE TERM 'GOVERNMENT'

In higher education literature, scholars use both the terms 'state' and 'government' in their writings. Sayed (2000:477), for example, in some instances refers to "government/state", while Hall and Symes (2005:204) refer to the concept of "state steering".

The deduction from the apparently indiscriminate use of these terms is that scholars are of the opinion that these terms ('state' and 'government') in essence comprise the same body or authority and that 'state' is a synonym for 'government'.

The question that arises is whether 'government' and 'state' do in fact constitute or represent the same body or authority. In SA, this question can be answered by considering the provisions of the Constitution of SA (RSA 1996), as the supreme law of SA, as well as some scholarly writing regarding this topic. The Constitution of South Africa (Section 1) defines the Republic of SA as a sovereign, democratic state that will be governed by a multi-party system of democratic government (RSA 1996:1243,1243(1)). In terms of the provisions of Section 40 of the Constitution, 'government' is described as "national, provincial and local spheres of government which are distinctive, interdependent and interrelated" (RSA 1996:1267).

Clearly, the Constitution (RSA 1996) distinguishes between government and state. This distinction becomes even more apparent when considering the criteria for statehood described by Dugard (2011:82-84) on the basis of Article 1 of the Montevideo Convention on Rights and Duties of States (1933:Online) that was signed by 19 countries. This Convention (1933:Online) formalized the criteria for recognition as a state in terms of international law, namely having a permanent population (according to Dugard (2011:83) no minimum population size is required), a defined territory (again, according to Dugard (2011:83) undisputed and clearly defined borders are not required), a government that is in effective control of the territory and that is independent from any other authority (Dugard 2011:83) and lastly, the capacity to enter into relations with other states.

Some of the important differences between the state and the government, identified by Joshi (2010:Online) are that:

- The state comprises four elements namely population, territory, government and sovereignty, with government being only one element of the state. In fact, Joshi (2010:Online) argues that the government is an agent of the state.

- The state is more or less permanent, while the government is temporary and may change depending on the outcome of the elections that take place in the country. The outcome of the elections does, however, not affect the position of the state as it continues to exist.
- The state comprises all citizens, while only a few citizens are members of the government.
- The state is sovereign and its power is absolute and unlimited, while the government has no sovereignty and its powers are generally delegated to it by the state through the constitution.
- The state is an abstract concept and cannot be seen, while the government is concrete and composed of people who can be seen and are known to be acting for the state.
- All states are identical in character and nature, notwithstanding their size, whilst governments may differ and vary.
- Citizens have the right to act against government, but not against the state as the state comprises all citizens.

If, on account of the above distinctions, it is accepted that the terms 'state' and 'government' have different meanings, and that each has its own rights and responsibilities, the question remains what the appropriate term in this study would be. Seeing that the state does not determine HE policy or legislation in SA, but the government does exactly that in terms of Section 43 of the Constitution of SA (RSA 1996:1271), the term 'government' will be used in this study when referring to policy-making powers and entities (except where a scholar who is quoted pertinently uses the term 'state'). However, in the discussion of the theoretical models (see 2.3 below), the term 'state' is mainly used by the proponents of specific theories, and is used accordingly by the researcher.

2.3 THEORETICAL MODELS EXPLAINING THE RELATIONSHIP BETWEEN GOVERNMENT AND HIGHER EDUCATION INSTITUTIONS

Various models have been developed by scholars to describe the nature of the relationship between government and HEIs, notably by Neave and Van Vught (1994)

and Gornitzka (1999). In addition, Olsen (1988) developed models that describe the relationship between agencies in society and the government. Both models that specifically describe the relationship between government and HEIs, and models that describe the relationship between agencies in society and the government are consequently explored. The reason for considering the models developed to describe the relationship between agencies in society and government is that they can also be applied to the relationship between government and HEIs, because HEIs function as agencies in society.

A clear differentiation between the political and administrative dimensions of the decision making processes of any model that describes the relationship between government and HEIs is required, because even though the political and administrative dimensions may from time to time coincide, these are distinct and separate concepts (Moja *et al.* 1996:145). A basic exposition, in tabular format, of the key differences formulated by Moja and others (1996:145) can be found in Table 2.1. This exposition helps in identifying a third control model (Moja *et al.* 1996:146).

Table 2.1: An exposition of the difference between the political and administrative dimensions of decision making

	Political	**Administrative**
Aim	Democracy through representation and cooperation	Interdependence through partnerships
Process	Legislative	Executive
Social technology	Governance	Regulation
Representative actors	Stakeholders	Professional administrators (and expert consultants)
Accountability	To constituencies	To the policy aim and the disciplines of enquiry

Source: Moja *et al.* 1996:145

2.3.1 State control model

The HE systems of Europe traditionally fit within the ambit of the state control model (Neave & Van Vught 1994:9), thus this model is also referred to by Clark (1983:125-126) as the continental (European) model. In this model, HE systems are created and almost fully funded by the state (Neave & Van Vught 1994:9). The state controls and regulates most aspects of the HE system, for example admission requirements, the curriculum or the manner in which examinations are conducted (Neave & Van Vught 1994:9). Another feature of this model is that the power of the state is combined with the authority of the senior professors, who yield substantial power at the lower level of the system (Neave & Van Vught 1994:9), thus this model can be described as a combination of the authority of the state bureaucracy and faculty guilds (Neave & Van Vught 1994:9). This explains why the interests of mainly two groups are expressed in the system, namely state officials and senior professors, with a weak institutional administration (Neave & Van Vught 1994:9-10). In this model bureaucratic coordination is a widely-observed phenomenon that is usually the responsibility of administrative agencies such as state departments, i.e national departments of education or those responsible for education, whose functionaries increase the number and the content of bureaucratic rules in an attempt to obtain consistency (Clark 1979:255).

Gornitzka's (1999:23) sovereign, rationality state-bounded model closely resembles Neave and Van Vught's state control model. In the sovereign, rationality state-bounded model the state is the architect of society with HEIs considered as instruments for reaching certain economic or social goals (Gornitzka 1999:23). This model is characterized by strict controls over HEIs with the emphasis on HEIs being accountable to the political authorities (Gornitzka 1999:23). Other features include, amongst others, evaluation of HEIs' performance based on their political 'effectiveness', decision-making from the top down, with a strict hierarchial system and steering by hierarchy (Gornitzka 1999:23; Olsen 1988:238). In this model HEIs have little or no autonomy (Gornitzka 1999:25), as the government controls most, if not all aspects, of the HE system

Moja and others (1996:144-148) have considered the state control model from a South African perspective and acknowledge that this model distinguishes between two groups with power, namely state officials and senior professors, with junior faculty members and students having little input in the affairs or decision making of the HEI (Moja *et al.* 1996:144-148). Control is not necessarily the objective of the state control model, but rather a standardised system where national qualifications are not awarded by the individual HEIs, but by the state (Moja *et al.* 1996:144-148). This model is based upon the rational planning approach and "presumes total and complete knowledge of the object of regulation" with government controlling both the processes and products of HE (Sayed 2000:744). This system of absolute control is then justified on the basis that it is, amongst others, in the interest of the economy and national development (Moja *et al.* 1996:144-148).

Even though the state control model has been described as having a negative impact on the academic freedom and institutional autonomy of HEIs, this model has, in some countries, brought about a more equitable system or dispensation (Moja & Cloete 1996:10). One of the major points of critique in relation to the state control model is that it fails to distinguish between a legitimate state and a state struggling to maintain its legitimacy (Sayed 2000:477). The interests of a legitimate state will reflect the will of the electorate with interventions therefore being considered as legitimate (Sayed 2000:477). In a state struggling with legitimacy, the state controls all in order to protect, promote and enforce its ideology (such as apartheid previously in SA) even against the popular will (Sayed 2000:477). In the case of SA, the distinction between the state and its bureaucracy was also absent during the apartheid period (Sayed 2000:477). Furthermore, in this model, the state's control in its relationship with HE is over-emphasized, while in the state supervision model the state's control in its relationship with HE is under-emphasized (Sayed 2000:478).

2.3.2 State supervision model

The state supervision model emanated from the US and traditional British HE systems (Neave & Van Vught 1994:10). One of the main features of these systems is that there is far less governmental influence than in the state control model (Neave & Van Vught 1994:11), because the state has taken on a supervisory role

responsible for ensuring academic quality and maintaining a certain level of accountability (Neave & Van Vught 1994:9-10). The state does not implement the HE system by enforcing detailed regulations or other strict controls (Neave & Van Vught 1994:9-10). In essence, the state acts as a supervisor, steering the HE system from a distance with the application of broad regulatory frameworks (Neave & Van Vught 1994:11). This reflects the strategy of self-regulation (Neave & Van Vught 1994:11).

In Gornitzka's typology the institutional state model is very similar to the Neave and Van Vught state supervision model. According to Gornitzka (1999:25) in the institutional state model HEIs have the responsibility for: protecting their academic values and traditions against political influence; upholding and defending academic freedom, storing and disseminating knowledge and ensuring the future transfer of knowledge. Decision making is specialised and traditionalist, with HEIs operating autonomously on the basis of shared principles of non-interference between the HEIs and the state (Gornitzka 1999:25). In this model changes to HEIs will rather take place through historical developments than as a result of changes that are implemented by the state (Gornitzka 1999:25).

The premise of HEIs operating autonomously and without interference from the state in the institutional state model, is similar to the state supervision model where the state steers the HE system remotely. One distinct difference is that in the institutional state model the changes to the HE system take place as a result of historical developments, while in the state supervision model such changes are linked to the steering by the state through its regulatory framework.

The state supervision model has been considered from a South African perspective by scholars such as Moja and Cloete (1996) and Sayed (2000). Moja and Cloete (1996:10) refer to the state supervision model as the state regulation model, with government being responsible for determining the policy framework for HE, for evaluating the system and for ensuring that there is uniformity across the system (Sayed 2000:477). Government's role is one of monitoring and establishing the regulatory framework that provides guidelines for the actions of HEIs (Moja *et al.* 1996:147). In essence, government has a supervisory role aimed at improving the

HE system; this is why this model is considered as playing out in a continuous process of reshaping of the HE system (Moja & Cloete 1996:10). Other features of the state supervision model include, amongst other, a professional bureaucracy and a clear set of policy tools (Moja & Cloete 1996:10).

This model has also been subject to criticism, because the boundaries or conditions that will guide the state's regulation are not clearly specified (Sayed 2000:478). Furthermore, the mechanisms used for steering in this model may be just as restrictive as in the state control model (Sayed 2000:478). However, the state supervision model does acknowledge the need for institutional autonomy, it can easily adapt to changes in the external environment and it provides adequate planning frameworks for HE administrators and the relevant government departments (Sayed 2000:479). Another feature of this model is that the nature of the relationship between government and HEIs can be reconstituted in different ways (Sayed 2000:478). As an example of this, Sayed discusses the process of "quangofication" in the United Kingdom (UK) where the Teacher Training Agency (a semi-governmental agency) was made responsible for supervising the provision of HE (Sayed 2000:478). In such a system the government retains strategic control of the HE system, but contracts certain services to a third party (Sayed 2000:478). In the South African context the establishment of the South African Qualifications Authority (SAQA) is comparable (Sayed 2000:478).

2.3.3 State interference model

It is argued by Moja and others (1996) that the typology of models that have been developed by Neave and Van Vught (1994) - and the related one of Gornitzka (1999) - to describe the relationship that exists between government and HEIs, namely the state control and the state supervision models should be amplified to include a third hybrid model, namely that of state interference (Moja *et al.* 1996:144-148).

By applying the distinction between the political and administrative elements of the decision making process (Moja *et al.* 1996:148) (see 2.3), a hybrid model or model variant, namely state intervention based on arbitrary crisis interventions by the government is proposed by Moja and others (1996:148). This model is also referred

to as the state interference model (Moja & Cloete 1996:10). Such instances of interference will occur sporadically, as can be gleaned from the use of the word 'intervention', which signifies that it is not a model of systematic control (Moja *et al.* 1996:144-148). Yet, it is possible that numerous interventions may actually constitute an attempt by government to exert control over HEIs by implementing restrictive measures (Moja *et al.* 1996:148). This model has the following characteristics (Moja *et al.* 1996:148-149):

- An inactive Chancellor who often also is the president of the country. For instance, when discussing his views on the radical attempts in Tanzania to transform the HE system from a liberal, elitist model to a proletarian system, Omari provides interesting examples of state intervention, for example that the ruling party had appointed one of its own members as the Vice-Chancellor of the national university at the inauguration of the university in 1970 (Omari 1991:181-186);
- A weak Ministry of Education which does not have the mandate to guide and promote HE;
- A weak and poorly trained bureaucracy;
- Councils of HEIs that are largely dormant and only heard from during a crisis;
- Large Senates that only concentrate on academic matters; and
- Vice-Chancellors who have to be both Chief Executive Officers and politicians, without the necessary preparation or training.

In many countries state interference unfolds according to a certain pattern, namely student protests, police intervention, appointment of a commission of enquiry, the resignation or dismissal of the principal, the appointment of a new principal and security police surveillance (Moja & Cloete 1996:10). The main difference between state intervention and the other models is that in the state intervention model the political and bureaucratic controls exerted do not form part of the national policy objectives (Moja *et al.* 1996:144-148).

The state intervention model is not recognized by all as a model to describe the relationship between the government and HEIs, because, as argued by Sayed

(2000:479) it represents a description of the state's actions in a specific situation or under specific circumstances, rather than a model for describing the relationship.

2.3.4 Conditional autonomy model

Further to the models of state supervision, state steering and state intervention, the model of conditional autonomy is proposed by Hall and Symes (2005:205-2011). This model entails that the limits of state steering and the respective roles of government and HEIs are negotiated in the interests of society (Hall & Symes 2005:205-2011). The motivation for this model is that the model of co-operative governance has failed "in the heat of political realities" (Hall & Symes 2005:205).

Co-operative governance was developed as a variant of the state supervision model (NCHE 1996:16; Hall & Symes 2005:204 citing Cloete), in which autonomous civil society constituencies work co-operatively with an assertive government (NCHE 1996:16). In fact, co-operative governance envisaged a system where HEIs are autonomous, but work together with government and stakeholders, to achieve certain common objectives (Grobbelaar 2004:8-40). Cloete (2007:55) views the concept of co-operative governance as reflected in the White Paper (RSA DoE 1997b) as an attempt to negotiate an amicable solution between the two opposing concepts of intervention and institutional autonomy, coupled with accountability. It is argued by Cloete (2007:55) that a co-operative relationship between government and HEIs in a system of co-operative governance, would, in fact, strike the proper balance between the right to self-regulation of HEIs and the right of government to decision making in relation to the HE sector.

The question that arises is what the appropriate balance between the institutional autonomy of HEIs and the steering role of the government should be. Berdahl's principles could provide guidance for negotiating a proper balance between the respective roles and responsibilities of government and HEIs (Hall & Symes 2005:205). Berdahl (1990:171-172) submits that one should, as the point of the departure for any discussion or negotiation about the appropriate balance between the roles and responsibilities of government and HEIs, understand what the different components of autonomy are. He distinguishes between substantive autonomy,

which is described as “the power of the university or college in its corporate form to determine its own goals and programmes … the what of academe” (Berdahl 1990:171-172) and procedural autonomy which is defined as “the power of the university or college in its corporate form to determine the means by which its goals and programmes will be pursued … the how of academe” (Berdahl 1990:171-172).

Whilst acknowledging that these concepts of procedural and substantive autonomy are distinctly separate, Hall and Symes propose a particular combination of these two concepts in the conditional autonomy model, namely that HEIs retain their substantive autonomy (and consequently their right to academic freedom), but that their procedural autonomy is limited by the state’s control (Hall 2006:12; Hall & Symes 2005:208). The advantage of conditional autonomy is that it provides a basis for asserting the right of individual HEIs to pursue research objectives on their own terms; interpret their social responsibilities; determine the content of the curriculum; and teach in the manner that they believe to be the best (Hall & Symes 2005:209). This means that academic freedom will be protected in this model, although the government will retain its responsibility for disbursement of funds to HEIs and for the authentication of academic qualifications (Hall & Symes 2005:209). The concept of conditional autonomy recognises the rights and obligations of government, while offering a practical basis for defending the substantive autonomy of individual HEIs (Hall & Symes 2005:210).

Scholars such as Divala (2006) and Waghid (2006) have considered whether the model of conditional autonomy presented by Hall and Symes (2005:205-2011) presents a viable option for recasting the relationship between the government and HEIs. Waghid (2006:19) declares that the model of conditional autonomy is refreshing, because it recognises the procedural role of government to ensure that public funds allocated to HEIs are utilised by HEIs for the purposes for which they were allocated, whilst acknowledging the substantive right of HEIs to academic freedom in teaching and research. It is also acknowledged that a model such as conditional autonomy has the potential of limiting state control or interference in the academic activities of an HEI (Waghid 2006:19). In fact, Waghid considers conditional autonomy as a legitimate model for the relationship between government and HEIs, although questions can be raised regarding whether substantive

autonomy could be unconditional and what the limits of the procedural autonomy of the state should be (Waghid 2006:19).

Divala (2006:22) considers Hall's conditional autonomy model as a rejection of the classic definition of autonomy and academic freedom. He argues that this model presupposes a contextual understanding of autonomy, namely that the government has a legitimate interest in the affairs of an HEI for protection of the public good and that HEIs have to account in return for receiving public funding (Divala 2006:22). Divala believes that the assumption, that such control by the government will not affect the research, teaching or social responsibilities of HEIs, is erroneous, not only in terms of its conceptualization, but also in terms of the history of these matters, with specific reference to the funding framework and the qualifications framework of SA (Divala 2006:22-23). Divala (2006:23) further argues that the assumed substantive autonomy of HEIs is problematic, because if HEIs are supported with money from public funds, the public will always have a vested interest in the operations and outcomes of the HEIs. Consequently, the public and its interest in HEIs will be at the core of the HEIs' business, whether this is explicitly stated or not (Divala 2006:22). In such an event, HEIs function within the framework of the public's expectations, and the model's conceptualization of HEIs' substantive autonomy becomes unfeasible (Divala 2006:22).

Notwithstanding the fact that conditional autonomy is a potentially viable conceptualization of institutional autonomy, another concern that has been voiced is that the distinction drawn between procedural and substantive autonomy may be of a more theoretical than practical nature, and that to give effect to the concept of conditional autonomy, dialogue between HE role players would be required (HEQC 2007:5).

2.3.5 Corporate-pluralist state model

Olsen's typology (1988:238) distinguishes four models to describe the relationship between government and the agencies in society (also applicable to HEIs as agencies in society). These are the sovereign, rationality state-bounded model (similar to the state control model, see 2.3.1), the institutional state model (similar to

the state supervision model, see 2.3.2), the corporate-pluralist state model and the supermarket state model (Olsen 1988:238). These models were analysed, contextualized and interpreted by Gornitzka (1999:24) within the HE context.

In the corporate-pluralist state model there are various centres of authority and control (Gornitzka 1999:26). The role of HEIs reflects the interests of their stakeholders such as students, industry, staff unions and the Ministry of Education, all of which have an input and interest in the role and direction of HE (Gornitzka 1999:26). Policy making takes place through a system of public bodies, such as boards, councils and commissions, while decision-making is segmented and dominated by interest groups on the basis of negotiation and consultation (Gornitzka 1999:26). Changes in HEIs depend on changes in the alliances, while autonomy of HEIs is negotiated and the result of a division of power (Gornitzka 1999:26).

2.3.6 Supermarket state model

In the supermarket state model the role of the state is minimal, while the role of HEIs is to deliver services, one of which is teaching, to the community (Gornitzka 1999:26). The performance of the HEIs is measured against their efficiency and ability to survive (also financially) (Gornitzka 1999:26). In this model the role of the state is that of the "bookkeeper of the great necessities" (Gornitzka 1999:27). Another feature of this model is a great level of decentralization, with decisions being individualised, and the state as the "night watcher" (Gornitzka 1999:27). In this model the institutional autonomy of an HEI depends on its ability to survive (Gornitzka 1999:27). Also, in this model, changes in the HE system depend on the rate of the changes in the environment (Gornitzka 1999:27).

2.4 THE DEVELOPMENTAL NATURE OF THE RELATIONSHIP BETWEEN GOVERNMENT AND HIGHER EDUCATION INSTITUTIONS

Having considered the general principles and models developed for describing the relationship between government and HEIs, the question is whether the nature of this relationship at present is the same as in the past. Many scholars agree that the relationship between the government and HE has changed over the last few

decades (Rostan 2010:S72). Tendencies in the European HE systems indicate that governments have over the past years moved away from directly controlling HEIs to a system of "distant steering" (Rostan 2010:S72), which gave rise to the notion of the "evaluative state" (Maassen 1995:63). Governments are moving away from controlling HEIs by means of legislation and policies, to a system where the government designs the framework, in which the universities "can elaborate the details themselves" (Maassen 1995:71), with governments increasingly focusing on the accountability of HEIs (Huisman & Currie 2004:529).

In essence, this system affords HEIs more autonomy, while in return seeking more accountability from both HEIs and academics by measuring their performance and establishing a link between the performance of an HEI and the funding it receives from the government (Rostan 2010:S72-74). In fact, governments today, more than ever before, are demanding performance from HEIs (McLendon, Hearn & Deaton 2006:1-2). They do so, because of factors such as globalization, financial pressures experienced by governments, changes in political leadership (McLendon *et al.* 2006:1-2), more emphasis on efficiency and value for money, and developments in information and communication technology, that have collectively blurred national borders, when it comes to the delivery of HE (Huisman & Currie 2004:533). In this context, the granting of funding to HEIs by government is subject to the performance of HEIs, with a number of indicators being applied to assess the performance of the HEIs, for example, the ability to retain students, the number of graduates produced, undergraduate access or diversity (McLendon *et al.* 2006:1-2).

How this 'new' relationship between government and HE plays out in different systems depends on factors such as the historical context of the country and the specific government's approach to the accountability of HEIs (Huisman & Currie 2004:529-534). The next section provides a brief overview of a few international examples.

2.5 ILLUSTRATIVE INTERNATIONAL EXAMPLES OF THE DEVELOPMENT OF THE RELATIONSHIP BETWEEN GOVERNMENT AND HIGHER EDUCATION INSTITUTIONS

Having explored the models that have been developed to describe the nature of the relationship between the government and HEIs (see 2.3), such relationships between government and HEIs in three countries, namely Taiwan, Belgium and Great Britain are considered. This discussion is not intended to be a detailed or comprehensive exposition of the relationship between the government and HEIs in the selected countries, as only certain aspects of the relationship between the government and HEIs will be highlighted in order to illustrate how a certain model can be applied in a particular country to describe the relationship between government and HEIs. The reason for the selection of Taiwan is that Taiwan had, similar to SA, experienced the effect of political transition on its HE system. Belgium was selected, as an example of the state control model in Europe, whilst Great Britain was selected, because the SAHE system has to a large extent been based on the British model.

2.5.1 Taiwan

The starting premise for any discussion about the relationship between government and HEIs is that this relationship will always be a complicated one (Teichler 1991:44), because on the one hand HEIs receive their funding from government and on the other hand government has its own changing expectations of what HEIs should deliver in return for the funding they receive (Jansen 2005:215). This applies to all relationships between governments and HEIs where HEIs are dependent on governments as the primary source of funding.

Notwithstanding the differences between the HE systems of SA and Taiwan, one striking similarity between the two countries is the effect that the political developments in the country had on HE – hence the developments in the relationship between government and HEIs in Taiwan are specifically of interest. In Taiwan martial law was revoked in July 1987 (Chiang 2013:412). This was followed by a long process of decentralization during which extensive educational reforms

were implemented (Lo 2010:127-128). In SA the newly elected government commenced with an extensive process of restructuring of the HE system after the first democratic elections in 1994 (see 1.1 and 2.6.2).

The educational reforms in Taiwan empowered the different stakeholders and led to a redefining of the relationship between government and the HEIs (Lo 2010:130-131) similar to what has occurred in SA. Taiwan started with the decision to grant public HEIs more financial autonomy, which was a move away from the strict budget control exerted over public universities before 1994 (Lo 2010:131). This led to the replacement of the Public Budget System with the University Fund System, under which 80% of the HEIs' funding is derived from government, with the remaining 20% generated from other sources, such as tuition fees and donations (Lo 2010:131). Even though HEIs fall under the supervision of the Taiwan Ministry of Education, the Ministry declared its intention to incorporate the public HEIs (Lo 2010:132). This incorporation would entail that the legal status of public HEIs would change to that of administrative legal entities with public universities becoming more autonomous in terms of finances and staff appointments (Lo 2010:132). This system also envisaged the establishment of the Higher Education Review Committee that would allocate government funding to public universities (Lo 2010:132). As this proposal could have given more power to the presidents of the top universities it was blocked by the legislature of Taiwan (the Legislative Yuan), but government has implemented incentives for public HEIs to be incorporated voluntarily (Lo 2010:132). The one tangible outcome of this process of decentralization was the development of a performance management system for HEIs (Lo 2010:134). Even though the public HEIs do now enjoy more autonomy in financial matters, funding for HEIs has become more mission and performance based (Lo 2010:134).

When considering the models developed to describe the relationship between government and HEIs (see 2.3), the relationship between government and HEIs in Taiwan can be described as a move from the state control model to the state supervision model. In the state control model, the state controls every aspect of the HE system, including finances, with a strong departmental bureaucracy and weak institutional administration (see 2.3.1).

In Taiwan until the late 1980s government exerted a strong level of control over the HE system to enforce its political ideologies, by applying strict rules and regulations relating to the establishment of universities, appointment of employees and allocating of finances (Lo 2010:130). This endured until the beginning of the educational reforms, which started with the granting of more financial independence to public universities. The granting of greater financial autonomy to public universities and the involvement of faculty members in the management of the university (Lo 2010:133), combined with the implementation of various measures to improve the quality of HE (Chiang 2013:144) are indicative of the move from the state control to the state supervision model.

Another example of this move from state control to a state supervision model is the change in the manner in which the university presidents in Taiwan are appointed. The amended University Act determines that the academics of the university should participate in the appointment of the University president and academic colleagues (Lo 2010:133). Another emancipating measure is the requirement that half of the members of Senates must comprise faculty members (Lo 2010:133). Yet, the requirement that the short list of potential university president candidates should be submitted to the Minister of Education for consideration and final appointment (Lo 2010:133) is indicative that elements of the state control model have remained in the Taiwanese HE system.

2.5.2 Belgium

The Belgian HE system is a typical example of the European state control model (see 2.3.1). In Belgium the autonomy of HEIs has increased over the years, primarily as the result of the law on the organisation of public universities of 28 April 1953 (Act 35 of 1953) (as amended), which increased the administrative autonomy of public universities with the establishment of faculties, councils, and, under certain circumstances, the freedom to appoint their own employees (Wielemans & Vanderhoeven 1991:5). Later, these public universities were even allowed to have their own property (Wielemans & Vanderhoeven 1991:5). From 1965 the expansion of universities proceeded and in 1971 legislation was enacted that provided for the budget and control of universities (Wielemans & Vanderhoeven 1991:6). Major laws

directly pertaining to university education ceased after 1975, although changes thereafter were introduced through budget laws (Wielemans & Vanderhoeven 1991:6-7).

These processes illustrate that control over HEIs can be exerted by government because of governmental control over the financial allocations to HEIs. However, the influence of factors such as social change, satisfying market needs (Wielemans & Vanderhoeven 1991:13) and producing employable graduates cannot be ignored. The reason for this is that the essence of a university, namely the freedom to pursue knowledge, with the search for the truth, become relative when HEIs are dependent on the market they serve (Wielemans & Vanderhoeven 1991:19). Across the European Union (EU) there has been a reshaping of the HE system, with governments moving away from pure state control, to an approach which has resulted in HEIs being granted more autonomy, coupled with accountability and social responsibility (Veugelers 2011:12). This has also been the trend in Belgium, as an EU member.

2.5.3 Great Britain

Although Maassen and Cloete (2007:11) maintain that SAHE has its roots in continental European and British traditions, the influence of British HE on our own system has certainly been more enduring. In the case of British universities, many scholars have expressed concern about the state's influence over the admission policies of HEIs, their curricula, the standards that have to be met by HEIs and the way that courses are taught by HEIs (Middleton 2000:540). During the 1980s there were further attempts to steer admissions and courses with the introduction of fee-banding and quotas for subjects, the awarding of annual grants and, by the early 1990s, requiring institutions to compete for contracts that would allow them to teach undergraduate students (Middleton 2000:541). Ultimately the 1998 Teaching and Higher Education Act bestowed unprecedented powers on the Secretary of State, enabling the Minister, *via* the funding council, to determine the fee levels for local students, as well as students from the EU (Middleton 2000:541). This closer state steering articulated in the quest for external quality assessment with the focus on

outcomes, which was seen by many as a direct attack on the autonomy of universities (Middleton 2000:541).

In 2003 the UK White Paper, *The Future of Higher Education*, was published (Trow 2006:82). It attempted to address the underfunding of British universities and allowed universities a certain level of autonomy in determining their fees (Trow 2006:82,85). Trow (2006:85) aptly describes the relationship between government and HEIs, when he states that, "(t)he growth of state regulation of higher education and the diminution of state resources for higher education have gone hand in hand." When considering which model describes the relationship between government and HEIs in Great Britain, the state supervision model can be applied, because government uses mechanisms such as funding to steer the HE system, although the concern is that this steering has become increasingly stricter.

2.6 THE RELATIONSHIP BETWEEN GOVERNMENT AND HIGHER EDUCATION INSTITUTIONS IN SOUTH AFRICA

Having explored the models that have been developed to describe the nature of the relationship between government and HEIs (see 2.3), in this section the relationship between government and HEIs during and after the apartheid era is explored. Consideration is given, first, to an overview of the interactions that had occurred between government and HEIs during particular periods, and second, to exploring such interactions on the basis of the models described in 2.3.1 to 2.3.3.

2.6.1 Before 1994

It is well known that the period immediately prior to 1994 was one of turmoil. The National Party (NP), which came into power in May 1948 (Van Wyk 2012:5), under the leadership of Malan, enforced their apartheid policy, which entailed the systematic exclusion and oppression of black people on the basis of so-called separate development (Van Wyk 2012:3). This system of oppression permeated all aspects of South African society, including HE. Verwoerd, who is considered to be the architect of apartheid (Van Wyk 2012:5), aggressively implemented and expanded the NP's apartheid policy across all HEIs in SA (Shear 1996:20-21).

The apartheid ideology was given effect in HE by the NP government's enactment of various legislative and policy measures, thereby shaping the relationship between government and HEIs. In terms of the Bantu Education Act of 1953 education in SA was officially divided along racial or ethnic lines with the Department of Native Affairs taking control of African schools, and the syllabus was specifically designed along racial lines (Shear 1996:20).

Government thereafter published the Separate University Education Bill in March 1957 with the purpose of prohibiting black people from studying at the so-called 'open universities' (Shear 1996:25). The Bill sought also to transfer the control of the University College of Fort Hare and the Medical School for Non-Europeans of the University of Natal to government (Shear 1996:25). Both the University of the Witwatersrand (Wits) and the University of Cape Town (UCT) were opposed to this Bill (Academic Freedom Committees 1974:10), and due to the incorrect inclusion of private interests in the Bill, the government had no choice but to amend the intended legislation (Academic Freedom Committees 1974:8).

The amended Separate University Education Bill was published on 10 April 1957 and after passing its second Reading, was submitted to a Parliamentary Select Committee that was reconstituted during the parliamentary recess as a Commission of Inquiry (Shear 1996:26-28). The latter recommended during August 1958 that a new Bill be drawn up, which resulted in the publication of the Extension of University Education Bill on 26 February 1958 (Shear 1996:28). This Bill was submitted to Parliament without there being consultation with either the University Advisory Committee or the Committee of University Principals and despite opposition, enacted as the Extension of University Education Act 45 of 1959 (Academic Freedom Committees 1974:8-9) on 11 June 1959 (Higgins 2000a:99).

This Act provided for the establishment of separate institutions of HE for Africans, coloureds and Indians and created four new universities and colleges, namely the University College of the North, the University College of Zululand, the University College of the Western Cape and the University College, Durban (Shear 1996:xii). These institutions were managed by administrators appointed by government (Shear 1996:xii). Furthermore, in essence, the admission policies of the so-called open

universities were subject to the racial constraints stipulated in this legislation (Taylor & Taylor 2010:898). In practice, this meant that black students were not permitted to register as students at the open or traditionally white universities after 1 January 1960 (Higgins 2000a:99), except with the written permission of the respective Minister, who would only grant such permission if it was not possible to accommodate the student at a designated college (Academic Freedom Committees 1974:13-14).

In 1959 the University College of Fort Hare Transfer Act 64 of 1959 was enacted that allowed the Governor-General to assign control of the College to the Minister of Bantu Education (Academic Freedom Committees 1974:9). These legislative measures were once again vigorously opposed by the so-called open universities - those universities who sought to maintain an open-door policy that entailed admission of students without regard to their race (Academic Freedom Committees 1974:10) and which included UCT, Wits, Rhodes University and the University of Natal (Taylor & Taylor 2010:912). This opposition culminated at UCT in a ceremony that was held on 29 July 1959 where a dedication was signed by the Chancellor, the Chairman of the Council, the Vice-Chancellor and the President of the Convocation declaring their commitment to "strive to regain the right to determine who shall be taught, without regard to any criterion except academic merit" (Academic Freedom Committees 1974:11). In 1959 UCT also instituted the TB Davie Memorial Lecture, which became an annual lecture focusing on academic freedom (Academic Freedom Committees 1974:11). Similarly, in 1961 Wits instituted its triennial public lecture, the Chancellor's Lecture, dedicated to the pursuit of maintaining and defending the autonomy of HEIs (Academic Freedom Committees 1974:12).

On 10 September 1968 government appointed a Commission of Inquiry into universities under the chairmanship of Judge J van Wyk de Vries (RSA DNO 1974:2-1). The commission, which included three university principals, was tasked with investigating educational, academic, financial and developmental aspects of universities for whites and the University of South Africa (UNISA), (RSA DNO 1974:1-3). The commission focused on various aspects, such as facilities, the academic performance of students and the qualifications of lecturers (RSA DNO 1974:2-3). The focus areas of the commission that could have impacted

substantially on the relationship between government and HEIs during this period, were the adaptation of the Holloway formula or the development of a new funding formula for subsidisation of universities to meet current and capital expenses and the establishment of a future policy in relation to the development of universities in SA (RSA DNO 1974:2-3). The control exerted by government over HEIs during this era was strengthened by HEIs' dependency on government for funding. Non-compliance with government's apartheid policy could very well have resulted in the withholding of subsidy by government.

Six years would pass before this Commission would submit its Main Report (Higgins 2000a:101). The Main Report and the two interim reports of the Van Wyk de Vries Commission were submitted to Parliament on 30 October 1974, with a minority report being submitted by Prof. G.R. Bozzoli who was the Vice-Chancellor of Wits during the period 1969 – 1977 (Bozzoli 1997:205,315). Bozzoli's minority report emanated from his conviction that the Main Report was an attack on the English universities and that it aimed at bringing all the universities in line with the government's apartheid policy (cited by Higgins 2000a:103). This Report included not only the commission's findings, but also its recommendations, that included, amongst others, the reconsideration of courses and teaching methods, the appointment of a Dean of Students and a new funding formula for calculation of subsidy to universities (RSA DNO 1974:518-524). It is important to note that this Report did not deal with the total HE system, as both the findings and the recommendations were limited to universities for whites and UNISA. The Commission also dealt with the concepts of academic freedom and institutional autonomy that will be explored in Chapter three, when considering the TB Davie definition of academic freedom (see 3.4.1).

Government consistently enforced and intensified its apartheid policy, *inter alia*, by means of Act 29 of 1971 that amended the Extension of the University Education Act of 1959 by empowering the Minister to withdraw permission previously granted to a student to study at an open university (Academic Freedom Committees 1974:15). In essence, this prevented open universities from allowing black students who were studying there with the Minister's permission, to change their field or course of study after admission (Academic Freedom Committees 1974:15). During this time, the

open universities continued their open opposition to government's apartheid policy. One example is the open letter written by the Vice-Chancellor of Wits to Mr. B.J. Vorster (who served as prime minister of SA from 1966 – 1978 and as president of SA from 1978 – 1979) on 7 June 1971 requesting that student grievances at universities, resulting from government's apartheid policy, be publicly investigated and openly reported on (Shear 1996:46).

During 1978 a new type of institution, namely technikons, was created in addition to the existing universities and colleges for vocational training (NCHE 1996:29). Government viewed HEIs as creatures of the state and made the differentiation between universities and 'technikons', on the basis of the functions that were performed by these institutions or that they were allowed to perform (Bunting 2007:37). Technikons were expected to train students in the application of knowledge and to engage in developmental scientific research (NCHE 1996:30).

Notwithstanding the resistance by the open universities, government continued expanding apartheid measures in HE and in 1983 enacted the Universities Amendment Act 83 of 1983 that provided that, *inter alia*, conditions may be determined for granting subsidy to universities (Shear 1996:152), which included quotas for certain groups who may be registered at a university, in essence, racial quotas (Shear 1996:152). This is a further illustration of how government utilized funding to enforce its apartheid ideology.

During 1984 an amended Constitution of SA was enacted (Bunting 2007:36). It made a clear distinction between general and own affairs, with universities being designated on the basis of four racial groups, namely African, Coloured, Indian and White (Bunting 2007:36). During 1986 and 1987 there were further threats by government to cut subsidy to universities should such universities fail to control the political activities of their staff and students on their campuses (Shear 1996:54). This resulted in the 1988 case of the University of Cape Town and others v Ministers of Education and Culture (House of Assembly and House of Representatives) and others 1988(3) SA 203 (C) 207 D-E (cited by Krüger 2013:10) where the Court rejected the Minister's argument that the conditions relating to subsidies were imposed in the interest of academic freedom (Krüger 2013:10). The Court came to

the conclusion that "…a dominant motive behind the imposition of the conditions was the implementation of action to combat lawlessness and to counter what was regarded as revolutionary conduct…" (University of Cape Town and others v Ministers of Education and Culture (House of Assembly and House of Representatives) and others 1988(3) SA 203 (C) 212).

The above discussion mainly referred to the relationship between government and the so called open universities. Similarly, the position of the Afrikaans universities and other HEIs, referred to by Bunting as the "historically black universities" (HBUs) (Bunting 2007:44) should be considered. Contrary to the stance taken by the open universities, the Afrikaans HEIs, namely the then University of the Orange Free State (UOFS), the then Potchefstroom University for Christian Higher Education (PU for CHE), the University of Pretoria (UP), the then Rand Afrikaans University (RAU), the University of Stellenbosch (US) and the dual medium, then University of Port Elizabeth (UPE) aligned themselves during this period with government's policies, because they believed this was essential for their continued existence (Bunting 2007:40). In fact, they agreed with the government's view that they are "creatures of the state" (Bunting 2007:40).

The fact of the matter is that, in spite of their opposition to apartheid, the open universities and the historically Afrikaans universities (collectively known as the historically white universities or HWUs) enjoyed considerable measures of institutional autonomy during the apartheid era, except in terms of student admissions and attempts to curtail what might be taught through censorship and banning orders.

After 1984 the HBUs included Medunsa, the University of the North, Vista University, the University of the Western Cape, the University of Zululand and the University of Durban-Westville (Bunting 2007:44). These universities had very little freedom, as government controlled the staff appointments, as well as the academic activities of these institutions (Bunting 2007:45). By the end of the 1980s and early 1990s these institutions, as well as the four universities created in the 'independent' homelands of Transkei, Ciskei, Venda and Bophuthatswana also actively opposed government's apartheid policy (Bunting 2007:45).

The enforcement of racial segregation in HE continued until 1988 when it was revoked by the NP government (Higgins 2000b:5). This was followed by numerous other emancipating measures that culminated in the release from prison of Nelson Mandela in 1990 (Higgins 2000b:5) and South Africa's first democratic elections in 1994.

When considering which model would best describe the relationship between the government and HEIs during the apartheid era, government's actions during this period before 1994 (see 2.6.1) are appropriately evaluated and compared with the characteristics of the models elucidated earlier which describe the relationship between government and HEIs (see 2.3.1, 2.3.2 and 2.3.3). This comparative analysis is demonstrated in Table 2.2.

Table 2.2 An exposition of the nature of the relationship between government and HEIs before 1994

Features of the state control model	**Features of the state supervision model**	**Features of the state interference model**	**Government's actions before 1994**
HE system created by the state.	The state recasts its relationship with HE in different ways. The aim of this model is to improve the system and it is a prolonged process of restructuring.	Arbitrary crisis intervention by government.	The SAHE system was indeed created by the government. The legislation enacted by government during this period, as discussed in 2.6.1 reflects the extent to which government created a HE system based on apartheid.
HE system is almost completely funded by the state.			The HE system was almost completely funded by government. In fact, government even threatened with cutting of subsidies if the political activities of staff and students of HEIs were not controlled (see 2.6.1).
Crucial aspects of the system are managed by government bureaucrats.	Government's role is monitoring and influencing the framework that provides the guidelines for the actions of HEIs.	A weak Ministry of Education which does not have the mandate to guide and promote HEIs.	Crucial aspects of system were indeed managed by government bureaucrats. This is apparent from the fact that government officials were involved with the appointment of employees in some HEIs, although there was a

			differentiated approach followed by government in relation to HWUs and HBUs (see 2.6.1 and 3.7).
A strong departmental bureaucracy.	Government has a supervisory role. The state supervises the HE system to ensure academic quality and a certain level of accountability with decentralised decision-making.	A weak and poorly trained departmental bureaucracy.	It is argued that a strong departmental bureaucracy existed, as in some cases government officials were involved with appointments of employees at certain HEIs. One should be mindful of the differentiated approach that was followed by government in relation to HWUs and HBUs (see 2.6.1 and 3.7).
Weak institutional administration.	Concurs with the need for institutional autonomy and responsiveness in times of rapid change.	University Councils that are largely dormant and only heard of during a crisis. An inactive Chancellor and Vice-Chancellors that have to be both Chief Executive Officers and politicians, without the necessary preparation or training.	No evidence could be found to suggest that there was weak institutional administration at the HWUs, taking into account that their actions were subject to government's apartheid policy. In fact, according to Bunting (2007:43) these institutions had "tight administrative and financial systems" with competent and sufficient staff to manage them. In the case of the HBUs, government controlled most aspects of their activities aimed at enforcing the apartheid policy, for example ensuring that the main administrative departments were dominated by white Afrikaners (see 3.7) (Bunting 2007:45).
A strong professoriate.		Large Senates that only concentrate on academic matters.	At the HWUs, taking into account that their actions were subject to government's apartheid policy, the professoriate participated in the management of the institution (Bunting 2007:43). In the HBUs, government enforced its apartheid policy by ensuring that the Senates continued to be dominated by white Afrikaners (Bunting 2007:45).

On the basis of this comparative analysis (see Table 2.2), the relationship between government and HEIs during the apartheid era is classified as an example of the state control model, as government did not acknowledge the will of its citizens, but rather controlled all HEIs in order to protect, promote and enforce its apartheid ideology (Sayed 2000:477). In essence, government's actions during the apartheid era satisfy most of the characteristics or features present in the state control model (see 2.3.1). The goals that had to be achieved by HEIs were the enforcement of government's apartheid policy and HEIs were accountable to political authorities. In fact, HEIs were threatened with cutting of subsidies if the political activities of students and employees on their campuses were not controlled (see 2.6.1).

2.6.2 After 1994

When SA became a democracy the new government inherited a HE landscape that was highly fragmented (Bunting 2007:35) and divided by the implementation of the apartheid policies during the previous decades (see 1.1 and 2.6.1). This division included the existence of different categories of institutions, universities and technikons, that each were established for the different population groups, with eight government departments controlling these different institutions (Bunting 2007:35,38). At the time of the first democratic elections in SA (1994) there were 21 universities, 15 technikons, approximately 120 colleges of education, 12 agricultural colleges, nursing colleges and a variety of mono-disciplinary colleges (Grobbelaar 2004:37). As discussed earlier (see 1.1), the new government identified the need to reshape and reform the South African HE landscape into a single integrated system, but to achieve this the necessary legislative framework had to be established (Grobbelaar 2004:41), which could only be done once a comprehensive analysis of the HE landscape as it existed had been completed (Grobbelaar 2004:38).

What follows is an overview of some of the most important policy and legislative measures for the HE sector taken by government, which forms the basis of the relationship between government and HEIs during the post 1994 period. This reshaping of the HE landscape in SA is considered to be the most extensive exercise of HE re-engineering that has ever been undertaken anywhere in the world, specifically taking the size of the SA sector into account (Grobbelaar 2004:52).

2.6.2.1 ANC Policy Framework for Education and Training

During 1994 the Policy Framework for Education and Training was issued by the ANC which proposed that the government should have central responsibility for the provision of HE, that redressing the historical imbalances of the past must be a priority, that the HE system and individual institutions must be required to be effective and have clear objectives linked to national development and that the democratic values of representivity, accountability, transparency, freedom of association and academic freedom had to underpin the South African HE system (Higgs 2010:367; ANC 1994:Online).

2.6.2.2 National Qualifications Framework

In 1995 the National Qualifications Framework (NQF) was devised by the South African Qualifications Authority (SAQA) in terms of Section 5(1)(a) and Section 5(1)(b) of the South African Qualifications Authority Act 58 of 1995 (RSA 1995:6). This established a single, integrated qualifications framework, with quality control vesting in state-appointed bodies (Malherbe 2003:215).

2.6.2.3 National Commission on Higher Education

During February 1995 a presidential commission, the National Commission on Higher Education (NCHE), was appointed by President Mandela to advise government on a new dispensation for HE that would reflect government's priorities (Grobbelaar 2004:38-40; NCHE 1996:265-267). The NCHE advised on the following (NCHE 1996:23):

- The goals and values of HE in SA.
- The types of institutions and the nature of the system that would best achieve these goals and values.
- The required restructuring of the governance, administrative and funding systems to achieve the envisaged HE system.

- The specific measures required to eliminate inequalities in relation to access to HE, inequitable and inefficient allocation of resources and the historic failure to respond to the needs of the majority of South Africans.
- The appropriate measures, structures, procedures and processes for implementing the recommendations made by the NCHE.

The NCHE did its work through a number of task groups and technical committees, and submitted its report, *A Framework for Transformation* to the President in August 1996 (Grobbelaar 2004:38-40). The Commission acknowledged that the HE system in SA was flawed, because of the history of the system and recognized that the HE system needed reshaping to serve the new social order, to meet national needs and to respond to the new challenges and realities facing HE (NCHE 1996:1). The following proposals for a new HE system were made (NCHE 1996:9-10):

- The development of a single co-ordinated system of HE encompassing universities, technikons, colleges and private HE providers.
- The incorporation of colleges of education, nursing and agriculture into universities and technikons, as well as the development of a new further education sector.
- Increased access, within the restrictions of limited increases in public expenditure.
- An expanded role for distance education and high quality resource based learning.
- A rolling three year national plan for HE.
- The inclusion of programmes in the NQF and in a new quality assurance system to be developed within the ambit of the SAQA.
- The importance of research within HE and its contribution to a National System of Innovation.
- Identification of the key areas of capacity development.
- The establishment of a National Higher Education and Admissions Service, improved student selection instruments and the provision and funding of programmes to bridge the gap between further and HE.

The NCHE maintained that these proposals, together with the recommendations for co-operative governance and goal-directed funding, provided a framework for the transformation of the HE system (NCHE 1996:10). The proposals in relation to goal orientated funding revolved around two main components: first, a funding formula component that generates block grants for HEIs offering approved HE programmes, and second, an earmarked funding component through which funds are allocated to HEIs in accordance with clearly specified policy objectives (NCHE 1996:20). In essence the NCHE proposed the establishment of a "single co-ordinated higher education system, co-operative governance and goal-orientated funding, based on the principles of equity, democratisation, development, quality, academic freedom and institutional autonomy, as well as effectiveness and efficiency" (Grobbelaar 2004:38-40; NCHE 1996:9-10).

2.6.2.4 Green Paper on Higher Education Transformation

The NCHE report was followed by the Green Paper on Higher Education Transformation (drawing heavily on the NCHE report) that was released during December 1996 (RSA DoE 1996:1). Of significant importance is that the Ministry reaffirmed its commitment to the principles of academic freedom and institutional autonomy within the framework of public accountability (RSA DoE 1996:29). In relation to governance, the Ministry supported a system in which stakeholder participation and consultation is entrenched (RSA DoE 1996:30).

The Ministry does however concede that specific proposals outlined in the Green Paper could affect institutional autonomy of HEIs in the following ways (RSA DoE 1996:29-30):

- The proposed funding mechanism: through this student recruitment is made subject to overall targets and to the distribution of numbers between major fields of study decided upon within the context of the national education plan.
- Course and curriculum planning: the proposals on accreditation, the NQF and the existence of SAQA do entail a degree of curtailment of autonomy.

- The review and evaluation of the activities of HEIs: this is conceived as taking place at the national level within the framework determined by a national management information and performance indicator system (although self-evaluation plays an important role in quality assessment procedures).
- The right of the Minister to have independent assessments performed: this is envisaged to take place when circumstances occur that may bring an HEI into disrepute on the basis of mismanagement, corruption or persistent turmoil.

2.6.2.5 White Paper 3: A Programme for the Transformation of Higher Education

The Green Paper on Higher Education Transformation (RSA DoE 1996) was followed by the Draft White Paper on Higher Education (RSA DoE 1997a) and culminated in the release of the White Paper published on 15 August 1997 (RSA DoE 1997b). The purpose or aim of this White Paper was to provide a comprehensive set of strategies for the transformation of HE in SA through the development of a single co-ordinated system with new planning, governing and funding arrangements (RSA DoE 1997b).

As far as the relationship between government and HEIs is concerned, the White Paper (RSA DoE 1997b) deals with the principles of co-operative governance, institutional autonomy and accountability, and declares that it adopts a model of co-operative governance for HE in SA based on the principle of autonomous institutions working co-operatively with a proactive government and in a range of partnerships. In essence, a co-operative relationship between the government and HEIs is envisaged (RSA DoE 1997b). The document reveals that the Ministry also believed that institutional autonomy of HEIs was to be exercised in conjunction with public accountability and that even though the Ministry would have an oversight role, such a role did not involve responsibility for the micro-management of institutions (RSA DoE 1997b).

The White Paper also confirms the principle of conditional funding for HEIs or as referred to by the Ministry, “goal-oriented public funding” (RSA DoE 1997b:Online), which came into effect with the new funding formula that was implemented during

2004, with one of the aims being the recognition of the importance of research output by HEIs (Woodiwiss 2012:422). This constituted a deviation from how funds were allocated during the 1987–2003 period when subsidies were based on the South African Post-Secondary Education (SAPSE) subsidy formula according to which the extent of the subsidy was determined on a 50:50 weighing between inputs (estimated cost of training of students) and outputs (students graduating) (Woodiwiss 2012:421-422). The primary aim of this change was to increase public accountability of HEIs by making funding dependent on the production of strategic plans by Councils of HEIs and reporting their performance against their goals (RSA DoE 1997b). HEIs, in terms of the White Paper, would be required to prepare comprehensive strategic plans comprising a distinctive mission statement, an academic plan (including three-year forward projections of student enrolments and graduations by field and level of study), an equity plan, a capital management plan and a performance improvement plan (RSA DoE 1997b). These plans provided for by the White Paper also would have to contain measurable goals and target dates supported by key performance indicators, in compliance with the guidelines published by the Minister (RSA DoE 1997b).

The White Paper requires that HEIs receiving public funds must report how, and how well, such money is spent (RSA DoE 1997b). The White Paper also requires that HEIs demonstrate the results they achieved with the resources allocated (RSA DoE 1997b). Lastly it requires that HEIs demonstrate how they have met national policy goals and priorities, although the intention in the White Paper is to allow for a high degree of autonomy or self-regulation (at institutional level) through the authority of internal governance structures such as Council, Senate and the advisory Institutional Forum (IF) within the national regulatory frameworks (HEIAAF Task Team 2008:21).

Hall and Symes (2005:203-204) argue that the White Paper (RSA DoE 1997b) interprets accountability narrowly as comprising only three aspects namely:

- HEIs must account for the public funds received from government and how they were spent;

- HEIs must publish and make available the results of what has been achieved using the public money received from government; and
- HEIs should indicate how they have met the national policy goals determined by government.

A similar view is expressed by the HEIAAF Task Team (2008:ix) when it states that the concept of accountability in policy is interpreted narrowly, namely as accounting for what has been achieved with the funding received from government. The White Paper also states that there is a need to reconceptualise the relationship between government and HEIs, which according to Hall and Symes (2005:203) constitutes a deviation from the NCHE report (NCHE 1996).

2.6.2.6 Higher Education Act

The White Paper (RSA DoE 1997b) in turn was followed by what is undeniably the principal and most important piece of legislation for the HE sector in SA, the Higher Education Act (RSA 1997; Mubangizi 2005:1122). The Higher Education Act (RSA 1997) that regulates HE took effect during 1997 and provides for the following:

- The establishment and closure of HEIs by the Minister;
- Mergers of HEIs by the Minister;
- The institutional governance structures of HEIs;
- Funding for HEIs in that the Minister has to, after consulting the CHE and with the concurrence of the Minister of Finance, determine the policy on the funding of public HE, which must include appropriate measures for the redress of past inequalities;
- Record keeping and reporting by HEIs;
- Possible appointment of an independent assessor for an HEI;
- Regulation of the private HE sector; and
- The establishment of the CHE as a permanent advisory body (and juristic person) to the Minister.

It is interesting to note that in the Preamble to the Higher Education Act (RSA 1997:2) it is acknowledged that it is desirable for HEIs to enjoy freedom and autonomy in their relationship with the State, while being publicly accountable. However, the use of the word 'desirable' is questionable, because 'desirable' is interpreted as having a meaning similar to or corresponding with 'recommended', which differs from 'being entitled to enjoy freedom and autonomy' as an enforceable right of HEIs. The word 'desirable' does therefore not in any way grant, guarantee or entitle HEIs the right to institutional autonomy (see 3.7.2 where institutional autonomy is explored).

The Higher Education Act (RSA 1997) has undergone numerous amendments over the past 17 years. In fact, amendments to the Higher Education Act (RSA 1997) have been enacted during 1999 (RSA 1999), 2000 (RSA 2000a), 2001 (RSA 2001), 2002 (RSA 2002), 2003 (RSA 2003), 2008 (RSA 2008), 2010 (RSA 2010), 2011 (RSA 2011) and 2012 (RSA 2012a). These amendments deal with, amongst others, governance and financial matters (RSA 1999:2; RSA 2000a:2; RSA 2001:2; RSA 2002:2, RSA 2011:2; RSA 2012a:2), regulation of the private HE sector (RSA 1999:2; RSA 2000a:2) and after 2001, the restructuring of the HE landscape by means of mergers and incorporations (RSA 2001:2; RSA 2002:2; RSA 2003:2).

2.6.2.7 National Plan for Higher Education

After the Higher Education Act (RSA 1997) came into operation, the CHE was requested to advise the Minister on the appropriate size and shape of the HE sector (Grobbelaar 2004:42; CHE 2000:4). The CHE report titled *Towards a New Higher Education Landscape: Meeting the Equity, Quality and Social Imperatives of South Africa in the 21st Century* was submitted to the Minister in June 2000 (Grobbelaar 2004:42; CHE 2000:4).

The *National Plan for Higher Education* (NPHE) (RSA DoE 2001) was published in February 2001 and was the Minister's response to the CHE report (RSA DoE 2001:2). The NPHE provides the framework and mechanisms for the restructuring of the HE system to achieve the vision and goals for the transformation of the HE system outlined in the White Paper (July 1997) (RSA DoE 2001:2). It aims at

addressing the policy goals and strategic objectives indicated hereafter that were deemed by the Minister as crucial to achieving the transformation of the HE system (RSA DoE 2001:17-18):

- "Provide increased access to HE to all irrespective of race, gender, age, creed, class or disability and to provide graduates with the skills and competencies necessary to meet the human resource needs of SA.
- Promote equity of access and to redress the past inequalities by ensuring that staff and student profiles reflect the demographics of SA.
- Ensure diversity in the organisational form and landscape of the HE system through mission and programme differentiation.
- Build high-level research capacity to address the research and knowledge need of SA.
- Build new institutional and organisational forms and identities through regional collaboration between institutions."

The NPHE establishes indicative targets for the size and shape of the HE system, including overall growth and participation rates, qualification and programme mixes and equity and efficiency goals (RSA DoE 2001:15-16). The NPHE also provides a framework and outlines the processes and mechanisms for the restructuring of the institutional landscape of the HE system by merging and incorporating HEIs or parts of HEIs (RSA DoE 2001:15-16). The NPHE explicitly states the Minister's commitment to the principle of institutional autonomy of HEIs, but it declares in no uncertain terms that the Minister must not allow institutional autonomy of HEIs to be used as a weapon to prevent change and transformation at HEIs (RSA DoE 2001:16).

2.6.2.8 National Working Group

A National Working group was established by the Minister in April 2001 to advise on the restructuring of the HE institutional landscape that was outlined in the NPHE (RSA DoE 2002). The terms of reference of the Working Group were to (RSA DoE 2002):

- Address how the number of institutions can be reduced and what form these should take.
- Ensure that the reduction in the number of institutions does not mean that sites of delivery are closed down. In fact, the academic programmes presented at these sites must continue, but within and by a new organisational form.
- Consider the full range of possible institutional arrangements, namely different forms of mergers and institutional collaboration.
- Consider the role and function of existing institutions in the development of new institutional forms.
- Submit recommendations as to how Vista University's campuses can be incorporated in other HEIs in accordance with the decision to unbundle Vista University. The distance education centre of Vista University is excluded from this, as it was to be incorporated within a single distance education institution by merging UNISA and Technikon South Africa.

The Working Group confirmed the importance of regional collaboration, while maintaining that universities and technikons should remain separate institutions (with their own mission and focus), except when these are merged to form a so-called comprehensive institution (RSA DoE 2002). The Working Group also recommended that the colleges of agriculture and nursing should be incorporated into the HE system (RSA DoE 2002). Also of significance is that the Working Group recommended, in line with the NPHE (RSA DoE 2001), that the distance learning programmes at traditionally residential institutions should be strictly regulated, without jeopardising those programmes that are of high quality and meet the agreed national and regional needs (RSA DoE 2002). Finally, the Working Group supported the proposals in the NPHE (RSA DoE 2001) that satellite campuses be regulated to stop their unplanned proliferation (RSA DoE 2002). This Report of the National Working Group resulted in the promulgation of the mergers and incorporations during December 2002 (Grobbelaar 2004:49-50), which reduced the number of HEIs in SA from 36 to 23 (Hall & Symes 2005:201). Also of significance is that the Working Group identified and referred a numbers of issues that fell outside their terms of reference to the Minister for further consideration and investigation (RSA DoE 2002):

- The development of HE leadership and management and administrative capacity through training interventions.
- The expansion of the training programme for Councils to include all the governance structures, including the Institutional Forums, because of the link that had been identified between institutional instability and uncertainty regarding the role and function of the governance structures.
- Encouraging academic and research output amongst employees.
- Addressing academic staff remuneration.
- Development of strategies for recruitment and retaining of employees.
- Supporting the approval of realistic programme mixes as part of the three year rolling plan.
- Determining whether HE is delivering on the value-for-money principle and investigating to what extent resources and facilities are being used optimally.
- Improving the quality of teaching and learning at secondary school level.
- Impact studies to assess the prevalence of HIV/Aids in HE.
- Introduction of regulations to regulate the provision of education by private HEIs.

The Department of Education's response to the Working Group's report, was titled, *Transformation and Restructuring: A New Institutional Landscape for Higher Education,* and was published during 2002 (Grobbelaar 2004:50). This was followed by the publication of the NQF that included the accreditation of qualifications by the CHE (established in terms of the Higher Education Act) (RSA 1997; Waghid *et al.* 2005:1178) and the establishment of the Higher Education Quality Committee (HEQC) of the CHE (Waghid *et al.* 2005:1178) that had to organize and oversee institutional audits, conduct national reviews and accredit new programmes (Waghid *et al.* 2005:1178).

2.6.2.9 White Paper for Post-school Education and Training

Other legislative measures more recently taken are the release of the *Green Paper for Post-school Education and Training* (RSA DHET 2012) as a discussion document during 2012, that was followed by the *White Paper for Post-school Education and*

Training (RSA DHET 2013b) released in November 2013. Government's goals and aims for South Africa's post-school system in 2030, reflected in this *White Paper for Post-school Education and Training* (RSA DHET 2013b) is a system that, for the first time, includes further education, HE and training (RSA DHET 2013b:xi). The White Paper foregrounded the following aims (RSA DHET 2013b:xi):

- the creation of a post-school system that can assist in building a fair, equitable, non-racial, non-sexist and democratic South Africa,
- a single, coordinated post-school education and training system, expanded access, improved quality and increased diversity of provision;
- a stronger and more cooperative relationship between education and training institutions and the workplace; and
- a post-school education and training system that is responsive to the needs of individual citizens, employers in both public and private sectors, as well as broader societal and developmental objectives.

With the inclusion of further education in the HE and training in the post-school system of SA, this White Paper represents a significant step towards a cohesive and integrated post-school system for SA that, it is believed, will contribute to satisfying market demands and increase employability, which in turn may benefit the economy of SA and contribute to the improvement of the lives of South Africans.

2.6.2.10 Regulations for reporting by HEIs

During June 2014 the Regulations for reporting by HEIs were published which specify that (RSA DHET 2014a:3):

- HEIs produce a Strategic Plan and update it at least every five years.
- HEIs submit an Annual Performance Plan to the Department annually as further provided for in the regulations. This plan must be consistent with the Medium-Term Expenditure Framework period, must contain performance targets and should be aligned with the Strategic Plan.

- This Plan must also identify the core set of indicators that the HEI will use to monitor institutional performance.
- HEIs must adopt a mid-year reporting system and submit a Mid-Year Performance Report as further provided for in the regulations.
- HEIs must also ensure alignment between the Strategic Plan, Annual Performance Plan, Annual Report, budget documents and Mid-Year Performance report.

These Regulations represents a further attempt to increase the accountability and regulation of HEIs, by adding numerous requirements that HEIs have to comply with. Whilst accountability is deemed essential to HEIs, the question remains whether HEIs will be able to manage with the ever increasing number of regulatory documents that have to be complied with.

2.6.2.11 Other developments

Further important events during the post 1994 period that changed the SAHE landscape include the division of the Department of Education into the Department of Basic Education and the Department of Higher Education and Training (see 1.1), the transfer of the Skills Development and Training Sector to the DHET, the establishment of the Central Application System (CAS) and Clearinghouse, the appointment of the Oversight Committee on University Transformation and the submission of proposals for the establishment of an Equity Index for HEIs.

From this discussion of the major policy developments in the HE sector since 1994, it is clear that these measures have sought to reshape the HE system from a divided and disjointed system suffering from the racial divides of the past into a single integrated post-school system. The question that arises is to what extent these policy documents also reconstituted the relationship between government and HE in the new SA.

To answer the question raised above, government's actions that are articulated in the legislation and policies discussed (see 2.6.2.1 to 2.6.2.10) are compared with the

characteristics of the models that have been developed to typify the nature of the relationship between the government and HEIs (see 2.3.1 to 2.3.3) in order to establish the nature of the relationship between the SA government and HEIs during the post 1994 period. This comparative analysis is contained in Table 2.3.

Table 2.3 An exposition of the nature of the relationship between government and HEIs after 1994

Features of the state control model	**Features of the state supervision model**	**Features of the state interference model**	**Government's actions after 1994**
HE system created by the state.	The state supervises the HE system to ensure the academic quality and a certain level of accountability with decentralised decision-making.	Arbitrary crisis intervention by government.	The HE system was reshaped by means of legislative measures enacted by government during this period, as discussed in 2.6.2.1 to 2.6.2.10. The legislative measures discussed enforced quality measures (HEQC) and enforced the principle of accountability by requiring from HEIs Annual Reports and compliance with the provisions of the latest Regulations for reporting by HEIs.
HE system is almost completely funded by the state.	The aim of this model is to improve the system and it is a prolonged process of restructuring.		The HE system in SA is in a prolonged process of restructuring to correct the fragmented system inherited in 1994 (see 1.1). Government is attempting to improve the HE system by enforcing the accountability of HEIs in general to society and specifically for funding received from the government.
Crucial aspects of the system are managed by government bureaucrats.	Government's role is monitoring and influencing the framework that provides the guidelines for the actions of HEIs.	A weak Ministry of Education which does not have the mandate to guide and promote HEIs.	Government has provided the framework for the HE system (see 2.6.2.1 to 2.6.2.10) that guides the activities of HEIs and monitors performance by, for example requiring Annual Reports from HEIs.
A strong departmental bureaucracy.	Government has a supervisory role.	A weak and poorly trained departmental bureaucracy.	Government has established a supervisory role and monitors the activities of HEIs.
Weak institutional administration.	Concurs with the need for institutional autonomy and responsiveness in	University Councils that are largely dormant and only heard of during a	A certain level of institutional autonomy does exist at HEIs, as

	times of rapid change.	crisis. An inactive Chancellor and Vice-Chancellors that have to be both Chief Executive Officers and politicians, without the necessary preparation or training.	discussed in Chapter three.
A strong professoriate.		Large Senates that only concentrate on academic matters.	There is a clear planning cycle for HEIs that include fixed dates for submission of reports and plans (also see 2.6.2.10).
	In the state supervisory model the state recasts its relationship with HE in different ways.		The relationship between government and HEIs are recast in different ways, by the legislation enacted and discussed in 2.6.2.1 to 2.6.2.10.

Based on this comparative analysis of the features of the state supervision model, state control model and state interference model, the contents and aims of the legislation and policies published, as well as government's actions during the period after 1994 (see Table 2.3), it is clear that the nature of the relationship between government and HEIs in the period after 1994, falls within the ambit of the state supervision model. However, there are concerns that this model is starting to dissipate, because the defining trend in governance over the period since 1994 has been a marked increase in direct state control over HEIs (Hall & Symes 2005:200).

Waghid and others (2005:1178) argue that the first step in the regulation of HE came with the White Paper 3, even though the White Paper was preceded by a draft Green Paper and Green Paper, as well as a draft White Paper, all of which should have given stakeholders sufficient opportunity to submit their comments (Grobbelaar 2004:39). They (Waghid *et al.* 2005:1178) are convinced that the Higher Education Act (RSA 1997), the NPHE, the CHE and the HEQC are all further steps in the process of the regulation of HEIs. These scholars maintain that because the state is controlling the financial allocations to HEIs, a system is created in which the HEIs are subordinates (Waghid *et al.* 2005:1178). In that capacity, HEIs are expected to carry out the instructions of the government, while fearing that should they not comply, the Minister might elect not to grant funding to such a HEI, or change the funding criteria, or decide not to accredit particular HEI programmes (Waghid *et al.* 2005:1178). They maintain that HEIs cannot be safeguarded, because HEIs are continuously subjected to government's regulatory interventions such as reduced

funding formulae (2005:1181). A similar view is held by Bentley, Habib and Morrow (2006:24-26) who argue that to promote institutional autonomy certain structural reforms are required in HEIs, one of which is that HEIs should become financially less dependent on government.

Similar to the views held by Waghid and others (2005), Hall and Symes (2005:200) are of the opinion that the defining trend in governance over the period since 1994 has been a marked increase in direct state control over HEIs. Habib, Morrow and Bentley (2008), (citing Holiday 2008:147) take it one step further by declaring that academics are concerned that government has become interventionist and that there is an ambivalent relationship between the government and academe, with at its foundation the belief by academe that government does not trust them to transform and meet the demands of the society which the sector serves (Habib *et al.* 2008:147).

2.7 SUMMATIVE PERSPECTIVES

The role of legislative documents in shaping the relationship between government and HEIs, has been explored (see 2.6.1 and 2.6.2.1 to 2.6.2.10). The models that have been developed for describing the relationship that exists between government and HEIs, namely the state control and state supervision models, together with the hybrid model of state interference and the proposed model of conditional autonomy have been considered (see 2.3.1 to 2.3.4). Similarly, the models developed for describing the relationship between government and agencies in society and the application of these models in the HE context have also been explored (see 2.3.1, 2.3.2, 2.3.5 and 2.3.6). Based on the characteristics of each of these models the nature of the relationship between government and HEIs before and after 1994 has been analysed.

Based on the analysis of the nature of the relationship between government and HEIs before 1994, it was concluded that the relationship between the government and HEIs during this period could be described as an example of the state control model (see 2.6.1). Similarly, the nature of the relationship between the government and HEIs after 1994 was analysed and the conclusion reached that it fell within the

ambit of the state supervision model (see 2.6.2.11), although there are concerns about the increase in the level of state control over HEIs (see 2.6.2.11) (Hall & Symes 2005:200).

It is clear that the autonomy that HEIs pursue lies somewhere between complete governmental control and supervision on the one hand and complete autonomy and independence on the other hand (Jansen 2005:216). However, in so much as complete governmental control and supervision cannot be tolerated, nor can complete independence, because government can never be absolved from its responsibility for providing HE to South Africans in the interest of the country and society as a whole. Government will therefore always retain a vested interest in HEIs, their operations and outcomes, to ensure not only that the financial allocations have been spent appropriately by HEIs, but also that HEIs meet the needs of the country and its people, as reflected in the national goals determined by government.

In essence, there should be an appropriate balance between governmental supervision and HEIs' autonomy (see 3.8) and this has to be negotiated between the government and HEIs, as is the case in the model of conditional autonomy proposed by Hall and Symes (2005:205-2011) (see 2.3.4). This model allows the opportunity for the respective roles of government and HEIs to be negotiated in the interests of society. This does not imply that this model is without flaws (see 2.3.4), but rather that it might constitute a viable option to recast the relationship that exists between the government and HEIs. The principles of academic freedom and institutional autonomy (see Chapter three) that are affected by the nature of the relationship between the government and HEIs, are explored in Chapter three.

CHAPTER 3

ACADEMIC FREEDOM AND INSTITUTIONAL AUTONOMY WITH PARTICULAR REFERENCE TO SOUTH AFRICAN HIGHER EDUCATION

3.1 INTRODUCTION

Academic freedom and institutional autonomy are inextricably linked to the nature of the relationship between government and HEIs (see Chapter two). The importance of academic freedom for HEIs cannot be over-emphasized. In fact, Higgs (2010:371) views academic freedom as the lifeblood of a university, while Altbach (2001:205) maintains that academic freedom is central to the mission of a university and a prerequisite for the existence of a developed and functional HE system. The importance of academic freedom and its role in HE is perhaps best described by Chetty (2009:325) when he declares that "(a)cademic freedom enshrines our protection to seek the truth. Academic freedom is not a special privilege accorded to academics, but is a responsibility and obligation of academics to be critically engaged with society - being public critical voices is a part of our job. This is our contract with society".

In this chapter, academic freedom as a concept is explored, taking into account its relationship with institutional autonomy and accountability, and focusing on the South African HE system.

3.2 CONCEPTUALIZING ACADEMIC FREEDOM

To understand academic freedom one should have an understanding of what an HEI does, what its role in society is and how this relates to academic freedom.

From their inception universities were considered to be places dedicated to the search for truth, with the responsibility of advancing human knowledge and ultimately the betterment of society as a whole (Lange 2010:3). The purpose of a university could therefore be defined as the pursuit of knowledge (Altbach 2001:206) and the truth (Higgins 2000b:13), characterized by the spirit of free inquiry, which means the

right to consider, to question and even reject accepted notions and ideas (Academic Freedom Committees 1974:2). It should however be taken into account that a university's nature is complex and constantly changing because it is fulfilling a public role that is shaped by society's ever changing expectations, needs and requirements (HEIAAF Task Team 2008:14).

There is broad agreement that academic freedom is a prerequisite for a functional and effective HE system (Altbach 2001:205) and therefore a prerequisite for an HEI to fulfil its mission. In fact, generally academic freedom is viewed as a prerequisite for the advancement of knowledge, research and innovation, granting academics the right to individual thought and criticism and to pursue the truth without fear of retribution (Rostan 2010:S72). Notwithstanding this and even though universities and consequently the principle of academic freedom have been in existence for centuries (Altbach 2001:205-206), there is still no real consensus as to what academic freedom entails, and it is, according to Taylor and Taylor (2010:897) "highly contested and in many ways unclear".

Furthermore, internationally, the content of the principle of academic freedom is changing (Aarrevaara 2010:S56) due to, amongst others, the effect of the following factors (Rostan 2010:S71):

- The development of HEIs into more autonomous corporate bodies with the strengthening of administrative staff at the expense of the academic staff. In essence academic personnel have been confronted by more professionalised management, which tightens control over academics. This trend is known as managerialism, and the rise in managerialism is frequently cited for its impact on academic freedom (Karran 2007:290). In fact, the Attali Report in France, the Bricall Report in Spain and the Dearing Report in the UK all recommended a shift in the governance of HEIs from the collegial to a more corporate governance model (Karran 2007:290);
- The trend by governments to move away from state control of HE to stronger steering with a consequent rise in accountability by HEIs and academic staff. This is nowhere more apparent than in the establishment of a clear link

between receiving funding from government and the performance of HEIs and academics;

- The increase on demands from HEIs and academics alike to support economic development, innovation and social progress by producing a highly qualified labour force and employable graduates. This process is known as the growing expectation of relevance;
- The growth in new information and communication technologies to deliver open and distance learning across borders, which means that an academic could be located within a state or country in which academic freedom is protected, while presenting a qualification or course in a country where academic freedom is completely absent (Karran 2007:290). It should also be kept in mind that such collaborations are usually very lucrative for the parties involved, whilst the purpose of HE is to be for the public good (Karran 2007:290).

In view of the lack of clarity that exists regarding the definition of academic freedom and what it encompasses, and the impact of the factors described above, various scholarly contributions are considered in order to gain more clarity. Numerous scholars have contributed to the extended and complicated debate regarding academic freedom and how to define it – Altbach (2001), Berdahl (1990), Moodie (1996), Hall (2006), Higgins (2000a; 2000b), Du Toit (2007), Bentley, Habib and Morrow (2006), Waghid, Berkhout, Taylor and De Klerk (2005), to name but a few.

According to Altbach (2001:206) academic freedom has since the inception of universities meant "the freedom of the professor to teach without external control in his or her area of expertise, and the freedom of the student to learn". This freedom was not exercised without limitation, however, as even in medieval times both the state and the church exerted a certain amount of control over universities (Altbach 2001:206). This definition of academic freedom as the freedom to teach without external control and the freedom to learn, was further refined with the rise of the research-orientated Humboldtian university in the early 19th century, that propounded the principles of *Lehrfreiheit* and *Lernfreiheit* – the freedom to teach and the freedom to learn, with research becoming part of the academic mission of the university (Altbach 2001:206). By the end of the 19th century the idea of a research university

had spread across the Atlantic Ocean and by the beginning of the 20th century the American Association of the University Professors (cited by Altbach 2001:207) defined academic freedom as an encompassing principle, inclusive of all issues, not only those matters related to the field of scholarly expertise or knowledge (Altbach 2001:207).

Berdahl (1990:171-172) agrees that academic freedom is the freedom of the individual scholar in his or her teaching and research to pursue the truth wherever it may lead without fear of punishment or termination of employment for having offended some "political, religious or social orthodoxy". The focus of this definition is therefore the freedom of the individual scholar, with no provision being made for the student's freedom to choose what to study or where to study, as provided for by, for example, Altbach (2001). Furthermore, accountability and limitations to exercising the freedom of the individual scholar, as found in for example the "Academic Freedom Statement" of the Academy of Science of SA (ASSAf 2010:Online), are also absent from this definition. Concurring with Berdahl (1990), Moja and others (1996:134, citing Van Vught 1991) identify the right of individual teachers and researchers to pursue knowledge, and to choose what they will assert in research and teaching, without fear of any form of orthodox persecution, as the common elements of academic freedom.

Along similar lines Moodie (1996:129) argues that academic freedom refers to the right of academics and scholars to be free to pursue and proclaim the truth in teaching and research without interference from unqualified outsiders, with the proviso that this cannot be exercised unconditionally (Moodie 1996:137). Waghid and others (2005:1184) take this point further by arguing that academic freedom is, in essence, the unbiased and objective search for the truth during which the boundaries of knowledge and understanding are continuously and critically tested and expanded, whereas Ashby (1968:65) warns that academic freedom is only possible if universities use this freedom to pursue the truth and "do not turn aside to seek power".

Palfreyman (2007:20) cites the Canadian Association of University Teachers that academic freedom includes the freedom to do research, to publish the results of the

research, to teach and discuss, as well as the right to criticize the institution, all without fear of censorship. Further to this, academic staff shall not be hindered or impeded in any way by the university or the academic association from exercising their legal rights as citizens, nor shall they suffer any penalties because of the exercise of such legal rights (Palfreyman 2007:20). However, it is acknowledged that academic freedom entails a corresponding duty to use the freedom in a manner consistent with the scholarly obligation to do research and teaching in an honest search for knowledge (Palfreyman 2007:20). This definition does add a further element, namely the right of academic staff to criticize their universities and confirms that academic freedom comes not only with privileges and rights but also with corresponding responsibilities and obligations. Palfreyman's views are similar to those of Rostan (2010:S72), who declares that in the European tradition academic freedom consists of two components, namely the freedom of academics from external constraints in choosing topics, concepts, methods and sources, as well as the freedom of academics to make contributions in accordance with the standards determined by the academic community itself. This view has been supplemented by the American tradition of concern for academics' civil and political freedom, while considering academics' role in the society and the world (Rostan 2010:S72).

From what has been discussed, it is apparent that it is generally accepted that academic freedom in the broadest sense of the term refers to the long-accepted right of academics to teach and research what they choose, with elements such as freedom of research and publication, freedom of teaching, and freedom of extra-mural utterance. Lange (2010:3) adds to the list the right of academics to participate in Senate and having a say in the academic governance of an HEI. This means that academic freedom entitles academics collectively at an institution to make academic decisions without unnecessary interference from government, another institution or person (Krüger 2013:22). These decisions of the academics are made collectively, in accordance with the professional standards of the particular discipline and are referred to as academic self-governance (Krüger 2013:24-25). Academic self-governance is therefore an important aspect of academic freedom, even though academic freedom does not grant universities, academic staff or students the right to exercise it without limitations or accountability (Krüger 2013:26). Similarly, Malherbe argues that academic freedom includes the self-governing right of the institution to

decide for itself on academic matters and that academic freedom therefore has an institutional component (Malherbe 2003:220). The freedom of academics to participate in decision-making is also highlighted by Moodie (1996:130-131) who maintains that academic freedom refers to any or all of three claims, namely claims made on behalf of individual scholars, those on behalf of universities, and lastly the decision-making powers or rights of academics as a group or groups, referred to as "academic rule". Pertinent in this regard is Du Toit's (2007:20-30) viewpoint of academic freedom as a social compact comprising three distinct components, namely scholarly freedom in the context of the scholarly disciplines, academic rule in the internal structures of university governance and institutional autonomy in the universities' external relations to the state and society. He argues that these components should mutually enforce and complement each other, although in practice this harmony does not always exist and in fact, in some instances there have been conflict between these different components (Du Toit 2007:20-30). The incorporation of institutional autonomy as a component of academic freedom adds a further dimension to an already complicated debate.

Other related facets of academic freedom mentioned by Waghid and others (2005:1184) are compliance with professional and ethical norms, the right to be assessed by one's academic peers and not by outsiders, and the right to tenure, which is the right to, having complied with reasonable criteria, be appointed to a permanent position and to occupy such position until retirement from the institution. The right to tenure includes the right to form and express academic opinions without fear that one's tenure will be affected (Waghid *et al.* 2005:1184). Along similar lines, Malherbe (2003:219) argues that academic freedom refers to "the freedom of anyone engaged in the practice of science to teach and to do research as they deem fit without interference" and identifies the following elements of academic freedom, namely the freedom to teach and research without outside interference, the freedom to decide who shall teach and conduct research and the right of tenure.

However, academic freedom is not an inalienable right, as it has to be balanced with all the other constitutional rights (HEQC 2007:5). Even though researchers and teachers in HE and the research community should be free to follow their own ideas, arguments, insights and findings, such features will always be conditional and must

be free of scholarly misconduct such as plagiarism, falsification of data and unethical research practices (ASSAf 2010:Online). In fact, in some aspects, academic freedom is a relative right, as teaching and research are informed by the institutional missions of universities, which in turn are aligned with the goals of society (HEQC 2007:5). Consequently, academic freedom can never be seen in isolation.

In this regard Hall's (2006:8-10) distinction between the "classic" and the "contextual" interpretation of academic freedom is noteworthy. The classic interpretation of academic freedom occurs when academic freedom is seen as the institutional form of a human right, which originates from the formulation of academic freedom by TB Davie (explored in 3.4.1), whilst the contextual interpretation of academic freedom allows for universities to change with political realities (Hall 2006:8-10). In this interpretation the freedom of intellectual life is not automatically associated with the independence of the university as an institution, and academic freedom and institutional autonomy are seen as separate concepts (explored in 3.8) (Hall 2006:8-10).

3.3 THE STATUS OF ACADEMIC FREEDOM IN THE EU AND AFRICA

Any discussion about academic freedom will be incomplete without considering academic freedom and its status in countries other than SA. The question that is considered is the extent to which academic freedom exists in other countries and the level of protection afforded to academic freedom. The focus firstly is on the EU, because of the importance of processes such as the Magna Charta Universitatum (1988:Online) and Bologna Declaration (1999:Online) for academic freedom (see 3.3.1).

3.3.1 Academic freedom in the European Union

As a point of departure for any discussion about academic freedom in the EU is the Magna Charta Universitatum that was signed by 388 Rectors of universities in Bologna on 18 September 1988. The Magna Charta Universitatum determines, in relation to freedom in research and training, that it "is the fundamental principle of university life, and governments and universities, each as far as in them lies, must

ensure respect for this fundamental requirement" (Magna Charta Universitatum 1988:Online).

The Salamanca Declaration, adopted on 29-30 March 2001 by 300 European HEIs and their main representative organisations in Salamanca, again committed the institutions to achieving the goals of the Magna Charta Universitatum 1988, with specific reference to academic freedom (EUA 2001:Online). Also of importance is the 2000 EU Charter of Fundamental Rights, granting protection to academic freedom in Article 13 that declares that "(t)he arts and sciences shall be free of constraint" (EU 2000:C364/11). Academic freedom shall be respected and this will have to be exercised with respect for human dignity and subject to the limitations set out in Article 10 of the Charter that declares that everyone has the right to freedom of thought, conscience and religion, which includes the right to conscientious objection (EU 2000:C364/10-C364/11).

Having gleaned the status of academic freedom in the EU from the mentioned processes, the protection afforded to academic freedom in the member countries of the EU is considered. According to the League of European Research Universities (LERU) (2010:Online) a large number of European constitutions and legislation deal with academic freedom. In these constitutions academic freedom is formulated "… either in the abstract or as an individual right, often uniting and specifying a number of freedoms (e.g. freedom of speech, conscience, association, and information)", which can be seen in the constitutions of countries such as Spain, Hungary, Poland, Portugal and Slovakia (LERU 2010:Online). Karran (2007:289) has performed a comprehensive evaluation of the health of academic freedom in the EU[6] and the level of protection afforded to academic freedom in universities in the EU by comparing the constitutional protection and specific legislation relating to freedom of speech, academic freedom, institutional governance, the appointment of the Rector and academic tenure. From the information gathered from 23 nation states (Karran 2007:292) it was established that freedom of speech, which is directly linked to academic freedom, was enshrined in their constitutional documents, except in the UK which does not have a written constitution and where legal restrictions were

[6] Cyprus was excluded as part of it was controlled by Turkey and it was impossible to get definitive information from the Belgian communities (Karran 2007:292).

placed on the freedom of expression (Karran 2007:293). Also, the Constitution of the Netherlands did not specifically mention freedom of expression, but did specify that permission need not be obtained before publishing (Karran 2007:293). It also became apparent that in 13 of the EU member states academic freedom (freedom of scientific research and the art of teaching) is enshrined in their constitutions, although in Germany and Greece this freedom is subject thereto that in the practising of academic freedom the provisions of the constitution had to be obeyed (Karran 2007:293). The Greek constitution contains the following provision, "… (a)cademic freedom and the freedom to teach do not override the duty to obey the Constitution", while the Basic Law of the Federal Republic of Germany specifies that "… (a)rt and science, research and teaching are free…" but that the freedom of teaching "… shall not release any person from allegiance to the Baisc Law" (LERU 2010:Online). Similar limitations to the practising of academic freedom can be found in the Spanish Constitution (LERU 2010:Online). In fact, in Estonia, Finland, Italy, Lithuania, Portugal and Slovenia not only is freedom of teaching and research protected constitutionally, so is the institutional autonomy of universities (Karran 2007:294). The constitution of Finland, for example, determines that "… universities are self-governing, as provided in more detail by an Act", while the Estonian Constitution declares that "… (u)niversities and research institutions are autonomous within the restrictions prescribed by law" (LERU 2010:Online). In countries where academic freedom and freedom of speech are enshrined in the constitution, the level of protection afforded to academic freedom is high (Karran 2007:294). The absence of such inclusion in the constitution means that the level of protection afforded to academic freedom is low (Karran 2007:294). Applying this classification system, countries such as Austria, Estonia, Finland, Hungary, Italy and Latvia were found to have high levels of protection of academic freedom, while countries such as Denmark, Germany, Ireland, Malta, Sweden and Greece were classified as granting medium protection and the Netherlands classified as granting low protection (Karran 2007:295). This view of intellectual freedom, namely that society's interests in reaching academic goals are best served by allowing the qualified officials of universities to take the substantive decisions (institutional autonomy), emanated during the fifteenth and sixteenth centuries in Europe in order " … to protect the corporate interests of the rising universities from undue governmental interference" (Downs 2009:Online). In fact, "… (s)ome European countries such as Great Britain

have long stressed the institutional dimension of academic freedom, and it has also carried significant weight in the United States..", despite the tradition of individualism and individual rights that is prevalent in the USA (Downs 2009:Online).

National constitutions are however not the only source of protection for academic freedom (Karran 2007:295). An analysis of EU legislation dealing with HE found that, with the exception of Malta and Greece, all EU nations have legislation relating to HE, which refers to academic freedom and/or institutional autonomy (Karran 2007:295). The legislation in countries such as Ireland, Latvia, Poland, Slovakia, Slovenia and Spain pertinently provides for the protection of academic freedom in teaching and research and the institutional autonomy of universities, while legislation in countries such as Austria, France, Germany, Italy, Hungary and Italy provides for protection of teaching and research, but does not mention the institutional autonomy of universities (Karran 2007:295). In Austria, for example, academic freedom is not only protected by legislation, but it is also determined that academics may not be forced to participate in work that is contradictory to an academic's conscience (Karran 2007:295). The conclusion reached is that the health of academic freedom varies between countries, depending on the contents of the constitutions and other related legislation (Karran 2007:310).

3.3.2 Academic freedom in Africa

The focus of this study is to determine the implications of the Amendment Act for the academic freedom and institutional autonomy of HEIs in SA. It therefore makes sense to also consider academic freedom in Africa. It is important to understand that HE in Africa has been shaped by the colonial HE policy to which it was subjected, with the most common elements of such policy being limited access to HE, the language of instruction in HE being the language of the colonizer, the limits on academic freedom and institutional autonomy and the limited curriculum (Teferra & Altbach 2004:23-24). One important characteristic of HE in Africa is the level of involvement of the state in the running of the system, although countries such as Ghana and Uganda have independent structures responsible for the running of the HE system, with government retaining an oversight function (Divala 2009:1139). In other countries, such as Kenya and Zimbabwe, there are high levels of state control

over HEIs, with the head of the state even nominating Councils (Divala 2009:1139). This relationship between government and HEIs (see Chapter two) is closely linked to the academic freedom and institutional autonomy of HEIs. In such instances of high state control (see Chapter two) there can be very little academic freedom and institutional autonomy.

Academic freedom ensures that academics are able to teach and research freely and to publish their results and ideas without fear of retribution, which is possible in a society that respects and promotes freedom of expression (Teferra & Altbach 2004:40). However, most African governments do not tolerate criticism and are generally intolerant of academic freedom (Teferra & Altbach 2004:40). The consequence of this is a culture of self-censorship where academics take care when expressing their opinions, being careful not to offend government, for fear of being kidnapped, imprisoned or even killed (Teferra & Altbach 2004:40). This intolerance by government of what it perceives as unwarranted or unacceptable critique is mirrored by what happened a number of years ago when the Ethiopian government imprisoned numerous professors from the University of Addis Ababa in a response which in essence amounted to nothing less than political repression (Altbach 2001:212).

3.4 THE DEVELOPMENT OF ACADEMIC FREEDOM IN SOUTH AFRICAN HIGHER EDUCATION

Academic freedom continues to evolve as the national and HE context within which it is practised develops. This exploration now turns to focus on a historical perspective of the development of academic freedom in SA.

3.4.1 Academic freedom under apartheid

When considering the development of academic freedom under apartheid, the TB Davie formulation of academic freedom will be explored, as well as infringements on academic freedom by government during this period.

Apartheid resulted in a fragmented and disjointed HE system which formed the basis for the restructuring of the SAHE system after 1994 (see 1.1 and 2.6). Due to the very nature of apartheid, human rights viloations by government were rife during this period. It is therefore not surprising to find numerous incidents of infringements on academic freedom.

One of the most tragic examples of government's actions is found in the case of David Webster. Webster (an anthropologist), who lectured at Wits, was assassinated in 1989 due to his political activism (James 2009:Online). Infringements on academic freedom were not confined to the open universities, but affected all universities. This is illustrated by the Albert Geyser case. Geyser started his career as a lecturer in the Faculty of Theology at UP, but a number of years later had no choice but to resign and accept a professorship at Wits because he had argued that apartheid could not be justified on biblical or theological grounds (Van Aarde, De Villiers & Buitendag 2014:1-3). He continued to express his views and this culminated with the issuing of a public statement supported by a number of academics against the removal of Coloured representation in parliament (Van Aarde *et al.* 2014:5). The persecution he suffered as a result of his beliefs was intense – some of his academic colleagues plotted against him, his phone was tapped, his mail intercepted and at one stage the brakes of his car were tampered with (Van Aarde *et al*. 2014:5,7). This persecution did not end with Geyser, as his supporters were also targeted (Van Aarde *et al*. 2014:1). One such supporter, Cas Labuschagne's lectureship at UP was terminated (Van Aarde *et al*. 2014:1). Academic freedom includes the right to pursue the truth, to be critical and to voice concerns without fear of persecution or retribution (see 3.2). It is clear from these examples that government, and even worse, some academics, had no respect for the academic freedom of these individuals.

In SA the concept of academic freedom can be traced back to the 1950's definition of academic freedom by TB Davie (Higgins 2000a:106). Davie (1895 - 1955) was the Vice-Chancellor of the UCT from 1948 to 1955 and was recognised as an avid supporter of academic freedom and university autonomy (Higgins 2000a:106).

When addressing a graduation ceremony at Wits (Higgins 2000a:106)[7] Davie first presented what was to become the generally accepted (although contested) South African definition of academic freedom, later known as “the classical formulation” (Hall 2006:370-373).

The TB Davie definition of academic freedom encompasses the freedom or the right of HEIs to decide without external influences on (Higgins 2000a:106):

(a) who shall teach?
(b) what shall be taught?
(c) how shall be taught? and
(d) who shall be taught?

This definition later gained international recognition when Judge Frankfurter in the United States of America (USA) in the case of Sweezy v New Hampshire 354 U.S. 234 195 stated that "(i)t is the business of the university to provide that atmosphere which is most conducive to speculation, experiment and creation (Gauntlett 2013:Online; Sweezy v New Hampshire 354 U.S. 234 195). It is an atmosphere in which there prevail the four essential freedoms of the university - to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study" (Gauntlett 2013:Online; Sweezy v New Hampshire 354 U.S. 234 195).

The TB Davie definition entails that HEIs must be permitted to appoint their staff because of their fitness for the positions for which they applied on the basis of their scholarship and experience (Higgins 2000a:106). The staff so appointed shall teach the truth as they see it and not as demanded by others on the basis of for example religious, social, political or other ideologies (Higgins 2000a:106). The methods of teaching applied shall be free of interference and the selection and admission of students shall take place on the basis of their intellectual capability, and not on other grounds such as ethnicity or race (Higgins 2000a:106).

[7] Smith (1995:680) differs from Higgins (2000a:106) and argues that the outline of the TB Davie definition can be found in an address by TB Davie to new students of the UCT.

When considering the TB Davie formulation of academic freedom the period during which it was formulated should also be taken into account, as any discussion about the definition or meaning of academic freedom will be influenced by the lens through which the principle or concept is considered (Lange 2010:3). This is especially true in the case of SA, where the period prior to 1994 was marked by government's implementation of its apartheid policy, which articulated into the legislation enacted for HE during this period (see 1.1. and 2.6.1.)

The difference in the position of HEIs before and after 1959 in relation to admission of students is also significant, because before 1959 UCT and Wits admitted students on academic grounds, without considering factors such as race, ethnic origins or faith (Academic Freedom Committees 1974:vii), in effect opposing the apartheid legislative measures pertaining to admissions. At UCT this opposition was publicly expressed in a ceremony held on 29 July 1959 where a dedication was signed by the top office bearers of the institution (Academic Freedom Committees 1974:10-11) that declared that:

> We are members of a University which since its foundation has always been free to decide whom to admit to its fellowship.
> In exercising this freedom our University has acted in the belief that the only valid criterion for entry to University is academic merit.
> Nevertheless, without consultation with our University, without its consent, and in our view, for no sufficient reason, a law has been passed authorizing the Government to impose restrictions based on colour.
> We wish to testify from our own experience that relations in our University have been harmonious, the mutual understanding has been fostered, and that our very diversity has enriched our academic life and helped us to contribute to the advancement of knowledge.
> We dedicate ourselves to the tasks that lie ahead: to maintain our established rights to determine who shall teach, what shall be taught, and how it shall be taught in this University, and to strive to regain the right to determine who shall be taught, without regard to any criterion except academic merit.

During the years that followed, the TB Davie definition was interrogated and extended by several scholars. In 1960, De Kiewiet (quoted by the Academic Freedom Committees 1974:4) presented the TB Davie Memorial Lecture at UCT and presented his definition of academic freedom namely "… the right of scholarship to the pursuit of knowledge in an environment in which the emancipating powers of knowledge are the least subject to arbitrary restraints. This means that scholarship and the teaching or writing in which it expresses itself must be free to deal with the major problems or issues of the age." The crux of this statement is that academic freedom is defined as the right of the members of academe to pursue knowledge in an enabling environment and the right to deal with current issues. The reference to the "major problems or issues of the age" in all probability pertains to the right of academe to comment on and criticize government's apartheid policy. Another example of support for the TB Davie definition can be found in the 1964 TB Davie Memorial lecture by Thouless (cited by Higgins 2000b:9) who reiterated the TB Davie definition of academic freedom.

During the apartheid period a noteworthy development from a policy perspective was the appointment in September 1968 of the Van Wyk de Vries Commission (see 2.6.1).

The Van Wyk de Vries Report[8] stated in relation to academic freedom that:

> In the exercise of its academic freedoms the community of 'scholars' cannot claim the right to decide what the interests of the community, society or the State should be, nor can it ignore the realities of those interests. It is unrealistic and fallacious to argue that such a community of 'scholars' has a right or a freedom derived from an international tradition or ideal or for that matter its own tradition; it is equally erroneous to argue that a community of 'scholars' (or a university) is at liberty to place itself beyond or above its community, society or State, there to determine its own character and nature, its own ethical and moral norms, and to operate as an *imperium in imperio*. (Van Wyk de Vries

[8] The Main Report of the Commission of Inquiry into Universities has popularly become known as the "Van Wyk de Vries Report" (Higgins 2000b:6).

Commission, 1974, section 6.22 cited by the Academic Freedom Committees 1974:4).

Scholars appear to be in agreement (for different reasons though) that the Van Wyk de Vries Report was disappointing. The Report is described as an "abstruse and complicated, not to say incoherent, account of the relation between university, society and the state" (Du Toit 2013:30) and by implication rejected the concept or principle of academic freedom based on institutional autonomy (Du Toit 2013:30). The central point that should however not be forgotten when reading or interpreting this Report is that the Commission had failed to reach consensus on the definition of academic freedom (Higgins 2000b:6).

Much has been said about how the apartheid policy of government influenced HE and HEIs during the period before 1994. However, there are different views about whether it was government and its apartheid policy alone that had eroded the academic freedom of HEIs prior to 1994. Murove and Mazibuko (2008:107-108) are of the opinion that although the apartheid policy of government is usually blamed for the erosion of academic freedom of HEIs during the apartheid period, there is another view that has to be considered, namely that some of the HEIs themselves had played a crucial role in enforcing government's apartheid policy in their operations and that they had actively co-operated with government in the implementation of the apartheid policy. On the basis of actions taken by the so-called 'open universities' (see 2.6.1) it can be argued that the view of Murove and Mazibuko, as a generalisation, holds true mainly for the historically Afrikaans universities. This is confirmed by Hall's arguments (2006:13) when he points out that during this era the proposed amendments to legislation and attempts by government to extend its control over HEIs were opposed by the open universities "in terms of the classic principles of academic freedom". Taylor and Taylor (2010:898) also argue that the open universities, under the banner of academic freedom resisted the government's interventions. Murove and Mazibuko's views (2008:107-108) are qualified by Bunting (2007:40) who points out that the historically Afrikaans universities aligned themselves (at least up to 1990) with government's apartheid policy to ensure their survival (also in financial terms) and that they

therefore did not join the fight for or defence of institutional autonomy or academic freedom in which the open universities were embroiled.

There is agreement that during the apartheid years in SA the TB Davie definition of academic freedom was at the centre of any discussion or debate regarding what constitutes academic freedom (Taylor & Taylor 2010:897). In fact, until the late 1980s academic freedom was generally defined on the basis of the TB Davie formulation (Higgins 2000a:107). The question that now presents itself is whether the 1950s TB Davie formulation of academic freedom is still valid in the post-apartheid SA.

The view held by Southall and Cobbing (2001:4) is that the TB Davie definition of academic freedom constituted the major defence of the HEIs that were opposed to the intrusion by the government during the apartheid period, while Moodie's (1996:131) and Du Toit's (2007:20-30) critique of the TB Davie formulation of academic freedom is that both the right of the student to study where he or she chooses and the right of the student to study what he or she chooses are absent from the TB Davie definition of academic freedom. This can be explained considering the period in SA during which the TB Davie formulation was construed and the principles that had underpinned the definition, namely the resistance by the so-called open universities against government's apartheid policy (Du Toit 2007:20-30). This is emphasised by Du Toit when he declares that "(i)n the 1950's when TB Davie distilled his formula for academic freedom in terms of the primary need for safeguarding the institutional autonomy of the universities, this happened in the context of traditional practices of academic self-rule" (Du Toit 2000:88). Du Toit goes on to argue that the TB Davie definition in its conceptualization of academic freedom was "inadequate and peculiarly limited, despite the elegance of the four freedoms", which in essence was an assertion of institutional autonomy against the possible interference by the state (Du Toit 2013:29-30). Another major criticism is that the TB Davie definition of academic freedom did not deal with the question of a university's accountability, other than to the university itself (Du Toit 2013:29-30). Similar views can be found in the HEIAAF Task Team Report where it is stated that the TB Davie formulation of academic freedom cannot be classified as 'classic' as it was the outcome of a particular political stance, namely the opposition to

government's apartheid policy (HEIAAF Task Team 2008:20). The conclusion is drawn that the TB Davie formulation is no longer appropriate for the post-apartheid context (HEIAAF Task Team 2008:20) and that reconceptualization of the concepts of academic freedom, institutional autonomy and accountability is required (HEIAAF Task Team 2008:20). This is echoed by Taylor and Taylor who consider the classic formulation of academic freedom by TB Davie to be nothing more than "a moral stand against apartheid" (Taylor & Taylor 2010:911).

On the basis of the shortcomings in the TB Davie definition and the changes that have taken place in SA since 1994, it is argued that the application of the TB Davie definition in the post-apartheid SA needs to be re-considered (see 3.9).

3.4.2 Academic freedom under democracy

In February 1990 F.W. de Klerk, the leader of the NP, announced in Parliament that apartheid was to come to an end (Shear 1996:xi). The first democratic elections took place on 27 April 1994, whereafter SA was governed by a multiparty Government of National Unity with Nelson Mandela as the leader of the majority party, the ANC, as President of SA (Shear 1996:xi). During this early period of democracy many had expectations that the academic freedom and institutional autonomy of HEIs would increase (Jonathan 2006:65) which, at first glance, would appear to be true with the incorporation of academic freedom into the Interim Constitution and thereafter of academic freedom and scientific research into Section 16 of the Constitution of SA (RSA 1996:1249) that came into effect on 4 February 1997 (RSA 1996:1241).

The Constitution of SA 108 of 1996 and the Bill of Rights (RSA 1996) is the supreme law of SA. The Bill of Rights enshrines the rights of all people in SA and affirms the democratic values of human dignity, equality and freedom, with academic freedom and scientific research incorporated in Section 16(1)(d) (RSA 1996:1249), as part of the right to freedom of expression. With this incorporation into the Bill of Rights, SA became one of only a few countries where both academic freedom and scientific research are constitutionally entrenched (Alston & Malherbe 2009:102).

Section 16(1)(d) of the Bill of Rights contains the following provisions (RSA 1996:1249):

16. FREEDOM OF EXPRESSION

(1) Everyone has the right to freedom of expression, which includes
    (a) freedom of the press and other media;
    (b) freedom to receive or impart information or ideas;
    (c) freedom of artistic creativity; and
    (d) academic freedom and freedom of scientific research.
(2) The right in subsection (1) does not extend to
    (a) propaganda for war;
    (b) incitement of imminent violence; or
    (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

It is clear that this formulation can be considered as a version of the so-called classical interpretation of academic freedom (the TB Davie formulation) as referred to by Hall (2006:8). In fact, Gauntlett (2013:Online) believes that the drafters of the Constitution were aware of TB Davie's four freedoms and intended for these to serve as the basis of the wording reflected in this Section 16 of the Constitution (RSA 1996:1249), without pertinently quoting the four freedoms.

When reflecting upon the meaning and implications of the incorporation of academic freedom and scientific research in the Bill of Rights as part of the section dealing with freedom of expression (Section 16) (RSA 1996:1249), it is noted that it bears a striking resemblance to the views of the Academic Freedom Committees of UCT and Wits who held that academic freedom cannot be separated from human freedom, that freedom of person, speech, movement and assembly are essential for an HEI in its search for the truth and that academic freedom is closely linked with the fundamental rights of a free society (Academic Freedom Committees 1974:4-5). The importance of the incorporation of academic freedom and freedom of scientific research in the so-called freedom of expression clause of the Bill of Rights (Section 16) (RSA 1996:1249) has to be acknowledged (Malherbe 2003:218), because on the

one hand it means that academic freedom is an enforceable legal right (protected by the Constitution of SA) (RSA 1996) and on the other hand it means that academic freedom forms part of the "key freedom rights such as privacy, belief, opinion and conscience, expression, freedom and security of person, and freedom of assembly, association and movement, all of which protect individual freedom, the cornerstone and founding value of any civilised and democratic state" (Malherbe 2003:218). Another consequence of the incorporation of academic freedom and scientific research in Section 16 of the Bill of Rights (RSA 1996:1249) is that scholars have utilized this as the basis of their definition of academic freedom.

Notwithstanding that the principle of academic freedom has been enshrined in the Bill of Rights (RSA 1996), it does not specify what this right encompasses or entails (Bentley *et al.* 2006:16).

Malherbe (2003:218) argues that "(j)ust as freedom of movement allows the individual physically to move about freely, so academic or intellectual freedom, together with freedom of thought, conscience, opinion or expression, ensures that we may follow wherever the explorations of the mind may lead" and that the right to academic freedom encompasses "the freedom of anyone engaged in the practice of science to teach and do research as they deem fit without interference." It is further argued by Malherbe that the right to academic freedom contained in Section 16 (1)(d) of the Bill of Rights (RSA 1996:1249) also includes another principle, namely institutional autonomy, as juristic persons are also entitled to the rights as defined in Section 16(1)(d), in terms of Section 8(4) of the Constitution that states that "(a) juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person" (Malherbe 2003:220; RSA 1996:1247). Along similar lines the HEIAAF Task Team points out that the right to academic freedom specified in Section 16(1) of the Bill of Rights (RSA 1996) has been extended to everyone as the formulation of this Section does not specifically mention either HEIs or the academics themselves (HEIAAF Task Team 2008:viii). An HEI, as a juristic person, is therefore entitled to the rights contained in the Bill of Rights to the extent required by the nature of the right and the nature of the juristic person (Malherbe 2003:220). In fact, the nature of this right contains an institutional component and the nature of a university requires that it be recognised as a "bearer

of the right to academic freedom" (Malherbe 2003:220). Chapman (2015:262) however, when considering certain of Higgins' contributions, states that "… (a)cademic freedom in South Africa, we are reminded, is defined constitutionally not as an institutional practice, but as an individual right".

Another question that requires consideration is the extent of the rights specified in Section 16(1) (RSA 1996:1249). The provisions of Section 16(2) of the Bill of Rights (RSA 1996:1249) provide the required clarity and specify that these rights are not without boundaries. The first limitation (Gauntlett 2013:Online) specified in Section 16(2) of the Bill of Rights will apply, namely that the right to academic freedom and scientific research may not extend to propaganda for war, incitement of imminent violence and advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

The right to academic freedom and scientific research will further also be subject to the limitations specified in Section 36 of the Constitution that provides as follows (RSA 1996:1261,1263):

36. Limitation of rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

This means that academic freedom is a judicially enforceable constitutional right (even though the content of what constitutes academic freedom may be undefined and disputed), subject only to such limitations as provided for in Section 36 of the Constitution (RSA 1996:1261,1263) (with due cognisance to the provisions of Section 16(2) of the Bill of Rights) (Malherbe 2003:221). This view is similar to that of Gauntlett (2013:Online) that the incorporation of academic freedom and scientific research in Section 16 of the Bill of Rights (RSA 1996:1249) means that academic freedom itself is now "constitutionalised".

The question can be posed whether the incorporation of the right to academic freedom and scientific research under the freedom of expression clause in the Bill of Rights is correct and appropriate, since academic freedom, as per the TB Davie definition or formulation, also encompasses other fundamental rights, such as the right to freedom of association, the right to freedom of movement, the right of assembly, demonstration, picket and petition and the right to choose an occupation or profession freely. The right to education, and the rights regarding language and culture and membership of cultural, religious and linguistic communities are also implied (Gauntlett 2013:Online). It was concluded that SA, like the USA, has elected to recognise academic freedom as a constitutional right, but attached it to a main facet of its existence, namely the right to freedom of speech, although this does not confine the right or deny its interwoven nature with the other fundamental freedoms (Gauntlett 2013:Online). This argument is echoed in Krüger's statements that the right to academic freedom, as contained in Section 16 of the Bill of Rights (RSA 1996:1249) cannot be interpreted in isolation, and that it should be read, evaluated and interpreted within the context of the Bill of Rights and the Constitution (RSA 1996) as a whole (Krüger 2013:21).

As early as 1996 Moja and others (1996:135) declared that only time would tell how this very general statement about academic freedom in the Constitution would be practised, protected and contested. Since almost 20 years have elapsed since this statement it becomes necessary to reconsider this comment by considering the period since 1996 and evaluating the actions of HEIs relating to academic freedom during this period. Since this statement was made no court case regarding the right to academic freedom and scientific research has been brought before the Constitutional Court for determination (HEIAAF Task Team 2008:1; Du Toit 2013:43) and consequently, since this right has not been tested, it is open to different interpretations and views (Du Toit 2013:43). Of equal importance is the question as to why this right has never been tested in court. It might very well be that HEIs have not engaged in the defence of academic freedom in the post-apartheid SA, as had been the case during the apartheid era (Hall 2006:13).

Another perspective on academic freedom can be gained from HE legislative and policy documents that have been published since 1994 and specifically, as the primary source, the White Paper (RSA DoE 1997b).

In the White Paper academic freedom is identified as a core principle of HE (RSA DoE 1997b:Online) when it states that:

> The principle of academic freedom implies the absence of outside interference, censure or obstacles in the pursuit and practice of academic work. It is a precondition for critical, experimental and creative thought and therefore for the advancement of intellectual inquiry and knowledge. Academic freedom and scientific inquiry are fundamental rights protected by the Constitution.

The formulation of this definition and the way in which the principle of academic freedom has been accommodated in the White Paper (RSA DoE 1997b) is criticised and questioned by Higgins (2000a:113) who argues that "it is present only as a received idea to which it is necessary to pay lip service before moving on to practical matters." The same author (Higgins 2000a:113) argues that the wording or formulation of the definition is problematic, because of the use of the word 'implies'. If academic freedom 'implies' the absence from outside interference, such implication could be challenged, whilst the word 'precondition' is much more than a mere 'implication' (Higgins 2000a:113).

3.5 SUMMATIVE PERSPECTIVES ON ACADEMIC FREEDOM

On the basis of the scholarly contributions reviewed (see 3.2) it is concluded that academic freedom is the freedom or right of anyone engaged in the practice of science to teach and to do research as they deem fit (Malherbe 2003:219) (including the freedom to publish (Lange 2010:3; Palfreyman 2007:20), without undue influence from government or institutions (Krüger 2013:24-25). The exercise of this freedom must be rooted in the unbiased and objective search for the truth (Waghid *et al.* 2005:1184). Also included in the right of academics to take academic decisions collectively and in accordance with the professional standards of the particular discipline (Krüger 2013:24-25) is reference to academic scholarly freedom and

academic self-governance (Du Toit n.d.:6-8). However, the exercise of freedom goes hand in hand with privileges and obligations such as the duty to use this freedom in a manner consistent with scholarly obligations and to perform research and teaching in an honest search for knowledge (Palfreyman 2007:20). Academic freedom and the exercising thereof are subject to the limitations contained in the SA Constitution (RSA 1996) (academic freedom was according to Altbach 2001:206 never without limitation). The principles of *Lehrfreiheit* and *Lernfreiheit*, as students are entitled to choose where they study and what they study (Altbach 2001:206) also comprises elements of academic freedom.

Having identified the different components of academic freedom, the researcher argues that when considering academic freedom there should be a natural distinction on the basis of who is afforded academic freedom, namely the individual academic, academics as a group or the student, because the definition of academic freedom is related to the privileged holder of that freedom. It is argued that the freedom of the individual academic amounts to the right to teach and to do research as he or she deems fit, without undue interference. The right to publish the findings or outcomes of research is implicit to and a normal outcome of the right to do research and is therefore not included in the definition of the individual academic's freedom. Academic freedom for groups of academics includes the right of the individual academic to teach and do research as he or she may deem fit (without undue influence), but it also includes the right of academics as a group to take decisions collectively. The student's right to academic freedom is the right to decide where and what he or she studies and includes the right to publish the outcomes of his or her research, without undue influence. All of these freedoms are subject to the limitations contained in the Constitution of SA (RSA 1996) and may therefore not be exercised in a manner that harms others, incites war, or infringes the rights of others, which means that academic freedom must be exercised responsibly.

3.6 CONCEPTUALIZING INSTITUTIONAL AUTONOMY

Institutional autonomy is closely linked to the nature of the relationship between government and HEIs (see Chapter two). Numerous definitions of what institutional autonomy encompasses have been presented, most of which have been contested

(Divala & Waghid 2008:2). The word “autonomy” has been derived from Greek terms with “auto” meaning “self, its own” and with “nomos” meaning “law” and refers to the idea that HEIs can protect their independence from the state and the private sector, in order to protect the freedom of the academics (Wright & Orberg 2008:30). It contains reference to self-government and freedom of action of both institutions and individuals (Wright & Orberg 2008:30). Lo (2010:128) similarly argues that autonomy refers to self-legislation or self-government, although what it encompasses will differ according to the particular social and legislative context of each country. Lo (2010:128) argues that institutional autonomy is a component of educational autonomy, while Divala and Waghid (2008:2) maintain that institutional autonomy and university autonomy are the same concepts.

Autonomy in the simplest of terms means the “power to govern without outside controls” (Berdahl 1990:171-172). Moja and others (1996:135), referring to Ashby, identify the following components of the concept of institutional autonomy, namely the freedom to select and examine students, the freedom to select and retain staff, the freedom to determine the curriculum and the standards thereof and the freedom to allocate funds within the particular institution. Wright and Orberg (2008:29-32) define autonomy as a concept or model whereby an HEI protects its independence from government and the private sector so as to preserve and protect the freedom of its academics, so that academics may decide on what and how to research and to teach without undue influence. The essence of this contribution is to equate autonomy to independence. This relationship between HEIs and society is further expanded on by Divala and Waghid (2008:3-4) when they argue that autonomy relates to the relationship between the HEI and its stakeholders, for example the parents, funders and also government, which concurs with Du Toit’s (2000:84-85) view that institutional autonomy is necessary for an HEI in its ever changing relationship with the external community. Du Toit (n.d.:7) offers one of the most comprehensive definitions of institutional autonomy, namely that:

> The institutional autonomy of the university refers to the extent to which the university in its various external interactions with the state, local communities or wider society, in relation to individual or corporate donors, etc. functions as an

autonomous corporation with recognised powers of self-government secured from interference by external agencies.

Berdahl (1990:171-172) identifies two distinctive separate components of institutional autonomy: substantive autonomy, which is defined as "the power of the university or college in its corporate form to determine its own goals and programmes … the what of academe" and procedural autonomy which is defined as "the power of the university or college in its corporate form to determine the means by which its goals and programmes will be pursued … the how of academe". The HEIAAF Task Team (2008:35-36) extends the substantive and procedural notions of autonomy defined by Berdahl (1990) and identifies the following versions of institutional autonomy namely:

- absolute autonomy (total autonomy is not viewed as viable),
- the TB Davie paradigm (academic freedom is interpreted as a negative right and easily combines academic freedom and institutional autonomy),
- substantive autonomy (the right to academic self-government is central, as with the TB Davie paradigm, but also acknowledges co-existing rights, duties and obligations),
- functional autonomy (HEIs must be able to function independently without undue interference, with the maintenance of academic freedom internally being regarded as irrelevant); and
- the instrumentalist view of autonomy (the institution's purpose and governance are to be aligned with the political goals of government and/or the market and this renders institutional autonomy redundant and the academic freedom of academics and student potentially void).

Institutional autonomy should promote the public good and the values of the academe, which are integral to HEs' social role and accountability (substantive autonomy) (HEIAAF Task Team 2008:38). Substantive autonomy is linked to an institutional defence of academic freedom by scholars, students and academics - the substantive goals of society (HEIAAF Task Team 2008:38). It also recognises that threats to academic freedom may originate internally or externally to HEIs and also

recognises mutual and correlative rights and duties (distinctive accountabilities on the part of the academics, institutional leadership, government and society) to ensure that HE is governed for the public good (HEIAAF Task Team 2008:38). A further view is that institutional autonomy or university autonomy is a component of academic freedom and refers to the "self-regulatory authority of the university to decide independently on academic related matters" (Waghid *et al.* 2005:1184). Yet it is acknowledged that such institutional autonomy is not unlimited and is applicable to the pursuance of the university's mission and vision to teach and to do research (Waghid *et al.* 2005:1184).

Another important connection that is established is the relationship that exists between institutional autonomy and accountability. In fact, institutional autonomy is inextricably linked to the accountability of HEIs, with institutional autonomy being defined as the right of HEIs to "govern themselves freely without intervention from any external party, while always remaining accountable to the public, to students and other stakeholders, meeting certain particularities common to universities the world over (eg Senates) and necessarily complying with applicable laws and regulations*"* (HEQC 2007:5). The definition, in so far as it deals with the right of HEIs to govern themselves and establishing that HEIs are accountable to stakeholders and have to comply with laws and regulations, is deemed acceptable. The researcher would argue, however, that although the compliance reference ensures that government's legitimate interest in HEIs is reaffirmed, it is actually unnecessary, as compliance is necessitated by law and is therefore an explicit requirement for all actions undertaken by an HEI (or any other legal person) in its operations.

3.7 THE DEVELOPMENT OF INSTITUTIONAL AUTONOMY IN SOUTH AFRICAN HIGHER EDUCATION

When exploring the development of institutional autonomy in SA, the position of HEIs under apartheid (see 3.7.1) and thereafter (see 3.7.2) are considered.

3.7.1 Institutional autonomy under apartheid

During the apartheid years both the English- and Afrikaans-medium universities (HWUs) enjoyed a measure of academic freedom and autonomy, subject to them functioning within the government's apartheid policy (HEIAAF Task Team 2008:17). The historically white Afrikaans medium universities aligned themselves with government's view that universities were "creatures of state" and considered themselves to be acting in government's service (Bunting 2007:40). The seven historically white technikons were conservative institutions sharing the same sentiments as the traditional white Afrikaans medium universities (Bunting 2007:47).

The historically white English medium universities acknowledged that they were public institutions who received funding from government, but they, by their very nature, were not servants to government, nor were they limited in their functions to the implementation of government's apartheid policy (Bunting 2007:42). During the 1980s the four historically white English medium universities took a strong stance against government, rooted in their belief that they were not dependent on government for their survival, because they had diversified income streams that made them less reliant on government funding (Bunting 2007:43). These universities strongly believed that there should be a distance between themselves and government (Bunting 2007:43).

The six HBUs were created not because of an academic need for their existence, but for political reasons, namely the need to "train black people who would be useful to the apartheid state" (Bunting 2007:45). The institutions had very little autonomy of any kind, as government exercised control over most aspects of the HEI, such as appointments, budgets and the curriculum (HEIAAF Task Team 2008:18). In this system autonomy did not exist (HEIAAF Task Team 2008:18). The status of institutional autonomy and what it entails for HEIs currently, specifically in the post-apartheid era in SA, will now be explored (see 3.7.2).

3.7.2 Institutional autonomy under democracy

In order to determine the status of institutional autonomy after democracy came to SA, the question of whether institutional autonomy is constitutionally protected is explored, where after certain policy documents are considered.

Whereas Malherbe (2003:220) argues (see 3.2) that the right to academic freedom also includes institutional autonomy seeing that "juristic persons are also entitled to the rights" as defined in Section 16(1)(d) (RSA 1996:124), this view is not shared by the HEIAAF Task Team. The Task Team maintains that institutional autonomy, in contrast to academic freedom, is not constitutionally protected (HEIAAF Task Team 2008:32). Apparently conflicting opinions exist regarding what institutional autonomy is and whether it is constitutionally protected.

Since there are conflicting opinions regarding whether institutional autonomy is protected constitutionally the views of government regarding institutional autonomy, reflected in HE policy documents are considered. One such view can be found in the White Paper (RSA DoE 1997b:Online) that:

> The principle of institutional autonomy refers to a high degree of self-regulation and administrative independence with respect to student admissions, curriculum, methods of teaching and assessment, research, establishment of academic regulations and the internal management of resources generated from private and public sources. Such autonomy is a condition of effective self-government. However, there is no moral basis for using the principle of institutional autonomy as a pretext for resisting democratic change or in defence of mismanagement.

The Preamble to the Higher Education Act contains the acknowledgment (RSA 1997:2) that it is desirable for HEIs to enjoy freedom and autonomy in their relationship with the State, while being publicly accountable. However, the use of the word "desirable" does not guarantee the institutional autonomy of any HEI and this does not really assist in defining the concept of institutional autonomy.

Relevant case law should also be considered, in so far as these judgments relate or may contribute to an understanding of the principle of institutional autonomy. The judgment by the Free State High Court in 2012 in the case of the Minister of Higher Education and Training and Others versus Central University of Technology, Free State (2776/2012, 2786/2012) [2012] ZAFSHC 144 (Minister v CUT 2012) is explored because of its significance, not only because it is the only time that the Minister has been challenged by an HEI in court regarding the appointment of an administrator for an HEI, but also because of the statements of Judge Daffue relating to the institutional autonomy of HEIs in SA.

In this case the High Court of the Free State was asked to rule on the Minister's decision to appoint an administrator for the Central University of Technology, Free State (CUT) (Minister v CUT 2012:144:2) in terms of Section 41A(1) of the Higher Education Act (RSA 1997). Arguments for the parties were heard on 19 and 20 July 2012 and judgment was handed down by Judge Daffue on 13 August 2012 (Minister v CUT 2012:144:2). The Application of the Minister was unsuccessful and in his judgment, Judge Daffue dealt specifically with the institutional autonomy of HEIs (Minister v CUT 144:54) declaring that:

> Universities in our country have a significant role to play and it is desirable that they enjoy freedom and autonomy in their relationship with the State within the context of public accountability. The Minister and his department must accept the autonomy of universities and should not be allowed to intervene in the affairs of a university unless the jurisdictional facts set out in section 41A(1) have been shown to exist. There is no doubt that the step taken by the Minister is a drastic one.

This High Court Judgment reaffirms that the institutional autonomy of HEIs should be respected by government (Minister v CUT 2012:144:54). This is highly significant, because institutional autonomy is not enshrined in the Constitution of SA (RSA 1996) and is only deemed "desirable" in terms of the Preamble to the Higher Education Act (RSA 1997:2) (see 2.6.2.6).

3.8 THE RELATIONSHIP BETWEEN ACADEMIC FREEDOM, INSTITUTIONAL AUTONOMY AND ACCOUNTABILITY

A discussion about the principle of academic freedom cannot take place without a reference to the concepts of institutional autonomy and accountability (Moja *et al.* 1996:134). Yet, the nature of the relationship between these concepts is not always clear. In fact, Moja and others (1996:136) deem accountability to be a "political issue, but one around which little consensus exists". This begs the question of what accountability for HEIs in SA entails.

The White Paper provides the following description (RSA DoE 1997b:Online):

> The principle of public accountability implies that institutions are answerable for their actions and decisions not only to their own governing bodies and the institutional community but also to the broader society. Firstly, it requires that institutions receiving public funds should be able to report how, and how well, money has been spent. Secondly, it requires that institutions should demonstrate the results they achieve with the resources at their disposal. Thirdly, it requires that institutions should demonstrate how they have met national policy goals and priorities.

This explication triangulates the accountability of HEIs, with HEIs being accountable to their Councils, to government and society as a whole. Accountability is also extended not only to include having to account for how funding received from government has been spent, but also having to account for the results achieved with such resources and how these have met the national policies and goals. This puts the emphasis firmly on the achievement of certain performance indicators by HEIs, for example producing competent graduates for the market. It is acknowledged that accountability for HEIs is a necessary requirement, but the question is whether focusing on the performance of HEIs in this manner does not detract from the essence of what an HEI is, namely a place dedicated to the search for the truth.

Hall (2006:370) posits that academic freedom and institutional autonomy are related, but distinctly separate concepts (Hall 2006:370), whereas Wright and Orberg

(2008:30) regard the relationship between academic freedom and institutional autonomy as being one where they go “hand in hand”. The distinction between academic freedom and institutional autonomy is confirmed by Berdahl’s contributions (1990:171-172) and the HEIAAF Report (HEIAAF 2008:69). The importance of the link that exists between academic freedom and institutional autonomy is aptly described by Habib and others (2008:148) who argue that institutional autonomy is a prerequisite for academic freedom and Aarrevaara (2010:S61) who argues that academic freedom is integral in guaranteeing the independence or autonomy of HEIs from the government.

Having explored the relationship between academic freedom and institutional autonomy, the question about what the nature of the relationship between academic freedom, institutional autonomy and accountability is, remains. Moja and others (1996:134) believe that the concepts of academic freedom, institutional autonomy and accountability are linked together “through a variety of mechanisms and agreements that connect individuals, institutions, state and civil society” (see 1.6). It is argued that greater autonomy of HEIs would normally mean that HEIs are in a better position to defend their academic freedom, although their accountability will undoubtedly remain (Berdahl 1990:171-172). Academic freedom and institutional autonomy can also not be separated from the responsibility or accountability of HEIs, although academic freedom is considered a legal and constitutional matter, while accountability and autonomy are institutional administrative matters that have yet to be negotiated as part of the relationship between the government and HEIs (Moja *et al.* 1996:135-137).

When exploring this relationship between academic freedom, institutional autonomy and accountability, the purpose of HEIs in society should also be taken into account. HEIs are “providers of public good” and can be considered as the beneficiaries of the contract between the government and the citizens of SA (Pityana 2004:Online). In terms of this contract government has to provide quality education to the people of SA and to this end grants HEIs a certain measure of institutional autonomy and academic freedom, coupled with accountability (Pityana 2004:Online). This view, held by Pityana, that academic freedom and institutional autonomy of HEIs are inseparable from their responsibility or accountability, can also be found in the

writings of Moja and others (1996:135-137) and those of Van Wyk and Higgs (2004:199). The belief is that society has granted academic freedom and institutional autonomy to universities in the conviction that this is the best way to ensure that universities fulfil their obligations to society (Van Wyk & Higgs 2004:199). Divala and Waghid (2009:1202) maintain that if social justice and the good of society are promoted as goals for HE, even alongside the principles of efficiency, accountability and productivity in response to the local demands, HE will reclaim its capacity for autonomy.

Having established the relationship that exists between academic freedom and the social responsibility of HEIs it is argued that four reforms are necessary for the HE system in SA (Bentley *et al.* 2006:24-30):

- The creation of maximum space for academic freedom, which will stimulate knowledge production. Stakeholder participation in HEIs must also be increased, so that a variety of opinions may be considered. Linked to this is the requirement that HEIs must transform themselves to reflect the demographics of SA.
- The development by HEIs of third income streams. Consequently HEIs will not be dependent solely on state funding, which will promote institutional autonomy.
- The cultivation of an institutional culture in HEIs that rewards scholarship and intellectual productivity.
- The promotion by HEIs of academic entrepreneurialism outside the academic sphere.

Of equal importance is the view of Habib and others (2008:151) that more public funding for HEIs will enable or enhance institutional autonomy, but that this will not necessarily have the same value for academic freedom. These scholars argue that for academic freedom to be promoted structural reforms are required that will enhance the power of the academic cohort in relation to the power of the state bureaucrats and also empower individual academics in relation to the institutional administrators (Habib *et al.* 2008:151).

Juxtaposed to what have already been discussed, Waghid and others (2005:1177-1178) question whether institutional autonomy and academic freedom can co-exist with state regulation of HE. It is argued by these scholars that the regulation of HE implies "power-over" institutions, with the government in the position of power or authority over HEIs, and that institutional autonomy can only become effective once the government jointly develops "power-with" HEIs (Waghid *et al.* 2005:1177-1178). In such a dispensation the government does not regulate, but strives with HEIs to address challenges (Waghid *et al.* 2005:1177-1178). Such a relationship based on the principles of cooperation would allow HEIs the opportunity of exercising "power over themselves" (Waghid *et al.* 2005:1177-1178). This does not mean HEIs would not be held accountable, but that less regulation by government could create an atmosphere in which HEIs are desirous to contribute to all aspects of society (Waghid *et al.* 2005:1177-1178). In fact, these authors submit that HEIs should be measured against such contributions, rather than being measured against criteria prescribed in a framework that reduces public accountability to the principles of accounting (Waghid *et al.* 2005:1177-1178). The same authors further argue that institutional autonomy or university autonomy is a component of academic freedom and that such institutional autonomy is not unlimited (Waghid *et al.* 2005:1184). The view that autonomy is a component of academic freedom is not confirmed by the contributions of Moja and Cloete (1996), Moja, Muller and Cloete (1996), Berdahl (1990), Pityana (2004) and Bentley *et al.* (2006).

From this analysis of the contributions of these scholars the following is concluded regarding the nature of the relationship between academic freedom, institutional autonomy and accountability:

- Institutional autonomy and academic freedom are distinct, but separate concepts (Hall 2006:370-373, Berdahl 1990:171-172 and Wright & Orberg 2008:30);
- Institutional autonomy and academic freedom go hand in hand with accountability (Pityana 2004:Online);

- Without institutional autonomy, academic freedom is not possible (Habib *et al.* 2008:148); and
- Academic freedom is also coupled with the social responsibility of HEIs (Bentley *et al.* 2006:141).

It is clear from what has been discussed in this section (3.8), that there is a definite relationship between the principles of institutional autonomy and academic freedom. In fact, in terms of the so-called classic interpretation academic freedom and institutional autonomy are indissoluble (Hall 2006:370). However, the balance between institutional autonomy and accountability, which also comes into play (Moja *et al.* 1996:134), is a precariously delicate one.

3.9 CONCLUSION

In this chapter the secondary research question was addressed namely "What constitutes academic freedom and institutional autonomy?"

The conclusions derived in relation to academic freedom and institutional autonomy are the result of studying various legislative and policy documents, as well as numerous scholarly contributions.

Authors (Moodie 1996:130-13; Du Toit 2007:20-30, 2000:88; HEIAAF Task Team 2008:20; Taylor & Taylor 2010:911) agree that the application of the TB Davie definition of academic freedom in the post-apartheid era in SA should be reconsidered. In fact, a new definition of academic freedom should be formulated, because the TB Davie formulation of academic freedom was in essence the defence against government's implementation of its apartheid policy (Du Toit 2013:30). The TB Davie formulation was a direct result of the period during which it was formulated and was therefore based on the need for safeguarding the institutional autonomy of universities framed under the pretext of academic freedom (Du Toit 2013:30). Furthermore, the TB Davie definition of academic freedom does not provide for the following aspects: scholarly freedom (*Lehrfreiheit*), the student's right to choose where to study (*Lernfreiheit*) (Du Toit 2013:30), HEI's accountability (Du Toit

2013:30), research, nor does is deal with the obligations or limitations that are coupled with academic freedom (e.g. that academic freedom may not be exercised in such a way that it infringes the rights of others). Therefore it is concluded that the TB Davie formulation of academic freedom can no longer be appropriately contextualized in the post-apartheid period.

Should the TB Davie formulation of academic freedom not be accepted (as is argued here), the question arises what definition of academic freedom will be applied and how such definition will be conceptualized. It is argued that conceptualizing a new definition of academic freedom should appropriately commence with the incorporation of academic freedom and scientific research in Section 16 of the Constitution of SA (RSA 1996:1249), as a result of which academic freedom became a judicially enforceable constitutional right, subject only to such limitations as provided in Section 36 of the Constitution (with due cognisance to the provisions of Section 16(2) of the Bill of Rights (RSA 1996:1249) (Gauntlett 2013:Online; Malherbe 2003:221). However, because it is not specified in Section 16 of the Bill of Rights (RSA 1996:1249) what the right to academic freedom and scientific research entails is less obvious (Bentley *et al.* 2006:16). Consequently, the following critical elements of academic freedom in a post-apartheid SA seem worthy of pursuit, namely that it should:

- facilitate the production of present and future social good in a manner that is consistent with the imperatives of the Constitution of SA (RSA 1996),
- articulate the relationship between institutional autonomy, intellectual responsibility and social responsibility in a manner that is consistent with the Constitution of SA (RSA 1996),
- recognize, in the conceptualization of academic freedom, the right of the student to choose where and what he or she studies while also ensuring that research should be accounted for in such a reconceptualization,
- protect the freedom of expression of academics and students from undue sanction by their own institution; and
- account for the relative freedoms and vulnerabilities of the different groups within the academy (HEIAAF Task Team 2008:29; Lange 2010:5).

In general terms institutional autonomy refers to the ability of HEIs to govern themselves. This is necessary for an HEI, because without institutional autonomy, academic freedom is not possible and without academic freedom an HEI cannot fulfil its mission. Notwithstanding the importance of institutional autonomy for HEIs, the institutional autonomy of HEIs can be impinged upon by, amongst others, the way in which government allocates funding to HEIs, the conditions for the allocation of donations or grants to HEIs and even compliance with government's requirements (e.g. Regulations for Reporting by HEIs) (see Chapter two). The question that remains is what level of autonomy should be afforded to HEIs. This depends inextricably on the nature of the relationship between government and HEIs that was explored in Chapter 2 (also see Chapter four where the relevant provisions of the Amendment Act (RSA 2012a) are analysed to determine whether the Minister's, administrator's and assessor's powers have been extended by the Amendment Act). As indicated in section 2.7, the required level of institutional autonomy lies somewhere between complete governmental control and supervision on the one hand and complete autonomy and independence on the other hand (Jansen 2005:216). Given that academic freedom and institutional autonomy are necessary in order for HEIs to fulfil their missions, they should be protected, but can never be absolute or without restriction and should be balanced against their accountability to government, stakeholders and society.

CHAPTER 4

EVALUATIVE POLICY ANALYSIS OF THE HIGHER EDUCATION AND TRAINING LAWS AMENDMENT ACT 23 OF 2012

4.1 INTRODUCTION

In this chapter the second objective of the research study (outlined in 1.5) is pursued, namely to determine by means of an evaluative policy analysis the extent of the Minister's powers to appoint administrators and assessors prior to and after the commencement of the Amendment Act (RSA 2012a) and to determine the effect the Amendment Act had on the powers of administrators and assessors. In order to realise this objective the Higher Education Act (RSA 1997) should be read concurrently with the Amendment Act (RSA 2012a) with a view to evaluating the consequences of the latter for HEIs.

Legislation is enacted within specific historical, national or international contexts and can, in essence, be considered as cultural products (Bacchi 2009:ix). Consequently, the Amendment Act (RSA 2012a) is considered within the context of the SAHE landscape (see Chapter two). It is within this HE landscape that HEIs operate according to their missions and influenced by commitment to the principles of academic freedom and institutional autonomy (see Chapter three and specifically 3.2, 3.5, 3.7, 3.9). Closely related thereto is the nature of the relationship that exists between government and HEIs (see 2.3). The Amendment Act (RSA 2012a) and its implications for academic freedom and institutional autonomy of HEIs is the core focus of this study.

This chapter compares the extent of the Minister's powers to intervene and appoint administrators and assessors prior to and after the Amendment Act (RSA 2012a), as well as the nature and extent of the powers of such appointed administrators and assessors prior to and after the Amendment Act (RSA 2012a) (see Table 4.1, Table 4.2 and Table 4.3 in section 4.2). For this purpose Bacchi's 'What's the problem

represented to be?' (WPR) approach (introduced in section 1.8.2.2) is used, with the applicaton of Bacchi's six questions (as discussed in sections 4.3.1 to 4.3.6):

- What's the 'problem' represented to be in a specific policy?
- What presuppositions or assumptions underlie the representation of the 'problem'?
- How has the representation of the 'problem' come about?
- What is left unproblematic in this problem representation? Where are the silences? Can the 'problem' be thought about differently?
- What effects are produced by this presentation of the 'problem'?
- How/where has this representation of the 'problem' been produced, disseminated and defended? How could it be questioned, disrupted and replaced? (Bacchi 2009:xii).

Before applying these questions, a comparative analysis of the two Acts concerned, i.e Higher Education Act (RSA 1997) and the Amendment Act (RSA 2012a) is undertaken, with a view to clarifying the nature and extent of the differences between the two Acts in terms of the Minister's powers, and an administrator's or assessor's powers.

4.2 COMPARATIVE ANALYSIS OF THE RELEVANT LEGISLATIVE PROVISIONS

In Tables 4.1 - 4.3 the powers of the Minister, the administrator and the assessor before and after the Amendment Act (RSA 2012a) are compared.

4.2.1 The Minister's powers prior to and after the Amendment Act

In Table 4.1 the extent of the Minister's powers to intervene and appoint administrators and assessors prior to and after the Amendment Act (RSA 2012a) is delineated.

Table 4.1: A comparative analysis of the Minister's powers to appoint administrators and assessors prior to and after the Amendment Act

Minister's powers prior to the Amendment Act.	Minister's powers after the Amendment Act.
(a) Issuing of a directive by the Minister that can result in the appointment of an administrator. No such provision existed in the Higher Education Act (RSA 1997).	**(a) Issuing of a directive by the Minister that can result in the appointment of an administrator.** Section 49A is inserted in the Higher Education Act (RSA 1997) by Section 11 of the Amendment Act (RSA 2012a:12). The provisions entail the following: **(i) Circumstances under which a directive may be issued by the Minister: Section 11.** The Minister may issue a directive to the Council to take such action specified by the Minister if - (a) the HEI is involved in financial impropriety or is being otherwise mismanaged; (b) is unable to perform its functions effectively; (c) has acted unfairly or in a discriminatory or inequitable way towards a person to whom it owes a duty under this Act (RSA 1997); or (d) has failed to comply with any law, or directive given by the Minister or has obstructed the Minister or a person authorised by the Minister in performing a function in terms of this Act (RSA 1997). **(ii) Procedural requirements that have to be complied with before a directive may be issued by the Minister: Section 11.** Before taking a decision to issue a directive the Minister must, subject to the provisions of the Promotion of Administrative Justice Act (RSA 2000b) - (a) give notice to the Council of the intention to issue a directive; (b) give the Council a reasonable opportunity to make representations; and (c) then consider the representations received.

	(iii) Minimum requirements that the Minister's directive has to comply with: Section 11. The directive issued by the Minister must - (a) state the nature of the deficiency; (b) the steps which must be taken to remedy the situation; and (c) specify a reasonable period within which the steps must be taken. **(iiii) Consequences of an HEI's failure to comply with the Minister's directive: Section 11.** If the Council fails to comply with the directive within the stated period, the Minister must dissolve the Council and appoint an administrator to take over the functions of the Council and the employees of the HEI in question must comply with a directive given by the administrator and the costs associated with the appointment of an administrator shall be for the account of the HEI in question.
(b) Appointment of an administrator by the Minister. Section 41A of the Higher Education Act (RSA 1997) contains the following provisions: **(i) The appointment process: Section 41A(1).** The Minister may, after consultation with the Council of the HEI concerned, if practicable, appoint a person as administrator for the HEI concerned. **(ii) The administrator's functions: Section 41A(1).** The administrator appointed by the Minister will take over the authority of the Council or the management of the HEI and perform the functions relating to governance or management on behalf of the HEI.	**(b) Appointment of an administrator by the Minister.** The additional Section 49B is incorporated in the Higher Education Act (RSA 1997) by Section 11 of the Amendment Act (RSA 2012a:14) and contains the following provisions: **(i) The appointment process: Section 11.** The Minister may, after consultation with the Council of an HEI, if practicable, appoint a person as administrator for the HEI concerned. **(ii) The administrator's functions: Section 11.** The administrator appointed by the Minister will take over the governance, management and administration of the HEI and perform the functions of the HEI.

(iii) Circumstances under which an administrator may be appointed by the Minister: Section 41A(1). The Minister may appoint an administrator for an HEI if - (a) an audit of the financial records of an HEI or an investigation by an independent assessor reveals financial or other maladministration of a serious nature at an HEI; or (b) where there is serious undermining of the effective functioning of an HEI.	**(iii) Circumstances under which an administrator may be appointed by the Minister: Section 11.** Section 41A(1) and Section 41A(2) of the Higher Education Act (RSA 1997) were deleted by Section 8 of the Amendment Act (RSA 2012a). Section 49A to Section 49E were incorporated in the Higher Education Act (RSA 1997) by Section 11 of the Amendment Act (RSA 2012a). In terms of Section 11 the Minister may appoint an administrator for an HEI if any of the following circumstances occur: (a) An audit of the financial records of an HEI or a report by an independent assessor reveals financial or other maladministration of a serious nature or serious undermining of the effective functioning of the HEI. (b) Any other circumstances arise that reveal financial or other maladministration of a serious nature or of serious undermining of the effective functioning of the HEI. (d) The Council of the HEI requests such appointment. The Minister may only act in terms of paragraph (a) or (b) above if - (a) the appointment of an administrator is in the interest of the HEI in question and of HE in an open and democratic society.
(iv) Duration of the appointment of the administrator: Section 41A(1) and Section 41A(2). (a) The administrator's appointment will be for a period determined by the Minister, but may not be more than two years. (b)The Minister may extend the above-mentioned period once for a further period of not more than six months.	**(iv) Duration of the appointment of the administrator: Section 11.** The administrator is appointed for such period as may be determined by the Minister, but may not exceed two years, although the Minister may extend this period once for a period not exceeding six months.

(v) Appointment of an administrator if the Council is deemed to have resigned: Section 41A(3). If the Council is deemed to have resigned as contemplated in the Higher Education Act (RSA 1997), the Minister must appoint a person for a period of not more than six months as an administrator on behalf of the HEI to take over the authority of the Council, to perform the Council's functions relating to governance and to ensure that a new council is constituted. **(vi) Dissolution of Council.** No provision exists in the Higher Education Act (RSA 1997) for the dissolution of the Council of the HEI when an administrator is appointed.	**(v) Appointment of an administrator if the Council is deemed to have resigned.** Section 41A(3) of the Higher Education Act was not amended by Section 8 of the Amendment Act (RSA 2012a:10) and remains in force. **(vi) Dissolution of Council: Section 11.** Section 11 of the Amendment Act (RSA 2012a:14) incorporates Section 49E in the Higher Education Act (RSA 1997) and specifies that the date on which the administrator is appointed as the date on which Council is dissolved.
(c) Appointment of an assessor by the Minister. Section 44 and Section 45 of the Higher Education Act (RSA 1997) contain the following provisions: **(i) Appointment process: Section 44.** The Minister may (from the independent assessment panel constituted in terms of the Higher Education Act) (RSA 1997) appoint an assessor who is independent in relation to the HEI concerned to conduct an investigation at the HEI - (a) in the cases referred to in paragraph (c)(ii) below; and (b) after consulting the Council of the HEI concerned, if practicable. The Council of the HEI and any person affected by the investigation must assist and co-operate with the independent assessor in the performance of his or	**(c) Appointment of an assessor by the Minister.** Sections 44 and 45 of the Higher Education Act (RSA 1997) have not been amended by the Amendment Act (RSA 2012a). The provisions contained in Sections 44 and 45 of the Higher Education Act (RSA 1997) are therefore still in force.

her functions in terms of Section 45 of the Higher Education Act (RSA 1997). **(ii) Circumstances under which an independent assessor may be appointed by the Minister: Section 45.** An independent assessor may be appointed if - (a) the Council of an HEI requests the appointment; or (b) circumstances arise at an HEI that - (i) involve financial or other maladministration of a serious nature; or (ii) seriously undermine the effective functioning of the HEI; or (c) the Council of the HEI has failed to resolve such circumstances; and (d) the appointment is in the interests of HE in an open and democratic society. **(iii) Remuneration and allowances: Section 49.** In terms of Section 49 of the Higher Education Act (RSA 1997) the Minister, with the concurrence of the Minister of Finance, may determine the remuneration and allowances to be paid to an independent assessor and any other person appointed under Section 48 (RSA 1997).	**(iii) Remuneration and allowances: Section 49.** These provisions of the Higher Education Act (RSA 1997) were not amended by the Amendment Act (RSA 2012a) and provide that the Minister, with the concurrence of the Minister of Finance, may determine the remuneration and allowances to be paid to an independent assessor and any other person appointed.

Sources: The Higher Education Act (RSA 1997) and the Amendment Act (RSA 2012a)

4.2.2 The assessor's powers prior to and after the Amendment Act

In Table 4.2 the extent of the assessor's powers prior to and after the Amendment Act (RSA 2012a) are shown.

Table 4.2: A comparative analysis of the assessor's powers prior to and after the Amendment Act

Assessor's powers prior to the Amendment Act	**Assessor's powers after the Amendment Act**
(a) Independent assessor's power to deal with complaints or allegations. No such provisions existed in the Higher Education Act (RSA 1997).	**(a) Independent assessor's power to deal with complaints or allegations.** Section 45A was inserted in the Higher Education Act (RSA 1997) in terms of Section 9 of the Amendment Act (RSA 2012a:10-12). The provisions entail the following: (a) The independent assessor has the power, on receipt of a complaint or an allegation or on the ground of information that has come to his or her knowledge and which points to conduct as set out in Section 45 (see Table 4.1(c)(ii)), to conduct an investigation for the purpose of determining the merits of the complaint, allegation or information.
(b) Assessor's power in relation to the investigation. No such provisions existed in the Higher Education Act (RSA 1997). **(i) Process to be followed.** No such provisions existed in the Higher Education Act (RSA 1997). **(ii) Issuing of directives.** No such provisions existed in the Higher Education Act (RSA 1997).	**(b) Assessor's powers in relation to the investigation: Section 9.** Section 45A was inserted in the Higher Education Act (RSA 1997) in terms of Section 9 of the Amendment Act (RSA 2012a:10-12). The provisions entail that: **(i) Process to be followed.** The assessor is empowered to determine the manner, format and procedure in which the matter concerned should be dealt with, taking into account the circumstances of the case. **(ii) Issuing of directives.** The assessor may direct that any category of persons or all persons whose presence is not desirable at the

	proceedings shall not be present at any proceedings pertaining to any investigation or part thereof.
(iii) Requesting assistance.	**(iii) Requesting assistance.**
No such provisions existed in the Higher Education Act (RSA 1997).	The assessor may, at any time prior to or during an investigation, request any person contemplated in Section 48 (RSA 1997) to assist him or her in the performance of his or her functions with regard to a particular investigation or investigations in general.
(iv) Non-disclosure.	**(iv) Non-disclosure.**
No such provisions existed in the Higher Education Act (RSA 1997).	No person may disclose the contents of any document in the possession of the assessor or the record of testimony given to the assessor, unless the assessor directs otherwise.
(v) Giving of evidence.	**(v) Giving of evidence.**
No such provisions existed in the Higher Education Act (RSA 1997).	The assessor may, for the purposes of conducting an investigation, direct any person to submit an affidavit or affirmed declaration or to appear before him or her to give evidence or to produce any document in his or her possession or under his or her control which has a bearing on the matter being investigated, and may examine such person. The notice to the person to appear before the assessor must contain the particulars of the matter in connection with which the person is required to appear before the assessor and shall be signed by the assessor and served on the person either by a registered letter sent through the post or delivered. The assessor may also request an explanation from any person whom he or she reasonably suspects of having information which has a bearing on a matter being or to be investigated. The assessor may require any person appearing as a witness before him or her to give evidence under oath or after having made an affirmation. The assessor may administer the oath or accept the affirmation.

(vi) Powers relating to those implicated in the investigation. No such provisions existed in the Higher Education (RSA 1997).	**(vi) Powers relating to those implicated in the investigation.** If it appears to the independent assessor during the course of an investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse recommendation pertaining to that person may result and if such implication forms part of the evidence submitted to the independent assessor during an appearance, such person must be afforded an opportunity to be heard in connection therewith by way of giving evidence. The assessor may allow a legal representative to assist a person who is possibly implicated in accordance with the provisions of the Promotion of Administrative Justice Act (RSA 2000b).
(vii) Entering of premises by the assessor and copying of documents. No such provisions existed in the Higher Education Act (RSA 1997).	**(vii) Entering of premises by the assessor and copying of documents.** Section 45B was inserted in the Higher Education Act (RSA 1997) by Section 9 of the Amendment Act (RSA 2012a:12) and provides that the independent assessor shall be competent to enter, or to authorise another person contemplated in Section 48 (RSA 1997) to enter, any building or premises of the HEI under investigation in terms of Section 45 and to make such investigation or assessment as he or she may deem necessary, and to copy any documents on those premises which in his or her opinion have a bearing on the investigation.
(c) Functions of the assessor: Section 47. Section 47 of the Higher Education Act (RSA 1997) is applicable and the provisions entail the following: (1) An independent assessor appointed under Section 44 (RSA 1997) must, within a period determined by the Minister, but not exceeding 90 days and on the terms of reference specified by the Minister -	**(c) Functions of the assessor: Section 10.** Section 10 of the Amendment Act (RSA 2012a:12) amended Section 47 of the Higher Education Act (RSA 1997) and provides that the independent assessor must, within a period determined by the Minister, but not exceeding 90 days and on the terms of reference specified by the Minister conduct an investigation at the HEI concerned, report in writing to the Minister on the findings of his or her investigation together with the

(a) conduct an investigation at the HEI concerned; (b) report in writing to the Minister on the findings of his or her investigation; and (c) suggest appropriate measures. (2) The Minister must as soon as practicable provide a copy of the report referred to above to the Council of the HEI concerned and publish such report in the *Gazette*.	reasons upon which the findings are based and suggest appropriate measures and the reasons why the measures are needed. Section 47 of the Higher Education Act (RSA 1997) has not been amended in so far as it still provides that the Minister must as soon as practicable provide a copy of the report to the Council concerned and publish such report in the Gazette.
(d) Assistance to the assessor. Section 48 of the Higher Education Act (RSA 1997) provides that an independent assessor appointed under Section 44 (RSA 1997) may, with the concurrence of the Minister, appoint any other person with suitable knowledge and experience to assist him or her in the performance of his or her functions.	**(d) Assistance to the assessor.** The provisions of Section 48 of the Higher Education Act (RSA 1997) were not amended by Amendment Act (RSA 2012a) and therefore still provide that the independent assessor may, with the concurrence of the Minister, appoint any other person with suitable knowledge and experience to assist him or her in the performance of his or her functions.

Source: The Higher Education Act (RSA 1997) and the Amendment Act (RSA 2012a)

4.2.3 The administrator's powers prior to and after the Amendment Act

In Table 4.3 the extent of the administrator's powers prior to and after the Amendment Act (RSA 2012a) are explained.

Table 4.3: A comparative analysis of the administrator's powers prior to and after the Amendment Act

Administrator's powers prior to the Amendment Act.	**Administrator's powers after the Amendment Act.**
(a) Administrator's powers: Section 41A1. In terms of Section 41A1 of the Higher Education Act (RSA 1997), the Minister may, after consultation with the Council of the HEI concerned, if practicable, and notwithstanding any other provision of the Higher Education Act (RSA 1997), appoint a person as administrator to: (aa) take over the authority of the Council, or (bb) the management of the HEI, and (cc) perform the functions relating to governance or management on behalf of the HEI, if an audit of the financial records of an HEI, or an investigation by an independent assessor reveals financial or other maladministration of a serious nature at an HEI or the serious undermining of the effective functioning of an HEI.	**(a) Administrator's powers: Section 11.** In terms of Section 11 (RSA 2012a:12,14) the Minister must dissolve the Council and appoint an administrator to take over all the functions of the Council, in the event that the Council fails to adhere to the directive issued by the Minister and employees of the HEI in question must comply with any directives given by the administrator and the costs associated with the appointment of an administrator shall be for the account of the HEI in question (see Table 4.1) The Minister may, after consultation with the Council of an HEI, if practicable, appoint a person as administrator to take over the management, governance and administration of the HEI and to perform the functions of the HEI, in the circumstance specified in Section 11 of the Amendment Act (RSA 2012:12,14) (Section 49(B) of the Amendment Act) (see Table 4.1).

Sources: The Higher Education Act (RSA 1997) and the Amendment Act (RSA 2012a)

From the comparative analyses performed in Tables 4.1, 4.2 and 4.3 it is clear that the main differences between the Higher Education Act (RSA 1997) and the Amendment Act (RSA 2012a) are:

- The Minister is entitled to issue a directive to the Council of an HEI, which, if not complied with, will result in the appointment of an administrator for such HEI and the dissolution of the Council of the HEI. This together with the administrative processes that are coupled with this process did not form part of the Higher Education Act (RSA 1997) prior to the Amendment Act (RSA 2012a).
- The assessor is empowered to: gain access to the premises of the HEI, make copies of documents, exclude certain people from being present at the

proceedings, direct that persons give evidence or produce documents, request an explanation from a person whom he or she reasonably suspects of having information relating to the matter under investigation, and provide any person being implicated with the opportunity of being heard. To this end the assessor may allow such person to be assisted by his or her legal representative. Also, on completion of the investigation, the assessor's report to the Minister must contain not only the findings of the investigation and the measures recommended, but also the reasons upon which the findings are based and the motivation for the recommendations. These provisions did not form part of the Higher Education Act (RSA 1997) prior to the Amendment Act (RSA 2012a).

- The Minister may appoint an administrator to take over the management, governance and administration of the HEI. This did not form part of the Higher Education Act (RSA 1997) prior to the Amendment Act (RSA 2012a).

4.3 POLICY ANALYSIS OF THE RELEVANT LEGISLATIVE PROVISIONS

In Tables 4.1, 4.2 and 4.3 the position in relation to the Minister's powers and the powers of assessors and administrators before and after the Amendment Act (RSA 2012a) is explained. These policy changes and the implications thereof will now be discussed according to the six questions of Bacchi's WPR approach (see 4.1 and 1.8.2.2). In essence, this means that Bacchi's WPR approach will be applied to get underneath the problem, namely the effects of the mentioned policy changes on academic freedom and institutional autonomy of HEIs. This approach will enable the researcher to consider what the origin of the 'problem' is, what the 'problem' results in, where the problem resides and what questions could be applied to the 'problem'.

4.3.1 "What is the problem represented to be?"

Before this first of Bacchi's six questions is explored (see 4.3.1.6), it is important for the policy analyst to gain an understanding of what this question encompasses (see 4.3.1.1), to establish the focus area (see 4.3.1.2), record the definitions that will be applied (see 4.3.1.3), identify the drivers behind Sections 9, 10 and 11 of the Amendment Act (RSA 2012a) (see 4.3.1.4) and analyse the changes brought about by these sections of the Amendment Act (RSA 2012a) (see 4.3.1.5).

4.3.1.1 Interpretation of the question

When considering this question, it should be understood that the problem in Bacchi's WPR approach refers to the change implied in a policy – what is the policy attempting to fix, improve or correct (Bacchi 2009:xi)? The goal of this question is to identify the implied problem representations in the policy, namely the Amendment Act (RSA 2012a) (Bacchi 2009:4). Consequently, the changes brought about by the relevant sections of the Amendment Act (RSA 2012a) dealt with in Table 4.1 (Minister's powers), Table 4.2 (assessor's powers) and Table 4.3 (administrator's powers) are considered to establish "what the problem is represented to be".

4.3.1.2 Focus

The focus is on Section 9 (RSA 2012:12,14), Section 10 (assessor's powers) (RSA 2012a:12) and Section 11 (Minister's and administrator's powers) (RSA 2012a:12,14) of the Amendment Act (RSA 2012a). The reason for the focus on Section 9 and Section 10 is that these sections determine the assessor's powers once his or her appointment by the Minister has taken place. The assessor's report to the Minister will contain his or her findings and recommendations (with the reasons for those) (see Table 4.2c) that will guide the Minister when deciding what steps to take in relation to the HEI concerned. The importance of this report and its impact on the HEI concerned is clear, because this report, to a large extent, shapes the outcome, namely the Minister's decision in relation to the HEI concerned. Inextricably linked to this are the powers of the assessor, the processes that the assessor follows in conducting the investigation and all the matters related to the assessor's investigation (see Table 4.2b). The reason for the focus on Section 11 of the Amendment Act is that it is the main provision in the Amendment Act (RSA 2012a) that determines the extent of the Minister's powers to intervene at an HEI.

The three above-mentioned sections should also be considered in the broader context of the importance of academic freedom and institutional autonomy for HEIs. The safeguarding of academic freedom and institutional autonomy is an important prerequisite for a well-functioning HEI (Altbach 2001:217) and HE system (see sections 1.6, 3.1 and 3.2). Notwithstanding this, academic freedom and the

institutional autonomy of HEIs have increasingly come under threat in SA (Van der Walt, Potgieter & Wolhuter 2010:294). This concern is not new, as Jansen, while delivering the 41st TB Davie Memorial lecture in 2004, already maintained that the autonomy of HEIs has been diminished and eroded due to government's actions (Jansen 2005:217-219). He identified the following actions that eroded institutional autonomy (Jansen 2005:217-219):

- the programme and qualification mix which has had the effect that the government will decide what is taught, where and, which HEI will offer what programmes,
- government deciding what programmes will be funded at what levels,
- government's contemplation of establishing a central application service for HEIs (this became a reality during 2012 when the Minister introduced the CAS), and
- the fact that government can replace a Vice-Chancellor of an HEI with an administrator of government's choice.

It is evident that academic freedom and institutional autonomy are of great importance to HEIs, but that threats to their academic freedom and institutional autonomy exist. In this study the implications of the Amendment Act (RSA 2012a) for the academic freedom and institutional autonomy of HEIs are explored (see 4.3.1.5 and Chapter six).

4.3.1.3 Definitions

The following definitions require clarification in the view of their particular interpretation and application in the context of this study's policy analysis:

- Council: The Council is defined in Section 1 of the Higher Education Act as the governing body of an HEI (RSA 1997:A-757).
- Minister: The Minister is defined in Section 1 of the Higher Education Act as the Minister of Higher Education and Training in SA (RSA 1997:A-761).

However, no definitions of either administrators or assessors exist in Section 1 (the Definition Section) of the Higher Education Act (RSA 1997). After considering the provisions of respectively Section 44 and Section 45 of the Higher Education Act (RSA 1997) and Section 10 and Section 11 of the Amendment Act (RSA 2012a) the researcher proposes the following definitions:

- Assessor: An assessor can be defined as a person appointed by the Minister from the independent assessor panel constituted in terms of the Higher Education Act (RSA 1997) to conduct an investigation at an HEI under the circumstances contemplated in Section 45 of the Higher Education Act (RSA 1997) and to present the Minister with a report containing his or her findings and recommendations, as well as the reasons for those within the stipulated period.
- Administrator: An administrator can be defined as a person appointed by the Minister to take over either the governance, administration, management or functions of an HEI or all of these under the circumstances contemplated in Section 11 of the Amendment Act (RSA 2012a) for the stipulated period.

4.3.1.4 Drivers of the policy

The aim of Section 11 (Minister and administrator's powers) of the Amendment Act (RSA 2012a) is to expand the Minister's power to intervene at an HEI (under the circumstances contemplated in Section 11 (see Table 4.1.a.i). The driver behind this expansion of the Minister's powers relates to government's inherent responsibility for the provision of quality education (including HE) to the citizens of SA. This is perhaps best described by Asmal's (2001:Online) statement reflected in the Foreword to the NPHE (RSA DoE 2001) that - "(t)he people of our country deserve nothing less than a quality higher education system, which responds to the equity and development challenges that are critical to improving the quality of life of all our people". In a more recent publication of the DHET, its Research Agenda 2014 – 2017 (RSA DHET 2014b:10) effective governance and management of HEIs is highlighted as a prerequisite for effective service delivery by HEIs and for quality HE, in order for HEIs to fulfil their role in society which is the improvement of society as a

whole (Lange 2010:3) (discussed in 3.2). In the event that an HEI fails to manage and govern its affairs effectively and the circumstances contemplated in Section 11 (see Table 4.1) arise, government, represented by the Minister, has the responsibility for intervening at the HEI, to ensure that effective management and governance is restored.

In Section 11 one of the grounds for the issuing of a directive to the Council of an HEI by the Minister is financial impropriety (see Table 4.1.a(i)). The principle that HEIs must account to government for how funding received was spent, has been explored in 3.8. The driver behind this provision of Section 11 is thus to ensure, as indicated by the Minister (*Mail & Guardian* 2013a:Online), that HEIs apply sound financial management practices and refrain from wasteful expenditures. Another ground for the issuing of a directive to the Council of a HEI is in the event that the HEI has acted unfairly, in a discriminatory manner or inequitably towards a person or persons to whom it owes a duty under the Higher Education Act (RSA 1997) (see Table 4.1.a.i). The driver behind this provision of Section 11 is to ensure that HEIs, when performing their operations, engage in non-discriminatory and fair practices.

In addition to the expansion of the Minister's powers, the amendments (Section 9 and Section 10) also aim at empowering the assessor when conducting his or her investigation at the HEI concerned (see Table 4.2). The effectiveness of the appointed assessor is important to ensure that his or her report to the Minister provides all the necessary information regarding the state of affairs at the HEI concerned, as this will be the basis on which the Minister will take further steps (or not). The quality of the report depends to a large extent on the correctness of the procedures followed by the assessor in the performance of his or her duties.

4.3.1.5 Changes identified

When identifying the changes that have been brought about by the Amendment Act (RSA 2012a), the focus will be on the Minister's powers to appoint assessors and also the assessor's powers (see 4.3.1.5a and 4.3.1.5b). Thereafter the Minister's powers in relation to the appointment of administrators and their powers will be explored (see 4.3.1.5c).

4.3.1.5(a) The Minister's powers to appoint an assessor

Section 44 (dealing with the appointment of an assessor from the independent assessor panel) and Section 45 (dealing with the circumstances under which an assessor may be appointed) of the Higher Education Act have not been amended by the Amendment Act (RSA 2012a). The incorporation of Section 45A and 45B by Section 9 and the amendment of Section 47 of the Higher Education Act by Section 10 of the Amendment Act (RSA 2012a) relate to the powers, functions and responsibilities of assessors. The circumstances that have to be present for the appointment of an assessor by the Minister set out in the Higher Education Act (RSA 1997) have remained the same (see Table 4.1c). It is therefore concluded that the Minister's powers in relation to the appointment of assessors for HEIs have not been extended by the Amendment Act (RSA 2012a). Even though the Minister's powers to appoint assessors have not been extended, the existing provisions relating to the appointment of assessors may pose a threat to the institutional autonomy of HEIs. HEIs, as legal persons, are independent institutions responsible for managing their own affairs. When a third external party (the assessor) conducts an investigation at an HEI, the ability of the HEI to act independently with its stakeholders, students and staff may be severely impacted on.

4.3.1.5(b) The assessor's powers

An analysis of the assessor's powers in terms of Section 9 and Section 10 of the Amendment Act (RSA 2012a) (see Table 4.2b and Table 4.2c) reveals that Section 45A and Section 45B were incorporated into the Higher Education Act (RSA 1997) in terms of Section 9 of the Amendment Act (RSA 2012a:10,12). The provisions of Section 45A deal with the assessor's powers in relation to the investigation that he or she is conducting. The newly incorporated provisions entail that the independent assessor has the power, on receipt of a complaint or an allegation or on the ground of information that has come to his or her attention and which points to conduct as set out in Section 45 (see Table 4.1c(ii) and Table 4.2a), to conduct an investigation, its purpose being to determine the merits of the complaint, allegation or information. The assessor is empowered to determine the manner, format and procedure in which such a matter shall be dealt with, taking into account the circumstances of the

case (see Table 4.2b(i)). The assessor may instruct that any category of persons or all persons whose presence is not desirable at the proceedings relating to the investigation, shall not be present or any other part of the investigation (see Table 4.2b(ii)).

The assessor may, at any time prior to or during the investigation, request any person contemplated in Section 48 to assist him or her in the performance of his or her functions with regard to the investigation/s (see Table 4.2b(iii)). The assessor may, for the purposes of conducting an investigation, instruct any person to submit an affidavit or affirmed declaration, or to appear before him or her to give evidence or to produce any document in his or her possession or under his or her control which has a bearing on the matter being investigated, and may question such person (see Table 4.2b(v)). The assessor may also request an explanation from any person whom he or she reasonably suspects of having information which has a bearing on the matter being or to be investigated (see Table 4.2b(v)). The assessor may require any person appearing as a witness before him or her to give evidence under oath or after having affirmed that he or she will tell the truth (see Table 4.2b(v)). The assessor may administer the oath or accept the affirmation (see Table 4.2(b)(v)). The assessor may allow a legal representative to assist a person who is possibly implicated in accordance with the provisions of the Promotion of Administrative Justice Act (RSA 2000b) (see Table 4.2b(vi)). All of these empowering provisions will enable the assessor to perform a thorough investigation, which, as has been explored in 4.3.1.4, is essential for the production of the report to the Minister.

Other newly incorporated provisions that are contained in Section 9 of the Amendment Act include that no person may disclose the contents of any document in the possession of the assessor or the record of testimony given to the assessor, unless the assessor determines otherwise (see Table 4.2b(iv)). The notice to the person to appear before the assessor must contain the particulars of the matter in connection with which the person is required to appear before the assessor, shall be signed by the assessor and shall be served on the person either by a registered letter sent through the post or delivered to the person (see Table 4.2b(v)). If it appears to the independent assessor during the course of the investigation that a person is being implicated in the matter being investigated and that such an

implication might be detrimental to that person or that an adverse recommendation relating to that person may result and if such implication forms part of the evidence submitted to the independent assessor during an appearance, such person must be afforded an opportunity to be heard in connection with the matter by way of giving evidence (see Table 4.2(vi)). The *audi alteram partem* rule is applicable here and includes the following specific rules (Wiechers 1991:237-241):

- A party at an administrative hearing or inquiry must be granted the opportunity to state his or her case, if such hearing or inquiry could lead to the excercising of a discretion, which could infringe on the party's rights, freedoms and priviliges.
- Allegations and facts that may prejudice a party must be disclosed to such party, so that he or she may defend himself or herself against these allegations or facts.
- The administrative organ must provide reasons for his or her decision.
- The administrative organ must be free from bias.

This amendment to the Higher Education Act (RSA 1997) is thus in compliance with the requirements of the *audi alteram partem* rule described above (Wiechers 1991:237).

Section 45B was incorporated in the Higher Education Act (RSA 1997) by Section 9 of the Amendment Act and provides that the independent assessor may enter, or may authorise any person who is assisting him or her to enter, any building or premises of the HEI under investigation and to make such investigation or assessment as he or she may deem necessary (see Table 4.2b(vii)). The assessor or any person assisting him or her in the investigation is entitled to copy any documents on the premises of the HEI under investigation which, in his or her opinion, has relevance for the investigation (see Table 4.2b(vii)). This is necessary, because the effectiveness and quality of the assessor's investigation is dependent on gaining access to the documents that are relevant to the matter that is under investigation.

Section 10 of the Amendment Act (RSA 2012a:12) amends Section 47 of the Higher Education Act (RSA 1997) and provides that the independent assessor must, within a period determined by the Minister, but not exceeding 90 days, and on the terms of reference specified by the Minister conduct an investigation at the HEI concerned, report in writing to the Minister on the findings of his or her investigation together with the reasons upon which the findings are based, suggest appropriate measures and provide the reasons why the measures suggested are needed (see Table 4.2c). Given that the Minister's decision to act (or not) will to a large extent depend on the findings and recommendations contained in the assessor's report (see 4.3.1.4), the importance of this report is undeniable.

The powers afforded to assessors in terms of Section 9 of the Amendment Act did not form part of the Higher Education Act (RSA 1997) (see Table 4.2a and Table 4.2b). It is therefore concluded that the powers of assessors have been significantly extended by the provisions of Section 9 of the Amendment Act. This may have implications for the institutional autonomy of HEIs, because assessors are for example granted the right to enter the premises of the HEI and make copies of documents. This impacts on the ability of HEIs to regulate access to its premises and its disclosure of documents, which are functions that an HEI should be able to perform as part of its relations with external stakeholders.

In terms of Section 10 of the Amendment Act, the assessor in his or her report to the Minister has to provide reasons for both his or her findings and the measures recommended (see Table 4.2c). The requirement that reasons must be provided by the assessor for his or her findings and recommendations was not previously a condition in terms of the Higher Education Act (RSA 1997) (see Table 4.2c). This, however, does not constitute an extension of the assessor's powers, but rather serves to improve the quality of the assessor's report and will also ensure that the assessor's report complies with the provisions of the Promotion of Administrative Justice Act (RSA 2000b) in so far as reasons are provided for the findings and measures recommended. It is also concluded that this does not impact negatively on the institutional autonomy of HEIs, because it is necessary to ensure compliance with the provisions of the Promotion of Administrative Justice Act (RSA 2000b). Furthermore, it ensures that the findings and the recommendations contained in the

assessor's report are properly motivated, which is not only in the interest of the Minister, but also of the HEI concerned.

4.3.1.5(c) The Minister's and administrator's powers

In terms of Section 11 of the Amendment Act (Section 49A of the Higher Education Act) the Minister is empowered to issue a directive to the Council to take such action specified by the Minister if the HEI:

- is involved in financial impropriety or is being otherwise mismanaged,
- is unable to perform its functions effectively,
- has acted unfairly or in a discriminatory or inequitable way towards a person to whom it owes a duty under the Higher Education Act (RSA 1997),
- has failed to comply with any law or directive given by the Minister or has obstructed the Minister or a person authorised by the Minister in performing a function in terms of this Act (see Table 4.1a and Table 4.1a(i)).

In the event that the Council fails to adhere to such a directive, the Minister must dissolve the Council and appoint an administrator to take over the functions of the Council of the HEI (see Table 4.1a(iiii)). The processes that the Minister has to comply with when issuing a directive and appointing the administrator are also specified (see Table 4.1a(ii)) and Table 4.1a(iii)). Section 11 of the Amendment Act also provides that employees of the HEI concerned have to comply with the directives of the appointed administrator (see Table 4.1a(iiii)).

Previously no provisions existed in the Higher Education Act (RSA 1997) for the issuing of directives to a Council that could lead to the appointment of an administrator, the process to be followed or the requirements thereof (see Table 4.1a). These enabling measures did not form part of the Minister's powers in terms of the Higher Education Act (RSA 1997). Therefore it is concluded that this constitutes an extension of the Minister's powers, that may very well have been caused by the challenges that were experienced by the Minister with the implementation of the Higher Education Act (RSA 1997) when an administrator was

appointed for the CUT (see 4.3.3.4a to 4.3.3.4.d). These provisions may very well impact on the academic freedom of academic staff as well as the institutional autonomy of HEIs, due to the consequences, as explored hereinafter (also see 4.4).

If the Minister acts in terms of Section 49A of the Higher Education Act the Council of the HEI is dissolved on the date on which the administrator is appointed and the administrator will perform all the Council's functions (see Table 4.1a(iii)). One could describe such an event as 'a state of emergency' at the HEI. Consequently, the provisions of the Higher Education Act (RSA 1997) as far as they relate to the membership of Council, conflict of interest of Council members, etc. will no longer apply. In these circumstances, the HEI will continue to perform its day-to-day functions, but as far as the management of the HEI is concerned, all the matters that were submitted to Council prior to the appointment of the administrator for approval or for deciding on, will have to be submitted to the administrator, who will be performing all Council's functions. Examples of such matters are the purchasing of property, the entering into a loan or an overdraft agreement or commencing with construction of a permanent building, for all of which Council's permission is required (Section 40(2) and Section 40(3) of the Higher Education Act (RSA 1997)).

Employees of the HEI concerned will continue to perform their daily tasks, but they will have to comply with all directives issued by the administrator. In terms of Section 27(4)(f) of the Higher Education Act (RSA 1997) a student or students of an HEI elected by the Student Representative Council (SRC) of the HEI are members of the Council of an HEI. In these circumstances students will continue with their studies, but there will no longer be student representatives participating in Council's functions, as all of these are performed by the administrator. In fact, one of the most crucial aspects of the functioning of a Council, namely stakeholder participation, will cease when an administrator is appointed and Council is dissolved.

The changes discussed in the above paragraph are not the only changes to the Minister's powers in so far as they relate to the appointment of administrators. Section 41A(1) and Section 41A(2) of the Higher Education Act (RSA 1997) were deleted by Section 8 of the Amendment Act. Section 49B is incorporated in the Higher Education Act in terms of Section 11 of the Amendment Act (see Table 4.1b).

It now extends provisions beyond the event of an audit or an assessor's report that permits the appointment of an administrator, but also if any other circumstances arise that reveal financial or other maladministration of a serious nature or that seriously undermine the effective functioning of the HEI, or if the Council of the HEI requests such appointment (see Table 4.1b(iii)). However, two conditions have been set, namely that the Minister may only (except when the Council of an HEI requests the appointment of an administrator) appoint an administrator if it is in the best interest of the HEI concerned and if it is in the best interest of HE in an open and democratic society (see Table 4.1b(iii)).

The Minister is also empowered to appoint such an administrator to take over the governance, management and administration of the HEI and to perform all the functions of the HEI (see Table 4.3a). This was formerly not the case (see Table 4.3a). This, together with the extension of the circumstances under which an administrator may be appointed by the Minister, effectively extends not only the Minister's powers to appoint administrators, but also the extent of the powers of administrators.

The implications of the appointment of an administrator for the HEI in terms of Section 49B of the Higher Education Act (RSA 2012a:14) (see Table 4.1b), depend on whether the administrator is appointed by the Minister to take over the governance, management or administration of an HEI or all of these. If the administrator is appointed to take over the management, administration and governance of the HEI concerned, he or she effectively takes control over every aspect of the HEI concerned. In this event, the administrator will be performing all of the functions of Council, as well as all the functions performed by the management and administrative structures of the HEI. The HEI will continue to perform daily functions, albeit under the control of the administrator as the central authority at the HEI. The effect of this is that there would only be one decision maker at the HEI (i.e. the administrator). The implications for the employees of the HEI concerned are that the administrator will prescribe the variations of policies required and how the management and administration of the HEI will take place, and the employees of the HEI will have to adhere to these prescriptions. Students will continue with their academic endeavours, under the control of the administrator.

A positive implication is that the appointment of an administrator may resolve the problems that existed, paving the way for the HEI to function effectively once again. This was the Minister's views on the appointment of an administrator for Walter Sisulu University (WSU) because of financial mismanagement, and where the Minister on expiry of the administration period declared that "(o)ur intervention in the governance of WSU has proven to be highly successful" (Nzimande 2014:Online). The Minister also stated that the University had been stabilized and strengthened and that the University was able to move ahead with pride and confidence (Nzimande 2014:Online). However, after the initial term of the administrator's appointment at the WSU had expired, the appointment had to be extended amidst the on-going labour unrest at the University (RSA DHET 2013a:Online). This raises a question regarding the effectiveness of the appointment of administrators to actually resolve the problems experienced by the affected HEIs.

A 2012 analysis of assessor's reports by HESA indicated that, in the majority of cases, the problems which lead to the appointment of administrators fall into one or more of the following categories:

- governance failures by Council in the performance of Council's duties,
- the relationships between the Council and the Vice-Chancellor and other members of staff,
- the failure of institutional structures such as the Senate and the Institutional Forum (IF) to perform their functions effectively, and
- failures by the management of the HEI (financial, human resources and even the Registrar's office) (HESA 2012:Online).

Closer scrutiny reveals that the problems experienced were related to inexperienced chairpersons of Councils, members of Council acting with self-interest, inexperienced or unqualified Council members (especially on specialized standing committees of the Council, such as the Audit Committee), Council members interfering in the operational activities of the HEI, failure by Council members to adhere to proper meeting procedures, inappropriate interaction between Council members and staff members or students and lack of leadership by Vice-Chancellors

(HESA 2012:Online). Therefore, even though an administrator may resolve the particular problem(s) experienced at a specific HEI at a specific time, this does not safeguard the HEI from such problems occurring again, nor from similar problems occurring at other HEIs. It should also be kept in mind that the appointment of an assessor and an administrator could lead to reputational damage for the HEI in the public domain, which might impact on student enrolments. Such an appointment may also cause fears of job losses or significant increases in resignations amongst the staff of the HEI concerned.

The final change that has to be considered is whether the provisions of Sections 9, 10 and Section 11 of the Amendment Act (RSA 2012a) have any impact on the institutional autonomy and academic freedom of HEIs (see 1.3 and 1.5).

Various South African Vice-Chancellors are in agreement that the Amendment Act (RSA 2012a) does indeed impinge on the institutional autonomy and academic freedom of HEIs. These views are apparent when considering the significant number of newspaper articles published on the potential impact of the Amendment Act (RSA 2012a). In an article published in the *Sunday Independent* on 4 November 2012 titled *Free our universities from Nzimande's blade* the then Vice-Chancellor of UNISA, Prof. Barney Pityana, declared that "(h)igher education functions best only through the light, invisible hand of the state, and not by control and command, or by threats of pulling the purse strings" (Pityana 2012:Online). He is of the opinion that the Minister "seeks to give himself legislative powers to justify high-handed and arbitrary interventions in HE in a manner that is not accountable" and that the Minister has engineered the Amendment Act to empower himself to intervene arbitrarily at HEIs (Pityana 2012:Online). Similar views are found in an article published in the *Mail & Guardian* (2012:Online) where Prof. Mthembu (Vice-Chancellor of CUT), is quoted as declaring that the Bill gave the Minister the power to control universities at his will. Prof. Mthembu was further quoted as saying that "(w)e can have directives from the minister on just about anything, [for example], if a member of the public, a staff member or a student is not happy about something" (*Mail & Guardian* 2012:Online). In the same article Prof. Bawa (the Durban University of Technology's Vice-Chancellor) is quoted as declaring that "the

amendments were not only unnecessary, but also allowed the Minister to intervene in the affairs of universities very much at whim" (*Mail & Guardian* 2012:Online).

It goes almost without saying that if used, the provisions of Section 9, Section 10 (assessor's powers) and Section 11 (Minister and administrator's powers) of the Amendment Act (RSA 2012a) shall curtail the institutional autonomy of HEIs. In fact, it can be argued that once an administrator is appointed the institutional autonomy of an HEI ceases to exist, because all the functions of the Council, management and administrative structures might then be performed by the administrator, in terms of the appointment by the Minister. Similarly these provisions may also impinge on the academic freedom of the academic staff of the HEI concerned because once the administrator is appointed he or she will take control of all aspects of the HEI, including the core teaching and research functions, implying that academic staff too will then have to adhere to all the directives issued by the administrator.

The inference that academic freedom and institutional autonomy may be impinged on by Sections 9, 10 and 11 of the Amendment Act (RSA 2012a) is reinforced by the Minister's views of institutional autonomy. As early as 1996, during a debate with Simkins, the Minister, a member of the South African Communist Party (SACP), who at that stage was a member of parliament, declared that:

> The right to academic freedom has been guaranteed in the Bill of Rights. But the right to academic freedom should not be confused with the right to institutional autonomy. While a degree of institutional autonomy is important for the health of the higher education system - this must be balanced with the need to create a co-ordinated higher education system that is responsive to the national needs for reconstruction and development (Nzimande 1996:Online).

This view appears again in the Minister's introductory address to the seminar on university autonomy, academic freedom and public accountability at the UJ when he declared that autonomy of HEIs is "not a sacred principle of democracy" (*Mail & Guardian* 2013a:Online).

4.3.1.6 Interpretation: "What is the problem represented to be?"

Having considered the changes that have been brought about by Section 9, Section 10 (assessor's powers) and Section 11 (Minister and administrator's powers) of the Amendment Act (RSA 2012a), the following problem representations have been identified:

- Policy: The Amendment Act (2012a) determines that the Council of an HEI will dissolve on the date on which the administrator is appointed (see Table 4.1a(iiii), Table 4.1b(vi), Table 4.3a and 4.3.1.5c).

  Problem representation: It is judged to be a problem that the Higher Education Act did not pertinently state that the Minister may or must dissolve the Council of the HEI concerned or that the Council would dissolve on the date on which the administrator is appointed (see Table 4.1a(iiii), Table 4.1b(vi), Table 4.3a and 4.3.1.5c).

- Policy: In terms of the Amendment Act (RSA 2012a) an administrator may take over all the functions of the HEI, including those of management and the Council (see Table 4.3a and 4.3.1.5c).

  Problem representation: It is judged to be a problem that Section 41A1 of the Higher Education Act (RSA 1997) provided that the administrator appointed by the Minister will take over only the authority of the Council or the management of the HEI (see Table 4.3a and 4.3.1.5c).

- Policy: In terms of the Amendment Act (RSA 2012a) the Minister may appoint an administrator not only on the basis of an assessor's report, but also if the Minister has issued a directive to the Council of the HEI, which the Council has failed to implement or obey (see Table 4.1a and 4.3.1.5c).

  Problem representation: It is judged to be a problem that in terms of Section 41A1 of the Higher Education Act (RSA 1997) the Minister is only empowered

to appoint an administrator on the basis of an audit or an assessor's report (see Table 4.1a and 4.3.1.5c).

- Policy: In terms of the Amendment Act (RSA 2012a) the assessor is empowered to enter the premises of an HEI, copy documents, call witnesses, issue directives regarding a range of matters, allow for legal representation, to name but a few of the assessor's powers (see Table 4.2 and 4.3.1.5b).

  Problem representation: It is judged to be a problem that the assessor was not in terms of the Higher Education Act (RSA 1997) empowered to perform any of the actions discussed in Table 4.2 (see 4.3.1.5b).

- Policy: In terms of the Amendment Act (RSA 2012a) the assessor is required, in his or her report to the Minister, to provide reasons for both his or her findings and recommendations (see Table 4.2c and 4.3.1.5b).

  Problem representation: It is judged to be a problem that the assessor was not in terms of the Higher Education Act (RSA 1997) required to provide reasons for his or her findings and recommendations (see Table 4.2c and 4.3.1.5b).

4.3.2 What presuppositions or assumptions underlie the representation of the problem?

Before addressing this question and considering the consequences of Sections 9, 10 and 11 of the Amendment Act (RSA 2012a) (see 4.3.2.4 and 4.3.2.5), attention is first focused on what this question entails (see 4.3.2.1), then the changes brought about by the relevant sections of the Amendment Act (RSA 2012a) (see 4.3.2.2) are considered, and the relations between these sections of the Amendment Act (RSA 2012a) and other policies are determined (see 4.3.2.3).

4.3.2.1 Interpretation of the question

When answering this question, the understanding or the conceptual logic that underpins the problem representation needs to be considered (Bacchi 2009:5). In fact, according to Bacchi (2009:5) "(t)he term 'conceptual logic' refers to the meanings that must be in place for the particular problem representation to cohere or make sense". The aim of Question two is therefore to establish the assumed thought that lies behind the problem representation (Bacchi 2009:5) – what are the thoughts behind the changes brought about by Section 9, Section 10 and Section 11 of the Amendment Act (RSA 2012a).

4.3.2.2 Changes identified

The changes brought about by Section 9, Section 10 and Section 11 of the Amendment Act (RSA 2012a), as well as the problem representations identified (RSA 1997), have been discussed in 4.3.1.5 and 4.3.1.6.

4.3.2.3 Relations with other policies

The Amendment Act (RSA 2012a) amended the Higher Education Act (RSA 1997) that has been the primary legislation for the regulation of HEIs since its enactment (see 1.1 and 2.6.2.6). Section 9 of the Amendment Act specifies the administrative processes for conducting the investigation by the assessor, while Section 10 of the Amendment Act specifies the requirements that the assessor's report has to meet (assessor has to provide reasons for the findings and recommendations). Section 11 of the Amendment Act provides for the issuing of the directives to the Council, the administrative processes that ensue and the appointment of the administrator. All these processes have ties with the Promotion of Administrative Justice Act (RSA 2000b) that regulates administrative actions such as those contained in Section 9, Section 10 and Section 11. The purpose of the Promotion of Administrative Justice Act (RSA 2000b) is to ensure that administrative actions are lawful, reasonable and procedurally fair and that written reasons are provided for administrative action in accordance with Section 33 of the Constitution of the SA (RSA 1996:1259). This establishes the relationship between the Amendment Act (RSA 2012a), the

Constitution of SA (RSA 1996) and the Promotion of Administrative Justice Act (RSA 2000b).

In terms of Section 11 of Amendment Act (incorporating Section 49A) the Minister must give the Council an opportunity to respond and must consider the representations of the Council, before taking a decision and proceeding with action (see Table 4.1a(ii)). This is consistent with the requirements of the Promotion of Administrative Justice Act (RSA 2000b). Section 11 of the Amendment Act is therefore compliant with the provisions of the Promotion of Administrative Justice Act (RSA 2000b). Similarly, Section 10 of the Amendment Act (amending Section 47 of the Higher Education Act) (RSA 1997) complies with the Promotion of Administrative Justice Act (RSA 2000b), because the assessor has to provide reasons for his or her findings and recommendations.

There is also a relationship between the Amendment Act (RSA 2012a) and the Regulations for Reporting by Public Higher Education Institutions (RSA DHET 2014a) (see 4.3.2.4).

4.3.2.4 What thoughts lay behind the changes that attempted to address the mentioned problems?

The changes (see 4.3.1.5) brought about by Section 9, Section 10 and 11 of the Amendment Act (RSA 2012a) are probably underpinned by the Minister's view of government's responsibility to provide quality HE and to ensure that HEIs function properly, in order to serve society. The Minister's interpretation of this responsibility of government is expressed as follows:

> The main reason that my Ministry is taking action such as establishing the Oversight Committee or amending the Higher Education Act, is to increase the capacity of the state to intervene to ensure that the interests of citizens and students, and especially those from less empowered sections of the society [are met]" (Nzimande 2013a:Online).

These changes are most probably also underpinned by the Minister's views of HE in SA, reported on 24 November 2012 by the South African Broadcasting Corporation (SABC) News:

> Nzimande also decried corruption and mismanagement at tertiary institutions. He has put a number of institutions under administration and says he is not convinced that those were the only institutions needing attention. Nzimande says he is in the process of changing policy to ensure that it is easier for him to intervene and for administrators to turn struggling institutions around. "There are inequalities and a lack of capacity in some of our universities - especially, those who were serving black Africans in the past. Not because of corruption, sometimes, that they cannot do certain things correctly, it is lack of capacity. There is lots of corruption in the system and that is what disturbs me. And management capacity is also a challenge," laments Nzimande (SABC 2012b:Online).

From this one can surmise that the Minister sees failures in governance and management in HEIs (which often leads to corruption), as problems that are wide-spread across the SAHE landscape. This is confirmed when the Minister's declares that:

> In my experience, very often the reasons that universities - and not only the rural universities - fail to perform at optimum levels has to do with corruption. I should say that corruption is not necessarily because of corrupt leaders, but is at times because of weak leadership and systems that opens the doors to the corrupt appropriation of university resources by others because of a lack of proper controls (Nzimande 2013a:Online).

The Amendment Act (RSA 2012a) was enacted in an attempt to address the Minister's concerns. However, the question needs to be posed whether increasing the Minister's power to intervene at HEIs, increasing the powers of assessors, expanding the scope of the administrator's functions and increasing reporting regulations will prevent maladministration or corruption from occurring at HEIs. Several HE leaders do not see this as a solution to the problem, one of them being

Prof. Ihron Rensburg, Vice-Chancellor of UJ, who commented as follows on 31 January 2013 in a *Business Day Live* article titled *Regulatory overkill threatens academic autonomy in South Africa* (*Business Day Live* 2013:Online):

> Some universities are in serious crisis. In the past few years, six institutions had, or still have, administrators appointed. However, this situation is not the norm across all universities. Clearly, Nzimande believes otherwise and now imposes Draconian measures required at those institutions on all universities. However, the failures in the crisis-ridden institutions are not of reporting standards, but rather of managerial and governance capabilities, resulting from the appointments made at the level of the institutions' executives and councils. The best reporting standards in the world are unlikely to change this situation while the government and the universities' stakeholders continue to make these kinds of appointments.

It is noticeable that the appointment of administrators and assessors for HEIs by the Minister has over the past years become relatively common-place in SAHE. This is demonstrated when the Minister on 23 August 2012 acknowledged that quite a few HEIs were under scrutiny (e.g the Tshwane University of Technology (TUT), the University of Zululand (UNIZULU), WSU, Vaal University of Technology (VUT) and CUT) (Nzimande 2012:Online). From this, another interpretation of what underpins the changes brought about by the Amendment Act (RSA 2012a) is derived, namely that the changes result from an increase in the level of direct state control over HE during the past few years (see 2.6.2.11). This belief, that government is becoming more interventionist in its interactions with HEIs, is articulated by Prof. Mthembu (2012:Online) (when considering the Regulations for Reporting by HEIs) (RSA DHET 2014a) (see 2.6.2.10) declaring that the quarterly reports envisaged by these Regulations are "a proxy for interference, intervention or control, sometimes where there are no jurisdictional facts established as in the CUT case. They are meant to strangle rather than nurture".

This inference that the Minister believes that HEIs' 'failure to perform' can only be addressed by increased government control over and regulation of HEIs is supported by other recent developments in the HE landscape such as the establishment of a

Central Application Service (CAS), the appointment of an Oversight Committee on University Transformation and the publication of the Regulations for Reporting by Public HEIs. These are of significance for this study, because they all have a direct impact on academic freedom and institutional autonomy.

During 2012 the Minister ushered in the establishment of a CAS for HEIs. This was reported on as *Blade considers centralising admissions* following the stampede at the UJ the day before during which 22 people were injured and one person died (*Sowetan Live 2012:Online*). The Central Applications Office would deal with all applications for HEIs in one office after payment of one application fee (Sowetan Live 2012:Online). This Central Applications Office became a reality when the SABC reported on 11 October 2012 that a new system to assist school-leavers to apply for post-school education has been introduced by the Minister namely the CAS (SABC 2012a:Online). It was reported that the plan was also to have financial aid and student housing awarded and centralized through the CAS (SABC 2012a:Online). The CAS was aimed at assisting both students and HEIs to ensure that events such as the stampede at UJ do not reoccur. However, regulating application processes, determining closing dates for applications and determining application fees are core functions in terms of procedural autonomy and the CAS may very well impinge on the institutional autonomy of HEIs.

In January 2013 the Minister announced that that he was appointing an Oversight Committee on University Transformation (Nzimande 2013b:Online). The Minister stated that the purpose of this Oversight Committee was, *inter alia*, to monitor progress on transformation in HEIs (Nzimande 2013b:Online). The Minister declared that the Oversight Committee had amongst its objectives the following (Nzimande 2013b:Online):

- Study and evaluate the transformation frameworks/charters and annual reports of all HEIs, including their transformation indicators and set targets.
- Determine the effectiveness and efficiency of institutional transformation frameworks/charters, policies and strategies.

- Suggest a reporting mechanism by HEIs on the determined institutional and national transformation targets and benchmarks.

Soon hereafter the Transformation Oversight Committee (together with researchers from the University of KwaZulu-Natal (UKZN)) developed an Equity Index for HEIs in SA (Matthews 2013:Online). This Equity Index "tracks how closely student, staff, senate and governing council bodies reflect the country's ethnic and gender make-up" (Matthews 2013:Online).

It is acknowledged and supported that SAHE and HEIs, like all other sectors in SA, have to transform themselves so as to reflect the demographics of the society they serve. This Committee might possibly contribute to achieving this objective. However, from its objectives it is clear that the work of this Committee will increase control over HEIs with additional reporting requirements to be adhered to by HE, which will affect the relationship between government and HEIs. It may also impact on the institutional autonomy of HEIs.

During June 2014 the Regulations for Reporting by Public Higher Education Institutions were published (RSA DHET 2014a) (see 2.6.2.10). These Regulations increase the level of regulation and control of HEIs by government and impact on the relationship between government and HEIs.

The sum total of all of these developments in the HE sector, points to a definite increase in the level of control of HEIs by government, which, as discussed, may very well have implications for the institutional autonomy of HEIs. In this context, the actual thoughts behind Sections 9, 10 and Section 11 of the Amendment Act (RSA 2012a) may well be an increase in government's control of HEIs.

4.3.2.5 Outcome

The planned outcomes of the changes brought about by Section 9 (assessor's powers) of the Amendment Act (RSA 2012a) are that assessors are now granted extensive powers in the performance of their functions (see Table 4.2b). The planned outcomes of the changes brought about by Section 10 of the Amendment

Act (RSA 2012a:12) are that an assessor's report to the Minister now has to contain the reasons upon which the findings are based, as well as the reasons why the measures are needed (see Table 4.2c). The planned outcomes of the changes brought about by Section 11 of the Amendment Act (RSA 2012a:12,14) are that the Minister will be able to intervene at HEIs by issuing directives to Councils, appointing administrators to take over the functions of Council and dissolving the Council of the HEI concerned (see Table 4.1a). The Minister is also able to intervene at HEIs by appointing an administrator (without issuing a directive to the Council) to take over the governance, management and administration, and to perform all the functions of an HEI (see Table 4.1b and Table 4.3a). Other planned outcomes are the increase in the Minister's ability to intervene at HEIs due to the powers that the Minister has been afforded by the Amendment Act (RSA 2012a).

The unplanned outcomes of the Amendment Act (RSA 2012a) include the opposition of HEIs to the Act and the critique against the provisions of the Act (RSA 2012a), mainly because HEIs argued that the provisions impacted on their institutional autonomy and academic freedom. In fact, both HESA's and the CHE's presentations to parliamentary bodies argued that these amendments would affect the autonomy of HEIs (*University World News* 2012a:Online).

4.3.3 How has the representation of the problem come about?

After exploring what this question entails (see 4.3.3.1), considering the changes brought about by Sections 9, 10 and 11 of the Amendment Act (RSA 2012a) (see 4.3.3.2) and exploring the challenges experienced by the DHET (see 4.3.3.3), the necessity, origins, history and mechanisms of the policy will be discussed with particular reference to the CUT case (see 4.3.3.4).

4.3.3.1 Interpretation of the question

In this question the conditions that allowed the particular problem representation to take shape, are explored. In fact, the questions are:

- What necessitated this new policy? (Addressed in 4.3.3.4)

- What are the origins, history and mechanisms of the policy? (Addressed in 4.3.3.4)

4.3.3.2 Changes identified

The changes (see 4.3.1.5) brought about by Section 9, Section 10 and Section 11 of the Amendment Act (RSA 2012a) and the problem representations that have been identified in the Higher Education Act (RSA 1997) have been explored in 4.3.1.6.

4.3.3.3 Challenges

The challenges experienced by the DHET with regard to the appointment of assessors and administrators in terms of the Higher Education Act (RSA 1997) can be gleaned from the Minister's statements with regard to the problems at various HEIs (referred to earlier) as well as from the CUT Judgment (detail in 4.3.3.4). Judge Daffue's statement when he found in favour of the CUT that "(I) find therefore that no reasonable decision-maker could have come to the decision arrived at by the Minister … In my view he pre-judged the issue as he made it clear, even before the Council's response was received, that the CUT should be stabilised" (Minister v CUT 2012:67-68) is an apt description of one of the problems experienced with the implementation of the Higher Education Act (RSA 1997).

4.3.3.4 What necessitated this policy and what are the origins, history and mechanisms of this policy?

Initially the objectives of the Higher Education and Training Laws Amendment Bill (RSA 2012b), published for comment in March 2012, were quite innocuous, namely to extend the powers of the Minister to establish national institutes for HE and to enable the Minister to intervene in such if financial mismanagement occurred (RSA 2012b:2). The Minister would also be empowered to disestablish such national institutes for HE after consultation with the CHE (RSA 2012b:2). The Bill also amended the NQF Act (67 of 2008), by changing the date on which the annual report of the SAQA had to be submitted to the Minister (RSA 2012b:2).

It is apparent that none of the changes brought about by Section 9, Section 10 and the Section 11 of the Amendment Act (RSA 2012a) or similar provisions existed in the Bill (RSA 2012b). It has also been pointed out by Ndungane and Price (*Mail & Guardian* 2013b:Online) that the provisions of the Bill (RSA 2012b), differed substantially from the provisions of the Amendment Act (RSA 2012a), because the Bill (RSA 2012b) had not contained any reference to suspension of Councils or vice-chancellors when HESA had been consulted (see 1.1).

The question that arises is why these changes and provisions (Section 9, Section 10 and Section 11) formed part of the Amendment Act (RSA 2012a) when it was enacted during December 2012. This can be explained by exploring the Judgment delivered by the Free State High Court in the case of CUT's opposition to the appointment of an administrator to take over the authority of the Council, the management and administration of the CUT (Minister v CUT 2012). This case is considered, not only because it is the only case in SA where an HEI has successfully challenged the appointment of an administrator by the Minister for such HEI in court, but also because it is widely accepted that it was the primary reason for the amendments to the Higher Education Act (RSA 1997) contained in Section 8, Section 9, Section 10 and Section 11 of the Amendment Act (RSA 2012a).

4.3.3.4(a) Background to the CUT case

The process that led to the appointment of first an assessor and thereafter an administrator for the CUT was initiated by an anonymous letter that was sent during February 2011 to the office of the Minister by a so-called group of concerned staff members (Minister v CUT 2012:19-20). In this letter allegations of financial, labour law, and human rights violations were made against the Principal and Vice-Chancellor of the CUT, Prof. Mthembu and one of the then Deputy Vice-Chancellors, Prof. Schultz (Minister v CUT 2012:19-20). These allegations were investigated by an assessor, and upon receiving the assessor's report, the Minister appointed an administrator for the CUT to take over the authority of the Council, the management of the CUT and to perform functions relating to governance and management of the CUT.

4.3.3.4(b) The nexus between the CUT and the Amendment Act

The CUT opposed the appointment of the administrator based on Section 41A(1) of the Higher Education Act (RSA 1997), as well as on certain procedural and substantive grounds (Minister v CUT 2012:25-26). Each of these is briefly explored below:

- The CUT submitted that the administrator's appointment was contrary to the provisions of Section 41A(1) of the Higher Education Act (RSA 1997), because the administrator was appointed to take over the management and governance of the CUT, while the Higher Education Act (RSA 1997) provided that an administrator will take over the authority of the Council or the management of the HEI and perform the functions relating to governance or management (Minister v CUT 2012:36-37). The Court held that the Minister was entitled to appoint an administrator to take over both the governance and management of an HEI. However, this challenge by the CUT did highlight that the use of the word "or" in Section 41A1 of the Higher Education Act (RSA 1997) was problematic and could lead to further legal challenges by other HEIs.

  Section 49B has now been incorporated in the Higher Education Act (RSA 1997) in terms of Section 11 of the Amendment Act and pertinently provides that an administrator may take over the management, governance and administration of an HEI and also perform all the functions of the HEI. This is the first of the links that exists between the CUT case and the Amendment Act (RSA 2012a).

- It was argued by the CUT that Minister had not provided any reasons for his decision to appoint an administrator for the CUT. The CUT also maintained that the process followed for the appointment of administrators, in so far as it is an administrative action, is subject to the provisions of the Promotion of Administrative Justice Act (RSA 2000b), with which the Minister agreed (Minister v CUT 2012:42).

This lacuna has been adressed by Section 11 of Amendment Act. Section 49A(3) of the Higher Education Act (RSA 1997) now pertinently provides that the Minister must comply with the provisions of the Promotion of Administrative Justice Act 3 of 2000 (RSA 2000b). This again establishes the causality that exists between the CUT Judgment and the Amendment Act (RSA 2012a).

- It was argued by the CUT that the assessor's report was vague.
  Section 47 of the Higher Education Act (RSA 1997) now noticeably provides that the assessor must provide reasons for both his or her findings and recommendations (see Table 4.2c). This is yet another example illustrating the link that exists between the CUT Judgment and the Amendment Act (RSA 2012a).

- A further argument made by the CUT was that the consultation process with the CUT followed by the Minister before the appointment of the administrator was flawed in that the Minister had accepted the assessor's report and its contents, before the Minister's consultation with the CUT had taken place. In essence, it was argued by the CUT that the Minister had prejudged the institution (Minister v CUT 2012:42-44). The CUT maintained that:

  Refering to the consultative process it is Council's case that it was not provided a fair and adequate opportunity to present a response to the DG, that there was no basis for constructive debate insofar as the DG had, prior to the meeting with Council, already come to a conclusion that the assessor's findings and recommendations were correct (Minister v CUT 2012:43).

  Section 49A(3) of the Higher Education Act (RSA 1997) now specifies that before taking the decision to appoint an administrator the Minister must allow the HEI the opportunity to make representations and that the Minister will consider such before taking a decision (see Table 4.1(a)(ii)). This again establishes the correlation that exists between the CUT Judgment and the Amendment Act (RSA 2012a)

- The CUT argued that the Minister did not have the authority to dissolve the Council in terms of Section 41A1 of the Higher Education Act (RSA 1997; Minister v CUT 201236:48). This was amended by Section 11 of the Amendment Act and Section 49E of the Higher Education Act (RSA 1997) now determines that the date on which the administrator is appointed is the date on which the Council is dissolved (see Table 4.1a(iiii) and Table 4.1b(vi)).

4.3.3.4(c) The Minister's response

Once Judgment was delivered, namely that the appointment of the administrator for the CUT was set aside, it was reported on 23 August 2012 in the *City Press* (2012:Online) that Nzimande had stated that "(t)he Higher Education Act might have to be amended in response to Judge Johann Daffue's ruling in the Bloemfontein High Court this month". On 10 June 2013 the Minister again commented on the Amendment Act (RSA 2012a) and declared that (Nzimande 2013a:Online):

> Although the Act allowed some interventions to take place, its effectiveness was greatly reduced where an institution resisted the efforts of an Independent Assessor. Until the recent amendment to the Act, the legislation only allowed the Assessor to make a recommendation based on evidence presented to him or her during the investigation. An Independent Assessor now has the right to enter any university building or other facility to conduct an investigation or assessment and to copy any documents relevant to the investigation. The Independent Assessor did not have the power to call a witness to give evidence in the investigation, even if the person had information critical to the investigation. This is remedied in the Amendment.

It is also noticeable that the Minister did not pursue an appeal against the Free State High Court Judgment.

4.3.3.4(d)Conclusion

The conclusion is that the provisions of Section 8, Section 9, Section 10 and Section 11 of the Amendment Act (RSA 2012a) were the Minister's response to suffering a

public defeat against the CUT in the Free State High Court. This conclusion is supported by the following:

- The Minister's statements after the CUT Judgment (see 4.3.3.4c),
- The fact that the Minister did not pursue an appeal against the CUT Judgment (see 4.3.3.4c),
- The absence of Section 8, Section 9, Section 10 and Section 11 in the Higher Education and Training Bill (RSA 2012b) when it was initially published during 2012,
- The very brief period that lapsed between the Judgment (August 2012) and the enactment of the Amendment Act (RSA 2012a) during December 2012. This 'rush' is believed to have contributed to what can be described as poorly drafted provisions of the Amendment Act (see 4.3.4.b and 4.3.6.2), and
- The correlation between the Judgment and the provisions of Section 8, Section 9, Section 10 and Section 11 of the Amendment Act (RSA 2012a).

By opposing the appointment of an administrator, the CUT acted to defend its institutional autonomy. It is ironic and regrettable that while the CUT had successfully challenged the Minister, this action resulted in provisions in the Amendment Act that may have negative implications for the academic freedom and institutional autonomy of all HEIs and thus affect the entire SAHE system.

4.3.4 What is left unproblematic in this problem representation?

This question is explored (see 4.3.4.2) by applying the questions specified in 4.3.4.1 below.

4.3.4.1 Interpretation of the question

This question explores what is not problematized by a particular policy (Bacchi 2009:12). To clarify the question, one could ask the following two questions:

- What are the silences in the policy?

- What are the conditions and situations that ought to be part of the policy, but were excluded?

4.3.4.2 What are the silences in the policy? What are the conditions and situations that ought to be part of the policy, but were excluded?

Matters on which Section 9 of the Amendment Act are silent have been identified by Gauntlett. These include that this section does not properly deal with fundamental issues such as open and transparent proceedings, procedural fairness and the privilege against self-incrimination (Gauntlett 2013:Online). In the event that the latter occurs, it also does not absolve such an individual from potential criminal liability on the basis of the evidence obtained under compulsion (Gauntlett 2013:Online). The implications of these gaps in Section 9 of the Amendment Act are that should the assessor require testimony from an employee or student during his or her investigation, the employee or student will have to comply, even though he or she risks self-incrimination (Gauntlett 2013:Online), which could possibly result in disciplinary or other actions being instituted against such employee or student. Equally negative are the implications that may flow from failure by the assessor to properly deal with transparent proceedings and procedural fairness (Gauntlett 2013:Online).

Another aspect on which the Amendment Act (RSA 2012a) is silent are the qualifications and experience necessary for an assessor to perform what is now, in terms of Section 9 of the Amendment Act (RSA 2012a:10), essentially a legal process, where legal arguments may be submitted by the legal representative/s of individuals implicated during the investigation (Gauntlett 2013:Online). Assessors must be appointed by the Minister from the assessor panel that is compiled by the CHE in terms of Section 43 of the Higher Education Act (RSA 1997). To qualify for appointment to the assessor panel by the CHE, individuals must meet the following requirements:

- must have knowledge and experience of HE,
- may not be members of the CHE;

- must comply with any other requirements determined by the CHE.

The consequence of this silence in the policy is that assessors will be engaging in a legal process, without the requirement of having the benefit of legal qualifications or training with corresponding relevant legal experience (Gauntlett 2013:Online). However, an assessor is entitled to recruit expert assistance which might provide a circumvention of this potential problem.

Furthermore, Section 11 of the Amendment Act provides that an administrator may take over the governance, administration and management of the HEI (see Table 4.1a(iiii) and Table 4.3a), but, as pointed out above, remains silent as to the qualifications required to be considered for appointment as an administrator. The risk is that a person appointed as an administrator for an HEI may not have all the necessary skills and experience to perform all the functions of the HEI. Fortunately, as the administrator, the individual is empowered to employ or contract individuals who can complement the experience and skills set of the appointed incumbent.

Two other matters on which Section 11 of the Amendment Act are silent have been identified by Gauntlett (2013:Online): that provision is not made for the Minister to grant an extension to an HEI to comply with the directive issued to the HEI, and no provision is made for the Minister to consider or grant a less severe action, such as a temporary suspension of the existing body, than the dissolution of the Council of the HEI concerned.

In conclusion, the silences that exist in the Amendment Act (RSA 2012a) that have been discussed in this section (4.3.4.2) are of such a nature that they could seriously impact on the rights of those involved.

4.3.5 What effects are produced by this representation of the problem?

Question five, as is the case with the other questions, will firstly be interpreted to understand fully what it encompasses (see 4.3.5.1). Thereafter the full scope of the question will be explored based on the elements of clarification identified in the process of interpreting what the question encompasses.

4.3.5.1 Interpretation of the question

The purpose of this question is to provide a means for assessing policies by examining three kinds of overlapping effects, namely discursive effects, subjectification effects and lived effects (Bacchi 2009:15). Discursive effects are the effects created by the limitations that exist about what can be thought or said about the problem representation (Bacchi 2009:15). Subjectification effects are the effects that accompany the way in which matters are constituted within a problem representation (Bacchi 2009:15), whereas lived effects are the effects that the problem representation has on people's existence and experience (Bacchi 2009:15). The aim of this question is to consider the impact of the problem representation on fundamental social relations (Bacchi 2009:15).

The following focal questions have to be considered and will be addressed in the next section:

- What is likely to change with this problem representation?
- What is likely to stay the same?
- Who is likely to be harmed?

4.3.5.2 What is likely to change with this problem representation? What is likely to stay the same? Who is likely to be harmed?

The changes (or those elements left unaltered) that have been brought about by Section 9, Section 10 and Section 11 of the Amendment Act (RSA 2012a) have been explored in Tables 4.1 - 4.3, as well as 4.3.5.1 above. The effects of these provisions on academic freedom and institutional autonomy of HEIs have also been considered (see 4.3.5.1). The risks and probable negative consequences arising from these Sections of the Amendment Act (RSA 2012a) have also been considered (see 4.3.4.2).

The question that remains to be answered is the impact of these sections of the Amendment Act (RSA 2012a) on fundamental social relations (see 4.3.5.1).

Probably the most important relationship that these sections of the Amendment Act (RSA 2012a) impact on is the relationship that exists between government and HEIs. It is safe to conclude that the Amendment Act (RSA 2012a) has already impacted very negatively on this relationship. This is apparent from the outcry that ensued with the enactment of the Amendment Act (RSA 2012a) (see 1.1).

Another way in which the Amendment Act (RSA 2012a) has impacted on social relations is the perceptions that it created about the Minister not only in the HE sector, but also in the eyes of the public who were exposed to the barrage of negative comments about the Minister. Examples of these are enumerated in section 4.3.1.5c of this study. They include the article published in the *Sunday Independent* on 4 November 2012 titled *Free our universities from Nzimande's blade* penned by the then Vice-Chancellor of UNISA, Prof. Barney Pityana and the views of Prof. Mthembu (the CUT's Vice-Chancellor) in an article published in the *Mail & Guardian* (2012:Online). The perception created by articles such as these is that of an all powerful, control hungry Minister, which does nothing to enhance the Minister's standing in the eyes of the public.

4.3.6 How/where has this representation of this problem been produced, disseminated or defended?

Ouestion six is the final question that requires answering when applying Bacchi's WPR approach. This question is explored (see 4.3.6.2) on the basis of the specific questions set out after considering what this question entails (see 4.3.6.1).

4.3.6.1 Interpretation of the question

The above question can be unpacked in the following two questions that can help the policy analyst to gain a deeper understanding of the representation of the problem:

- How or where is the representation of the problem produced, disseminated and defended?

- What are the past and current challenges to the representation of the problem?

4.3.6.2 Challenging problem representations

The questions of how the problem representation was produced and what underpins the Amendment Act (RSA 2012a) have been explored in 4.3.2 and 4.3.3. In Question six the possibility of challenging the problem representation that is judged to be harmful is considered.

It has already been argued that the provisions of Section 9, Section 10 and Section 11 of the Amendment Act (RSA 2012a) may infringe on academic freedom and institutional autonomy of HEIs (see 4.3.1.5c). This is consistent with the conclusion reached by Gauntlett (2013:Online) when he discusses the Amendment Act (RSA 2012a) and concludes that it is open to constitutional challenge, because it is impermissibly vague, it unjustifiably infringes the constitutional right to academic independence and it violates the right to a fair procedure.

Additional evidence of harmful provisions in the Amendment Act (RSA 2012a) have been explored and numerous examples of vague wording were identified. These are discussed, as are also their impact on the performance of the functions required by the individuals involved.

The provisions contained in Section 9 raise concerns when the wording applied to empower the assessor is considered, because not only is the wording in some instances vague, but it also confers unfettered powers on the assessor, that might have negative implications for those affected by the assessor's investigation.

For example, the independent assessor now has the power (see Table 4.2b), on receipt of a complaint or an allegation or on the basis of information that has come to his or her knowledge and which points to conduct as specified in Section 45, to conduct an investigation for the purpose of determining the merits of such complaint, allegation or information. The independent assessor shall also determine the manner, format and procedure in which the matter concerned should be dealt with,

taking into account the circumstances of the case (see Table 4.2b(i)). Here the words “points to” in the text are significant: they mean that for the independent assessor to conduct an investigation, all that is required is that the complaint, allegation or information received by the assessor should “point to” certain actions (see Table 4.2a). In this instance, there it is no objective, measurable standard requirement expected to warrant such an investigation; a mere indication alone will suffice, with the discretion to decide resting with the assessor.

The use of the words “shall be determined” in Section 9 of the Amendment Act that states that the format and the procedure are to be decided by the assessor, with due regard to the circumstances of the case, also means that the decision on the format, manner and procedure of the investigation rests solely with the independent assessor.

The assessor may also direct that any category of persons or all persons whose presence is not desirable at the proceedings shall not be present at any proceedings pertaining to any investigation or part thereof (see Table 4.2b(ii)). The use of the words “may direct” in the text is of importance, because once again the auxiliary verb “may” is applied, but now it is coupled with the word “direct”. The use of “may” grants the assessor a discretionary power and, coupled with the word “direct” and the clause “shall not be present”, gives the assessor the power to decide whether a person or persons may or may not be present at the proceedings. The words “may direct” is similar to a command – an instruction issued by the independent assessor. This provision is one of the numerous empowering provisions found in the text, with the tone of the text in keeping with creating dictatorial empowerment.

The assessor may also, for the purposes of conducting an investigation, direct any person to submit an affidavit or affirmed declaration or to appear before him or her to give evidence or to produce any document in his or her possession or under his or her control which has a bearing on the matter being investigated, and may examine such person (see Table 4.2b(v)). The assessor may further request an explanation from any person whom he or she reasonably suspects of having information which has a bearing on a matter being or to be investigated (see Table 4.2(v)). The tone of command mentioned previously continues in the text, because of the use of the

words “may direct”, “may request” and “may examine”, with the auxiliary verb “may” providing the independent assessor with discretionary powers to decide whether to act in such a manner or not. The use of the words “reasonably suspects” also warrants mentioning, as once again there is not an objective achievable standard delineated for such a course of action, instead it centres only on whether the assessor has a suspicion about a matter. In addition to the tone of command in the text, it is apparent that another consequence of the tone of the text is one of empowering the assessor with unrestricted discretionary powers.

When considering the provisions of Section 11 it becomes apparent that the wording that is applied is in some instances vague, similar to the wording found in Section 9. The words “reasonable period” (for the Council to take the steps required by the Minister) (see Table 4.1a(iii)) and “reasonable opportunity” (for the Council to make representations to the Minister before the Minister takes a decision to appoint an administrator or not) (see Table 4.1a(ii)) are examples of such vague wording. The question is what measures will be applied when considering what constitutes either a reasonable period or a reasonable opportunity. Furthermore, there are no provisions that specify how, for example, the authenticity of an alleged instance of discrimination or unfair treatment by the specific HEI will be established prior to the Minister issuing a directive. This implies that an anonymous complaint (as in the CUT case) that could emanate from dissatisfied employees or students and that could even be without merit might be sufficient to enable the Minister to issue a directive to the HEI with the drastic consequences for the HEI that could follow.

On the basis of what has been discussed, the conclusion that both Section 9 and Section 11 of the Amendment Act (RSA 2012a) are open to challenge, because of the vague wording applied and the autonomous powers vested in both the Minister and the assessor appointed by the Minister is inevitable.

4.4 SUMMATIVE PERSPECTIVES

In this chapter the stipulated secondary research questions (see 1.3) were addressed. To achieve this, the Amendment Act (RSA 2012a) and specifically Section 9, Section 10 and Section 11 of the Amendment Act (RSA 2012a) were

explored, applying the principles of Bacchi's WPR approach (see 1.8.2.2 and 4.1). First, a comparative analysis was done of the relevant sections of the Higher Education Act (RSA 1997) and the Amendment Act (RSA 2012a) (see 4.2). Thereafter, Section 9, Section 10 and Section 11 of the Amendment Act (RSA 2012a) were explored (see 4.3), on the basis of the six questions posed by Bacchi.

Applying Bacchi's approach, the changes brought about by the Amendment Act (RSA 2012a) were explored (see 4.3.1.5). The conclusion is that the Minister's powers in relation to the appointment of assessors for HEIs have not been extended by the Amendment Act (see Table 4.1c and 4.3.1.5a). The implications of this are that the Minister's powers to appoint assessors in terms of the Higher Education Act (RSA 1997) have remained unchanged and will therefore not have any implications for the academic freedom or institutional autonomy of HEIs.

However, as the powers afforded assessors in terms of Section 9 of the Amendment Act did not form part of the Higher Education Act (RSA 1997) (see Table 4.2a, Table 4.2b and 4.3.1.5b) it is clear that the powers of assessors have significantly been extended by the provisions of Section 9 of the Amendment Act and that this may very well have implications for the institutional autonomy of HEIs.

Previously no provisions existed in the Higher Education Act (RSA 1997) regarding the issuing of directives to a Council that could lead to the appointment of an administrator, the process to be followed or the requirements therefore (see Table 4.1a, Table 4.1a(iii) and Section 4.3.1.5b). These enabling powers did not form part of the Minister's powers in terms of the Higher Education Act (RSA 1997). This constitutes an extension of the Minister's powers (see 4.3.1.5b). The Minister is further also empowered to appoint an administrator to take over the governance, management and administration of the HEI and to perform all the functions of the HEI, which was not previously the case (see Table 4.3a and 4.3.1.5c). This, together with the extension of the circumstances under which an administrator may be appointed by the Minister, effectively extends the Minister's powers to appoint administrators (see 4.3.1.5c). The duties of administrators are also extended by the Amendment Act (RSA 2012a) (see Table 4.1b and Table 4.3a).

In conclusion, the Amendment Act (RSA 2012a) has to the extent discussed significantly extended the Minister's, assessor's and administrator's powers and this may have implications for academic freedom and institutional autonomy of HEIs. In Chapter five, participants view's regarding whether the Amendment Act (RSA 2012a) has any implications for academic freedom and institutional autonomy of HEIs are discussed.

CHAPTER 5

QUALITATIVE RESEARCH RESULTS AND INTERPRETATION

5.1 INTRODUCTION

The aim of this study is to determine whether the Amendment Act (RSA 2012a) has any potential or real implications for academic freedom and institutional autonomy of HEIs in SA (see 1.5). This is articulated in the research problem of the study (see 1.2). To address this problem, one primary and six secondary research questions (see 1.3) were formulated. In this chapter, one of the secondary research questions will be dealt with, namely, "What are the perceptions of senior officials and academic staff of HEIs in SA with regard to the implications of the Amendment Act (RSA 2012a) for academic freedom and institutional autonomy of HEIs in SA?" (see 1.3). This was established by conducting semi-structured interviews with nine employees of the three selected HEIs (see 1.8.2.3). Chapter five presents analyses and interpretation of the data obtained from these interviews.

The manner in which the participating HEIs and individual participants were selected, the way in which the semi-structured interviews were conducted (invitations, obtaining informed consent and the use of the interview protocol) and the mechanics of the data analysis were discussed in Chapter one (see 1.8.1, 1.8.2.3 and 1.8.3). Hence this chapter will focus on the outcomes of the interview process and will present the perceptions of the interview participants according to six themes.

5.2 DATA ANALYSIS

The recordings of the semi-structured interviews that were conducted with the participants of the participating HEIs ("the data") were transcribed *verbatim* by the transcriber. The data was then interrogated by applying content analysis, which is the study of recorded human communications (Babbie 2013:295). Content analysis is essentially a coding operation (Babbie 2013:300) aimed at breaking down the data into labelled, meaningful pieces (Terre Blanche *et al.* 2006b:325-326).

Inductive reasoning was applied, because it allows for moving from the particular to the general to discover patterns in the data (Babbie 2013:21-22). Categories and possible sub-categories (families) and themes (super-families) were subsequently compiled. The coding or labelling, elaborating and recoding were repeated until saturation was reached (Terre Blanche *et al.* 2006b:326), whereafter the interpretation of the data took place.

5.2.1 Identifying themes and categories

The purpose of conducting the semi-structured interviews with selected senior officials and academic staff of HEIs in SA was to determine their perceptions regarding the implications of the Amendment Act (RSA 2012a) for academic freedom and institutional autonomy of HEIs in SA. To this end, the data were analysed and the following themes were identified:

- Theme 1: The relationship between government and HEIs in SA.
- Theme 2: Accountability of HEIs in SA.
- Theme 3: The concepts of academic freedom and institutional autonomy.
- Theme 4: The relationship between the Amendment Act (RSA 2012a) and academic freedom and institutional autonomy.
- Theme 5: Concerns about the Amendment Act (RSA 2012a).
- Theme 6: Perceptions about the Amendment Act (RSA 2012a).

5.2.2 Profile of interview participants

The nine semi-structured interviews were conducted between October 2014 and April 2015 with senior officials and academic staff of the participating HEIs. Their profiles are indicated in Table 5.1 below.

Table 5.1: Profiles of interview participants

Interviewee Symbol	Position in selected HEI	Experience in Higher Education
A	Vice-Chancellor and Rector	More than 20 years
B	Vice-Chancellor	More than 20 years
C	Acting Vice-Chancellor	More than 20 years
D	Registrar	More than 20 years
E	Registrar	More than 20 years
F	Registrar	More than 20 years
G	Academic staff member	More than 20 years
H	Acting Deputy Vice-Chancellor: Academic[9]	More than 20 years
I	Academic staff member	Eight years

The specific number of years of experience in the particular HEI is not provided to ensure that the identities of participants remain protected.

[9] This participant was interviewed, not on the basis of being part of the management of the HEI, but as an academic scholar.

5.3 DISCUSSION AND INTERPRETATION

The data was analysed using the thematic analysis approach. The findings from the semi-structured interviews identified the perceptions of the nine participants with regard to the Amendment Act (RSA 2012a), including the implications of the Amendment Act (RSA 2012a) for academic freedom and institutional autonomy of HEIs in SA. These findings were clustered into six themes. This section presents and discusses the interpretation of the data with the purpose of clarifying the themes and categories identified during the data analysis, first in relation to all the participants and then per occupational category, namely Group A (Vice-Chancellors), Group B (Registrars) and Group C (academic staff).

5.3.1. Theme 1: The relationship between government and Higher Education Institutions in South Africa

The majority of the participants are convinced that there have been changes in the relationship between government and HE over the past twenty years, with increasing levels of control and more regulatory measures. For example, Participant H declares: “Look I think that the relationship has been evolving from state supervision towards state control”. Their views have been shaped not solely by the Amendment Act (RSA 2012a) but also by other regulatory measures introduced for the HE sector by various Ministers over the past years such as the budgeting process and the manner in which funding is allocated to HEIs, the PQM, the Regulations for Reporting by HEIs and the CAS, as reflected herein after.

Participant D states that, “There has been an increasing tendency to move from supervision to intervention.” Having said that, Participant D highlights some of the steering instruments employed over the past two decades:

> “There has been an increase, first of all through the PQM process, secondly through the enrolment planning process ... The increasing amount of earmarked allocations is another way in which steering is taking place ... all of those are effectively steering mechanisms which have been gradually increased and money has been taken out of the block grants which had been

handed over to the University for discretion and spending and put to earmarked allocations. So that is it, that is a powerful steering mechanism. The last one is the way in which the subsidy has been dealt with ... That is a very powerful steering mechanism ..."

Participant F also refers to some of the steering mechanisms and most noteably the role that the academic planning processes at HEIs have on the relationship between government and HEIs:

"So the state can only assist but not prescribe to universities, assist Universities to go towards this particular direction and that they do, and the state does that for instance with regard to the whole notion of academic planning. That is another state steering mechanism lever, you know, because, as Universities we submit our enrolment plans and they get approved by the Department."

Participant D expands further on the influence of the PQM process on the relationship between government and HEIs and specifically the effect thereof on academic freedom. Participant D declares:

"I think that there are other areas where the state's issue with public higher education institutions is changing and I think that one of the ones [that] has not been given the attention it deserves is the effective control or licensing of Universities to offer the programs and qualifications they want to and the curricula for those qualifications that are involved ... Any qualification you want to offer, if it is approved, accredited and registered then it gets added to your PQM and your PQM is what is described as your 'license to operate'. Now that doesn't sound sinister, but the detail and the approach the CHE is taking to determining the basis on which it will give an accreditation for a qualification is, I think, becoming intrusive. You know the old formula that academic freedom was the right to determine who shall be taught, who to teach and what should be taught. We no longer have the freedom to determine what should be taught, because that is subject to the PQM process and I think that is a really important part of what is the relationship between the state and public higher (education) insitutions ... "

Another seemingly innocuous initiative that could open the door for government interference is CAS, highlighted as follows by Participant E:

> " … the new interventions of the Minister, at best, may be seen as being in the interests of the poorest of the poor or at worst could be seen as an intention to shape the membership of each institution by administrative or executive fear from, and I am referring to the Central Applications Service, the proposal to limit the cost of making applications to Universities and limiting it to a single payment regardless of how many institutions you apply to and then the more bizarre attempts to control where the poorest of the poor will study through manipulation in this system ... ."

Participant F refers explicitly to the Reporting Regulations as a form of micro-management by the Minister:

> " ... it is not only this Amendment Act but it is also the Reporting Guidelines, for instance the Reporting Regulations where the Minister wants a whole lot of things to be done … So this is being viewed as some form of micro-management on the part of the Minister … ."

However, the view of Participant F was not shared by all the other participants. In contrast, Participant D does not view the Regulations for Reporting by HEIs as problematic, stating:

> "So I think that the new reporting regulations are quite benign ... So I am not too concerned about these reporting regulations".

These Regulations represents a further attempt to increase the accountability and regulation of HEIs, by adding numerous requirements that HEIs have to comply with. Whilst accountability is deemed essential to HEIs, the question remains whether HEIs will be able to manage with the ever increasing number of regulatory documents that have to be complied with and whether these Regulations will assist to resolve the structural problems that exist.

Having acknowledged the existence of steering mechanisms, Participant F describes the changes in the relationship between government and HEIs as follows:

> "We could talk about state intervention, state interference, but there has been a move from control to state steering and intervention. But then with the Amendment Act it is back to state control; that is how I think things are, back to state control. So the relationship has been that of state steering, but then with this it has gone back to state control."

Participant I emphasizes the effect of increased measures of control by saying that there " ... might be too much control in such a way that the institution loses its autonomy to produce what the government needs at the end of the day."

An increase in interference by goverrnment is also a concern of Participant E:

> "I think that there are tendencies now that want to intervene in the way which was not the norm before and it has grown since 1997 … The reality that we have now is that those institutions too are seen by the government to be also open to personal intervention and pressure is brought to bear in a totally inappropriate way by phone call and correspondence in respect of individual cases that are put forward and almost without exception those individual cases are normally about loyal members of the current governing party and their affiliates and has very little to do with the principles that govern decisions that are taken about a person's educational attitude, progress or otherwise. And so there is a risk that the legislative powers that are in their hands can be manipulated and used. I am not suggesting that this is a daily occurrence but what I am saying is that there are trends … "

For Participant A the crux is:

> "… dit is die algemene gedrag van 'n Minister … van die huidige Minister, van 'n Minister se wil om in te meng … " (… it is the general conduct of a Minister … of the current Minister, of a Minister's will to interfere … ").

The researcher acknowledges that government will always retain a vested interest in HEIs, their operations and outcomes, to ensure not only that the financial allocations have been spent appropriately by HEIs, but also that HEIs meet the needs of the country and its people, as reflected in the national goals determined by government. However, the increase in controls over HEIs over the past years, as mentioned by these Participants, has led the researcher to believe that there has been a change in the relationship between government and HEIs with the increase in controls at the heart of the change.

On the other hand, Participant B acknowledges that certain measures have changed, one of which is increased accountability (see 5.3.2), but declares that the word “control” is not applied, because it has a negative implication.

The views of the majority of the participants are that there has been an increase in controls over or interference with HEIs and consequently a change in the relationship between government and HEIs, with participants citing a change from the state supervision model to the state interference model and even an escalation to the state control model (see Chapter two where these models were explored). These views are similar to those of Hall and Symes (2005:200) when they declare that the defining trend in governance since 1994 has been an increase in direct state control over HEIs (see 2.6.2.11). The belief that government is becoming more interventionist in its interactions with HEIs is reiterated, as emphasised earlier in this study by Mthembu (see 4.3.1.5c). The manner in which several participants respond to the Amendment Act (RSA 2012a) and other developments in the HE regulatory framework, resonates with the findings of policy analysis according to the WPR approach of Bacchi (see 4.3.2 and specifically 4.3.2.4).

5.3.2 Theme 2: Accountability of Higher Education Institutions in South Africa

The majority of the participants indicated that HEIs are accountable to government and to society, and related this accountability to public funding of HE. In fact, the majority of the participants were quite vocal about the need for HEIs to be accountable. This is perhaps best articulated by Participant F as follows:

> “We are being sponsored through public money and we have to be accountable to the public, because we use the public's money.”

Participant A has a somewhat narrower view, referring to the ‘state’ and not to the ‘public’, and declaring that:

> “… Universiteite as gesubsidieerde entiteite moet totaal transparant en verantwoordbaar wees teenoor die staat in terme van die geld wat hulle van die staat kry … ” (“ … universities as subsidized entities have to be fully transparent and accountable towards the state in terms of the money they receive from the state …”).

These sentiments are echoed by Participant C who asserts that:

> “… the University is using public funds and there is no way you can use public funds and not be held responsible and I think that is the right thing that we are held accountable...”

Accountability in a broader sense than just financial accountability, in a manner similar to that of Participant F, is explained as follows by Participant C:

> “ ... we are a public entity so the Government by its very nature is a societal organisation that is looking after the interests of the public, so it is in that respect that I say that we need to be accountable as higher education institutions... ”

Participant B focuses on the role that Parliament and the Parliamentary Portfolio Committee for Higher Education play in accountability and what is perceived as an increase in the accountability of HEIs:

> “ … the legislature exercised quite a lot more accountability … for example my sense is that I am much more frequently called before the Higher Education Parliamentary Portfolio Committee … So if you know you are going to be called to account to the public forum, to Parliament for reaching a certain goal or not

> reaching them, then that has the effect of - controlling is too strong a word, but it is a significant influence on the practice in the university and institution and financial accountability and I think that those are all good things … I think that this is an appropriate mechanism of accountability."

Though supporting the principle of accountability Participant H believes that this should be a mutual accountability between HEIs and the Ministry of Higher Education and Training:

> "Some of the crises that happened at higher education institutions in the last five years and in the last ten years could have been prevented and could have been predicted because the most sufficient information in the system, the institutions' annual reports, should be interrogated by the Ministry for the crisis to be seen. The point is that the government did not have the capacity to scrutinise that documentation in an appropriate way … Now they will insist on change. It is unlikely that government is going to get anything out of it in terms of the set of results. I think it is very, very unfortunate. This does not mean that I do not believe that higher education institutions have to be absolutely accountable to society and to the government, but I do not think this is the way of doing it."

What is encouraging to see is that the participants do not view accountability of HEIs as an obligation that merely has to be met, but rather as an essential responsibility that should be embraced. The sentiments of the participants reflect the principles of the White Paper declaring that institutional autonomy of HEIs is to be exercised in conjunction with public accountability (RSA DoE 1997b) (see 2.6.2.5) and the Preamble to the Higher Education Act (RSA 1997:2) which states that HEIs function within the context of public accountability (see 1.1 and 2.6.26). The participants' views are furthermore consistent with scholarly contributions that argue that HEIs are accountable not only for the funding received from government, but also to broader society for realising their mission (see 3.8).

5.3.3 Theme 3: The concepts of academic freedom and institutional autonomy

The significance of the principles of academic freedom and institutional autonomy for HEIs is clearly articulated by some participants. Participant F, for example, maintains that academic freedom is of crucial importance to HEIs and declares: "Well, academic freedom, it is what defines the existence of universities", which resonates with the view of Higgs (2010:371) that academic freedom is considered to be the lifeblood of a university.

Participant A believes that without institutional autonomy " … dan kan jy maar die ligte afsit en huistoe gaan want dan het jy nie meer Universiteite oor nie … ". (" … then you might as well switch off the lights and go home because then you do not have universities left … "). Since institutional autonomy refers to the level of independence that HEIs have in their interactions with external parties, such as sponsors, donors and government (Du Toit n.d.:7) (see 1.7.4 and 13.6), the view of Participant A is supported, as institutional autonomy is deemed necessary for the performance of a HEI's functions.

The nature of the relationship between academic freedom, institutional autonomy and accountability has been the subject of much debate, with different views being held by different scholars (see 3.8). This can also be seen in the views of the participants. Participant C highlights this relationship between autonomy, academic freedom and accountability as follows:

> "… it is not a bad thing that we balance between responsibility and the autonomy and I think the ethic itself is asking you to account and allow the other eye to know what is happening within the university, which is not a bad thing. Because what we perceive in academia is autonomy actually and sometimes what we call academic freedom has got to be measured against the meaning of what we mean by autonomy ... I think we need to unravel and understand that the autonomy and freedom that we want to claim can not happen without responsibility, they have got to be balanced ... "

The views of the majority of the participants that there is a clear relationship between the principles of academic freedom, institutional autonomy and accountability of HEIs are reflected in the contributions of scholars such as Altbach (2001) (see 3.2 and 3.8), and Moja and others (1996:134) who believe that the concepts of academic freedom, institutional autonomy and accountability are linked together "through a variety of mechanisms and agreements that connect individuals, institutions, state and civil society" (see 3.8). Participant H, for example, declares that institutional autonomy is necessary for the existence of academic freedom and describes this relationship as follows:

> " … in order to have academic freedom one needs to have a sufficient level of institutional autonomy and if an institutional autonomy has been eroded, well then these things in the end affect academic freedom … ".

The complexity of this relationship is explicated further by Participant G who believes that it requires detailed analysis:

> " … there is acknowledgement that academic freedom is a good thing, it is a constitutional value, there is anxiety about its links to institutional autonomy which for me can't really be understood except in institutional terms which really means that institutional autonomy is … complex and needs to be analytically taken to pieces so that one dimension of institutional autonomy or two dimensions are relevant for academic freedom, but not all of the dimensions … So you have to disentangle those … it becomes very important at this stage to distinguish between the different dimensions of institutional autonomy separating the ones which are for me tied up with academic freedom and those which are not tied up with academic freedom as such … "

In contrast to the above viewpoints, Participant F believes in "limited autonomy" and "autonomy coupled with accountability":

> "I personally don't like that notion of institutional autonomy … as long as you are being sponsored through our taxes then we cannot talk about institutional

autonomy. You are state sponsored, you can't do anything without that money, therefore the autonomy is very limited."

Even though the principles of academic freedom and institutional autonomy are supported by the majority of the participants, it is clear that there are different interpretations of these concepts and of the relationship between them. This is also apparent in the scholarly contributions that were explored (see Chapter three). This points to the need for further debate in the HE sector on these important principles and their relationship with each other (see 6.4(a)).

5.3.4 Theme 4: The relationship between the Amendment Act and academic freedom and institutional autonomy

There was general agreement amongst the participants that the Amendment Act (RSA 2012a) may have implications for either academic freedom or institutional autonomy of HEIs or both. There were, however, differing opinions regarding the way in which the Amendment Act (RSA 2012a) may affect academic freedom and institutional autonomy, as well as what the extent of its impact might be.

Participant I demonstrates strong sentiments when questioned about whether the Amendment Act has any implications for academic freedom and institutional autonomy of HEIs and states that:

> "Yes, I think it is a big yes ... Immediately if there is an administrator there is no autonomy. It is a one man voice. You know in Council they come to a decision after discussions amongst various individuals who form Council ... but immediately if there is administration, the voice of the people dies. It is no longer available, for there is no longer autonomy ... ".

Sharing these views about the implications of the Amendment Act (RSA 2012a) Participant E declares that "(t)he autonomy of Universities is directly placed at risk by some of the actions that are possible in that new Amendment Act". Participant D shares similar views and illustrates the way in which the Amendment Act (RSA

2012a) may impinge on academic freedom and institutional autonomy by means of a practical example. Participant D declares that:

> "If the Minister would exercise a lot of the powers that the 2012 Amendments give and starts issuing directives, such directives could affect both or one of the institutional autonomy or academic freedom. There is, let's take a hypothetical one where the Minister has made some noises. In KwaZulu-Natal they have this controversial language policy in which all students must take a course in IsiZulu ... if there was a Ministerial directive along those lines and the Minister has welcomed the KwaZulu-Natal policy and has suggested that it should be replicated elsewhere; that would be an infringement of both academic freedom and instutional autonomy. So the powers in the 2012 Act, if they were used, they haven't been used yet, if they were used, it could have a very serious impact on both."

These comments of Participant D respresents a balanced view that is supported by the researcher. This practical example cited by this Participant best illustates the manner in which the provisions of the Amendment Act (RSA 2012a) might impact on both the academic freedom and institutional autonomy of HEIs.

Participant E was particularly concerned about the power of the Minister to appoint assessors on the basis of complaints lodged against an institution:

> "Yes, look, institutions will not be able to do whatever they want to do for the good of society, because now people will go and report to the Minister and then the Minister will be obliged to act, to send an assessor. Just like that, you know, that is what the Act is saying … So the Universities will feel that they don't have the necessary freedom to do what they want to do, because they are afraid that the Minister might come and sjambok them and so they feel infringed on by the Act. So that whole notion of academic freedom then will just disappear, because people will do that in Universities, but keeping in mind that if somebody doesn't like what we are doing here, then they might report to the Minister and the Minister might come and intervene."

This Participant focuses on the way in which the Amendment Act (RSA 2012a) might curtail the academic freedom of HEIs. The essence of this contribution is that fear of retribution or interference by the Minister on the basis of complaints lodged will restrain academic freedom. It has to be conceded that this fear of HEIs might impact on academic freedom.

Both Participants H and B see the biggest threat of the Amendment Act (RSA 2012a) being for institutional autonomy while acknowledging that the erosion of institutional autonomy will also indirectly affect academic freedom. Participant H maintains that:

> "So if one has a definition of academic freedom that is traditional, this thing does not perturb anything in that regard … In a sense, one, in order to have academic freedom one needs to have a sufficient level of institutional autonomy and if institutional autonomy has been eroded, well then these things in the end affect academic freedom."

This view is supported, because academic freedom and institutional autonomy are closely linked together, the erosion of the one will naturally affect the other.

Participant B believes, with specific reference to the issuing of directives by the Minister, in terms of the Amendment Act (RSA 2012a), that, " ... that would be a negative impact on the university autonomy…" and goes on to say:

> " … there are two deep understandings of academic freedom. One is that it is a freedom that relates to individuals, an individual with the right to teach what they want to teach, to research what they want to research, to speak their minds without interference. That is the one, the other is the right of institutions, the right of an institution to appoint or admit the students which it wants to admit without interference, to create curricula, to research and to appoint staff. So the sense in which the Act infringes on autonomy relates and also infringes on academic freedom where academic freedom is an institutional right and so as I mentioned if it is an institution who wants to retain the right to decide which student should go to that University, that can both be regarded as an issue of academic freedom or as an issue of institutional autonomy … and in that sense

> the Amendments infringe that. I don't think the Amendments specifically infringe on the individual rights to academic freedom."

Whereas all the participants agree that that the Amendment Act (RSA 2012a) encroaches on the institutional autonomy of HEIs, they hold different views on whether the Act poses a direct or indirect threat for academic freedom. As far as the former is concerned, their views are consistent with the sentiments of Rensburg (*Business Day Live* 2013:Online), Ngubane and Price (*Mail & Guardian* 2013b:Online) and the prominent jurist, Gauntlett SC (2013:Online) (see 1.1).

5.3.5 Theme 5: Concerns about the Amendment Act

During the interviews the majority of the participants expressed concerns regarding the Amendment Act (RSA 2012a). These concerns related to the processes followed with the enactment of the Amendment Act (RSA 2012a) (procedural concerns) or to the provisions of the Amendment Act (RSA 2012a) (substantive concerns), whereas others were of a general nature.

5.3.5.1 Procedural concerns

The concerns voiced regarding the processes followed with the enactment of the Amendment Act (RSA 2012a) were that there was not sufficient consultation with the HE sector, that there was not sufficient time allowed for the submission of comments and that the HE sector's comments were not taken into account.

Participant F describes one of these procedural flaws namely inadequate consultation by the Minister with the HE sector as follows:

> "The Minister amended the Act and gazetted those amendments second-handedly without involvement of the sector. That does not do justice to the whole notion of co-operative governance …".

Participant G shares the concern voiced by the previous participant:

> "I think one of the things which kind of immediately makes one concerned about the new legislation is that it seemed to go forward without consulting the agencies which exist which is specifically put in place to democratise the pursuance of higher educational policy and I am thinking notably of course of the Council on Higher Education and also the Association of Vice-Chancellors and so on."

Similarly, Participant D declares that numerous provisions of the Amendment Act (RSA 2012a) were "rushed through without adequate consultation". Participant D also maintains that the Amendment Act (RSA 2012a) was enacted, notwithstanding comments from various roleplayers to the contrary:

> "Well at the time that these amendments were before Parliament we made it clear that we thought they were bad and that they were badly drafted and we appeared before the standing committee, the portfolio committee and during the hearings of the bill as did the CHE as did quite a number of other organisations ... ."

In brief, it can be said without a doubt that one of the major concerns is that the Minister did not allow sufficient time for the submission of representations and that the comments that were submitted were not taken into account. These concerns of the participants, mirror those of Ndungane and Price who alleged that the Minister had, without consultation, introduced new or further amendments during the Portfolio Committee meetings in September 2012, while comments were being presented and that these amendments were beyond the scope of the original Bill (RSA 2012b; *Mail & Guardian* 2013b) (see 1.1). Ndungane and Price also believed that the period of two weeks granted for interested parties to submit their comments on the provisions of the Bill (RSA 2012b) had been insufficient (*Mail & Guardian* 2013b) (see 1.1).

5.3.5.2 Substantive concerns

Even more concerns were raised by the participants regarding the provisions of the Amendment Act (RSA 2012a) (substantive concerns).

Participant D explains concerns regarding certain provisions of the Amendment Act that might be unconstitutional:

> "I think the issues in the 2012 amendments that are singularly worrying are the provisions in terms of which the Minister can issue a directive on a whole range of serious and not so serious issues ... some of which are objective and some of which are not subject to an objective test and the fact that the Act of 2012 makes it obligatory for the Minister to dissolve a Council if a Council fails to respond to a directive. He has no discretion, the Act does not give him a discretion ... That is just crazy. It may be unconstitutional but it is just crazy and I don't think it was intended, certainly from the Minister's point of view, but it is just an example of the poor drafting."

This concern regarding certain provisions of the Amendment Act (RSA 2012a) that are unconstitutional is shared by Participant E who declares that:

> " ... some of the provisions are unconstitutional and would probably have failed if he had tried to exercise those powers and had been taken to court."

These concerns about the provisions of the Amendment Act (RSA 2012a) are not unfounded. In fact, Gauntlett maintains that the Amendment Act (RSA 2012a) is unconstitutional because it is impermissibly vague, it unjustifiably infringes the constitutional right to academic independence and it violates the right to a fair procedure (Gauntlett 2013:Online) (see 1.1 and 4.3.6.2). Gauntlett (2013:Online) also criticizes that that provision is not made for the Minister to grant an extension to an HEI to comply with the directive issued to the HEI, and that no provision is made for the Minister to consider or grant a less severe action, such as a temporary suspension of the existing body, than the dissolution of the Council of the HEI concerned (see 4.3.4.2).

Another concern (similar to those voiced by Gauntlett) in this regard is provided by Participant D:

> "Another issue that is repugnant is the provision that if any person is implicated in the report of an assessor, and a person can be implicated without having had an opportunity to give his or her side of the story, then without any further process and without any possibility of challenging the process, that law provides that that person may not be again on a University Council. Now there is no indication in the Act as to what it means to be implicated in the report of the assessor ... it could be for an error in judgment if it is, let us say it is the Vice-Chancellor of the university and he or she is implicated in the report of the assessor in a way, then he or she can never be Vice-Chancellor again, because they can't be a member of the Council therefore the person can't be the Vice-Chancellor. That is unconstitutional and I am certain that if it is the outcome, if it results to such thing, there would be a High Court challenge which, I have no doubt, would be successful just as the CUT case challenge was successful. But it is just an example of drafting - it was simply inadequate."

This is another very good example of inadequate drafting, illustrated at the hand of the consequences that might ensue, namely that if implemented the provisions of the Amendment Act (RSA 2012a) might result in a Vice-Chancellor not being a member of the Council of the specific HEI again as a result of being implicated in an assessor report – not found guilty, but merely implicated and without any further procedural requirements having been met. This is contrary to the legal principle that a person accused of having committed an offence can only be punished after having been found guilty of such, following due process.

Other concerns raised by Participant D relate to the administrator performing both the governance and executive functions of an HEI and the absence of exit measures for an administrator when his or her appointment comes to an end:

> "I think that the next issue which is not new in the 2012 Amendments, but becomes more serious in the 2012 Amendments is the fact that the administrators they have appointed hold the governance function at the same time as holding the executive function. So there is no possibility for checks and balances and the administrators are put in a very difficult position of how the administrator then plans for his or her exit from that position at the transition to

a new governance structure and where necessary to a new executive structure. We have seen this in one case where the administrator had a significant role in appointing the new Vice-Chancellor, before handing this over to the Council, but it didn't work. That is the case of Institution X[10] where the Vice-Chancellor resigned after two years [after assuming office] immediately after the previous administrator left and who had had a significant part in ensuring [the Vice-Chancellor's] appointment and as a result the incumbent had never actually got the confidence of the Council. But that is just one of the consequences of the fact that two roles are merged into one individual and there is no process in the 2012 provisions and there was no process in the pre - 2012 provisions: there is no process for an orderly disengagement."

This concern regarding administrators performing all the manangement and governance functions of a HEI is shared by the researcher, who considered this in 4.3.4.2. The researcher's main concern is regarding the silences in the Amendment Act (RSA 2012a) in so far as the qaulifications required to be able to act as an administrator, although it is conceded that the administrator may obtain assistance from suitably qualified individuals (see 4.3.4.2).

5.3.5.3 General concerns

There are general concerns that the provisions of the Amendment Act (RSA 2012a) are badly drafted. Participant D summarizes this concern by stating that the "… 2012 Amendments, first of all, were poorly drafted... " and that "... the long and the short of it is that the 2012 amendments were bad, badly drafted and badly conceived". This concern is shared by Participant E who maintains that " ... some of the legislation was badly worded, open to conjecture and to challenge". The researcher is also of the opinion that numerous of the provisions of the Amendment Act (RSA 2012a) are badly drafted. Some of the provisions of the Amendment Act (RSA 2012a) that serve as examples of poor or inadequate drafting have been explored by the researcher in 4.3.6.2.

[10] Reference is made to X to protect the identity of the HEI.

5.3.5.4 Summative comments

These concerns of the participants are consistent with those of Gauntlett, who on numerous occasions voiced his critique of the Amendment Act (RSA 2012a) (see 1.1 and 4.6.2) and has maintained that it is unconstitutional (Gauntlett 2013:Online). The concerns of the participants are also similar to the concerns voiced by a number of Vice-Chancellors when the Amendment Act (RSA 2012a) was enacted (see 1.1 and 4.3.1.5c) and explored by the researcher in 4.3.4.2 and 4.3.6.2.

5.3.6 Theme 6: Perceptions about the Amendment Act

The participants held both positive and negative views regarding the Amendment Act (RSA 2012a). However, the negative views regarding the Amendment Act (RSA 2012a) by far exceeded the positive views. Another perception that was uttered was that the Amendment Act (RSA 2012a) was the Minister's response to the CUT Judgement. Each of these is explored below.

The positive comments of some participants mainly relate to the way they perceive government's oversight responsibility. Participant I, for example, declared that:

> "From where I sit, I think that maybe the main aim of the government was to try and make sure that the higher (education) institutions are not falling out of the scope of the government as to what they would like to see the country producing ... . At the same time the government must be able to see if the institution is still in line basically with the Constitution of the country."

One has to agree with Participant I that government has responsibility for ensuring that HEIs are functional and that HE in SA meets the demands of the country. The Amendment Act (RSA 2012a) can thus be considered in this context (also see Chapter four).

In addition, some participants associate the Amendment Act (RSA 2012a) with dysfunctional HEIs. Participant G declares that:

> "So in the situation the sum of the positive contents of the Higher Education Bill are an attempt to deal with some of the symptoms of these structural problems … So I can see that the intentions, some of the intentions of the Amendment Law are to try and address various things which are symptoms of this deeply structured crisis in higher education in the country …".

Participant I concurs:

> "So the way the government has taken in, it's, to try and control - because I think it is because of the failure of leadership in institutions that has made that Amendment Act to surface. If institutions were run by correct individuals there was not going to be any need to amend this Act and if you check how many institutions were put under administration 2010, 2011 you will see that the Minister was bound to act and do something so as to salvage the situation."

These views that the Amendment Act (RSA 2012a) might be underpinned by government's responsibility to ensure functional HEIs has been explored by the researcher in Chapter four (see specifically 4.3.2.4).

Another perspective is that the Amendment Act (RSA 2012a) might provide HEIs with a certain level of protection by detailing all the steps that the Minister has to comply with when appointing administrators or dissolving the Council of an HEI. Participant B motivates as follows:

> " …the first positive one was that a lot of procedures were specified about how the Minister should act if he or she wanted to intervene and the appointing of an administrator for the university or to just dissolve a Council or to remove a Vice-Chancellor … . The Minister has often made a decision, almost generally, naturally and acted on it. And the Amendment requires that the Minister should first inform the Council or Vice-Chancellor of his intention and then give the party time to respond and only then make a decision after … . So that is the positive thing as it prevents the Minister from acting naturally and it … protects the university to some extent … ."

Procedures have indeed been specified in the Amendment Act (RSA 2012a) that the Minister has to comply with prior to appointing administrators or assessors. However, whether these procedures do provide any measure of protection to a HEI is questionable, considering the way in which the provisions in the Amendment Act (RSA 2012a) were formulated, the unfettered discretionary powers conferred and the vague wording applied (see Chapter four).

Participant C believes that the Amendment Act (RSA 2012a) itself is not problematic, but the way that it is implemented might be.

> "You know if you take this Act to different institutions, different institutions react differently because of our social being, where we come from. The history is very, very important, so that is why I am saying the Act itself, if we are to read it from the cold piece of paper and is not influenced by the human element, you, it will stand in as a good Act."

It is true that the way in which the Amendment Act (RSA 2012a) is implemented may differ between various Ministers, however, the problematic provisions of the Amendment Act (RSA 2012a) are the source of concern (also see Chapter four).

Even though those participants who criticize the Amendment Act (RSA 2012a) do not negate the fact that there are problems in some HEIs, they are of the opinion that the Minister should distinguish between HEIs that are troubled and well-functioning HEIs, rather than enacting legislation for all alike. This is supported, because even though some HEIs are experiencing problems, not all HEIs are struggling with corruption or maladministration and one or two struggling HEIs do not represent a struggling or corrupt HE sector. Participant F expresses this sentiment as follows:

> "Yes, look, we understand the Minister's frustrations, we understand that the Minister is genuinely trying to make the sector work for public good, but the Minister must not paint all universities with the same brush. If he has problems with specific universities he must not change the legislation, he must deal with those universities with the existing legislation. He must not change the legislation. He must confront those universities, confront them directly, deal

with them, you know, but don't go and change legislation and treat the whole sector as if it is a corrupt sector because, it is not. But if we change the legislation then it means that we are throwing those Universities into the same pool with the rest of the rotten universities. So I don't think the Minister should do that."

Similarly Participant A believes that:

"Jy kan nie die 'worst case scenarios' gebruik om 'n norm te stel vir al die universiteite nie wat dan ook 'n impak het op universiteite wat goed funksioneer en wat nog nooit probleme gehad het nie en dit is waar die probleme inkom …". ("One cannot use the worst-case scenarios to set a norm for all the universities that will also affect the universities that function well and that have never had problems and that is where the problems come in …").

These views are shared by Participant H who also questions the mechanisms for dealing with crises at HEIs:

"One of the fundamental problems with this Act is that the purpose of it is to control failing institutions or to save failing institutions. In the process of doing that, what the Ministry has done is to put all higher education institutions under the same framework. … So the consequence of this is that basically one gets a kind of a police state introduction into higher education institutions. There is no limitation almost as to the powers that the Minister has, no limitations as to the reasons why the Minister could appoint the necessary administrator and as it has been demonstrated in several cases, the Minister might be wrong in his approach … . So I think it is pretty problematic. Now that said, the state of the higher education system, or rather the state of some higher education institutions is cause for concern. Now the point is why in 20 years of democratic government have we not developed more democratic instruments in order to deal with this crisis or why have we not been able to attend to the causes that are the origin of the problems that happened at higher education institutions. … Neither the administrator nor the assessor cancel out problems that are

> fundamentally structural problems if you analyse the reasons why assessors and administrators have been appointed to higher education institutions."

The researcher similarly questions the extent to which the appointment of an administrator resolves the problems that exist at a HEI and will prevent these from occurring again (see Chapter four).

Participant I also questions whether the appointment of an administrator in terms of the Amendment Act (RSA 2012a) is always necessary and states that:

> "If it was very close, I would be more than comfortable or if it would say that research would be conducted by a researcher to look at the root cause of the failure, maybe of the particular management at that time before administration is recommended for the institution. You know, maybe sometimes you don't even need an administration, you just need a new head in the institution. But also there must be proof beyond reasonable doubt that there is a need for that."

The centralization of powers in the Minister provided for in the Amendment Act (RSA 2012a) is highlighted by Participant G:

> " … there are existing provisions for dealing with various of the problems of higher education institutions and this new legislation kind of re-duplicates those, but centres authority very much in the figure of the Minister and his committees and so on. It is a centralisation of authority… ."

Similar views are voiced by Participant E that:

> "I think the Act is unfortunate and typically of the current Minister … So for me it was a sad day when that legislation was passed."

In relation to the responses of HEIs on the Amendment Act (RSA 2012a), that is similar to what is reflected here, where the Minister (*Mail & Guardian* 2013a:Online) said the following:

> "Now, however, a similar opposition is mounted by some to limit the interventions of an elected government to ensure good governance and to fight mismanagement and corruption. This appears to represent a liberal, knee-jerk reaction that attempts to limit the powers of the state wherever it can; and, in the process, it (consciously or unconsciously) opposes attempts to transform South Africa in the interest of the less privileged and the poor."

However, when considering the contributions of the participants, the researcher cannot agree. No signs of a so-called "knee-jerk reaction" could be detected in the participants' responses during the interviews. In fact, the participants displayed an overwhelming shared sense of responsibility for HE, together with deep rooted concerns about HE in SA, and specifically about the situation in some HEIs.

The connection between the enactment of the Amendment Act and the Judgement in the Free State High Court in the CUT case (see 4.3.3.4a – 4.3.3.4d) surfaced in the responses of several participants. These participants believe that the provisions of the Amendment Act were the Minister's response to the defeat he suffered in the Free State High Court in the CUT case.

This is apparent from the statement by Participant E:

> "The reasons for the Amendment Act are clear. The Ministry didn't like losing the High Court case about the way in which he appointed an administrator in one institution. The Minister set about to make it legally possible to do the things that he had attempted to do in that instance".

Participant D shares the views of Participant E and declares that " … .it was an immediate reaction to that...". Participant E also has this view. He mentions the CUT case explicity and then explains that:

> "I think the Minister is aware that the problem is with a few institutions but I think he does not have the guts to deal with those institutions. If he loses in Court he does not have the guts to try some other alternatives, some other

rules to deal with those specific institutions. Now he runs to the legislation and changes it, that is not okay."

The researcher confirms with this opinion, namely that the Amendment Act (RSA 2012a) is directly linked to the public defeat suffered by the Minister at the hands of the CUT (see 4.3.3.4a – 4.3.3.4d).

Participant B identifies the CUT case as one of the factors that had played a role in the Amendment Act (RSA 2012a):

"... that was of course the result of a court case when the Minister tried to intervene at the Central University of Technology and was challenged and the challenge was successful, so precisely the reason, this principle, resulted in an Amendment you see … ."

5.3.7 Comparison of the views of vice-chancellors, registrars and academics

A comparison of the views of the participants of Group A (Vice-Chancellors), Group B (Registrars) and Group C (Academics) highlights interesting differences in perspectives between the three groups.

The vice-chancellors were well acquainted with the Amendment Act, but not to the same level of detail thereof as the registrars. This is to be expected given the nature of their positions. Whereas all the vice-chancellors agreed that the Amendment Act (RSA 2012a) may impact on the academic freedom and institutional autonomy of HEIs, they differed on a number of issues. Participant A believed that the Amendment Act (RSA 2012a) should not be seen in isolation, specifically with reference to the Minister's intentions in relation to HE (see 5.3.1). Participant C believed that the Amendment Act as it stands is a good Act, but that the human element in the implementation thereof may be problematic (see 5.3.6), while Participant B identified both positive and negative aspects of the Amendment Act (RSA 2012a) (see 5.3.4 and 5.3.6).

The registrars were well versed with the details of the Amendment Act (RSA 2012a), basing their views on specific provisions and the implications they have for HEIs. Due to the nature of a registrar's functions at an HEI, this is not surprising. Participant D identified numerous problematic provisions (see 5.3.5.2). Similarly, Participant E and F identified numerous problems with the Amendment Act (RSA 2012a) (see 5.3.4 and 5.3.5.2). These participants identified several substantive and procedural flaws with the Amendment Act (RSA 2012a) (see 5.3.5.1 and 5.3.5.2) and highlighted the day to day practical implications of the Amendment Act (RSA 2012a) for HEIs.

The academics were acquainted with the Amendment Act (RSA 2012a) and its provisions, but adopted a more questioning and philosophical approach, which is consistent with the nature of academics. Participant H submitted that the appointment of an assessor or an administrator would not resolve the problems at the specific HEI and questioned why better mechanisms have not been developed to deal with HEIs in crisis (see 5.3.6). Participant I shares this concern and questions whether an administrator would be the answer to an institution in crisis (5.3.6). In fact, Participant I submitted that sometimes all that may be required is a new Vice-Chancellor (see 5.3.6).

5.4 SUMMATIVE PERSPECTIVES

In this chapter the data obtained from the semi-structured interviews were analysed using the thematic approach and the findings then identified the perceptions of the participants with regard to the Amendment Act (RSA 2012a), reflected in six themes (see 5.3). On the basis of the interpretation and discussion, it is concluded that the participants believe that the Amendment Act (RSA 2012a) may very well impinge on academic freedom and institutional autonomy of HEIs (see 5.3.4 – Theme 4). As a general observation, even though certain positive comments (see 5.3.6 – Theme 6) were expressed regarding the Amendment Act (RSA 2012a), the vast majority of the views were negative (see 5.3.6 – Theme 6). The crux is that participants are not opposed to accountability (see 5.3.2 – Theme 2). In fact, vice-chancellors, registrars and academics welcome accountability (see 5.3.2 – Theme 2), but most of them are deeply concerned about the Amendment Act (RSA 2012a) and the changes it effects

in the relationship between government and HEIs. These, together with other developments in the HE landscape (see 5.3.1 – Theme 1), signify, a disturbing increase in control over HEIs. This was unambiguously illustrated by participants' contributions.

CHAPTER 6

CONCLUSIONS, LIMITATIONS OF THE STUDY AND RECOMMENDATIONS FOR FUTURE RESEARCH

6.1 INTRODUCTION

Academic freedom is central to the mission of the university (Altbach 2001:205), and is described by Higgs (2010:371) as the lifeblood of a university (see 3.1). Institutional autonomy is regarded as a requirement for academic freedom (Habib *et al.* 2008:148) (see 3.8). Consequently, the erosion of one will impact on the other. Scholars worldwide regard the safeguarding of academic freedom and institutional autonomy as important prerequisites for a well-functioning HEI (Altbach 2001:217) and HE system (see 1.6). It is therefore not surprising that when the Amendment Act (RSA 2012a) was enacted during December 2012, HE leaders and managers and scholars alike openly declared their opposition to the Act (see 1.1), because they were of the opinion that the Act may affect academic freedom and institutional autonomy of HEIs. This study therefore examines whether the Amendment Act (RSA 2012a) has any potential or real implications for academic freedom and institutional autonomy of HEIs in SA. This was also the primary research question (see 1.3).

The purpose of this chapter is to demonstrate to what extent the stipulated research questions (see 1.3) have been answered and the research objectives (see 1.5) have been achieved. Furthermore this chapter advances conclusions and recommendations emanating from this study, based on the literature review (Chapters two and three), the policy analysis (Chapter four) and the qualitative research findings (Chapter five). Also, the limitations of the study are pointed out and future research is suggested.

6.2 LIMITATIONS OF STUDY

The document that is the focus of this study is the highly controversial Amendment Act (RSA 2012a) and the questions that have been raised about the implications of

the Amendment Act (RSA 2012a) for academic freedom and institutional autonomy of HEIs in SA (see 1.1). In essence, the question is whether the Amendment Act (RSA 2012a) could impact on or possibly constitute a threat to academic freedom and institutional autonomy of HEIs in SA. Therefore, this study is limited to considering this question, acknowledging that other threats or possible threats to academic freedom and institutional autonomy of SA HEIs may exist, and that this situation is not generalisable to other HE contexts.

6.3 CONCLUSIONS FROM THE STUDY

This study explored whether the Amendment Act (RSA 2012a) has any potential or real implications for academic freedom and institutional autonomy of HEIs in SA (see 1.6). The study was led by the primary research question (see 1.3), namely:

What are the real or potential implications of the Amendment Act (RSA 2012a) for academic freedom and institutional autonomy of HEIs in SA?

In order to answer the primary research question, the following secondary research questions (see 1.3) were also addressed:

- What constitutes academic freedom and institutional autonomy?
- What were the Minister's powers to appoint assessors and administrators for HEIs prior to the Amendment Act (RSA 2012a)?
- What were the powers of assessors and administrators appointed for HEIs by the Minister prior to the Amendment Act (RSA 2012a)?
- What are the Minister's powers to appoint assessors and administrators for HEIs after the promulgation of the Amendment Act (RSA 2012a)?
- What are the powers of assessors and administrators appointed for HEIs by the Minister after the commencement of the Amendment Act (RSA 2012a)?
- What are the perceptions of senior officials and academic staff of HEIs in SA with regard to the implications of the Amendment Act (RSA 2012a) for academic freedom and institutional autonomy of HEIs in SA?

The conclusions based on the literature review (Chapters two and three), the policy analysis (Chapter four) and the qualitative research findings (Chapter five) are enumerated below.

6.3.1 Relationship between government and Higher Education

In Chapter two various models that describe the relationship between government and HEIs were explored (see 2.3), because academic freedom and institutional autonomy of HEIs are inextricably linked to the relationship that exists between government and HEIs. The relationship between government and HEIs in SA before and after 1994 was analysed to determine which model best describes the nature of this relationship during the mentioned periods.

On the basis of the comparative analysis that was performed, it is concluded that the relationship between government and HEIs during the apartheid era can be classified as an example of the state control model, as government controlled all HEIs in order to protect, promote and enforce its apartheid ideology (Sayed 2000:477) (see 2.6.1).

This model is also characterized by strict controls over HEIs with the emphasis on HEIs being accountable to the political authorities (see 2.3.1). Other features include the evaluation of HEIs performance based on the HEIs' political effectiveness and decision-making from the top down, with a strict hierarchical system and steering by hierarchy (see 2.3.1). The actions by government during the apartheid era fall well within the ambit of the characteristics described – the goals that had to be achieved by HEIs were the enforcement of government's apartheid policy and HEIs were accountable to political authorities. In fact, HEIs were threatened with the cutting of subsidies if the political activities of students and staff on their campuses were not controlled (see 2.6.1). It is therefore concluded that because of government's actions the relationship between government and HE during this period can be characterized as an example of the state control model (see 2.6.1).

When considering the contents and aims of the HE policies and legislation and government's actions during the period after 1994 (see 2.6.2) and comparing those

with the various conceptual models, it is concluded that the nature of the relationship between government and HEIs in the period after 1994, fall within the ambit of the state supervision model (see 2.6.2.11). This model allows for considerable autonomy of institutions with strong steering by government. This certainly typified SAHE post-apartheid, with planning, funding and quality assurance, as steering mechanisms becoming increasingly prominent. However, concerns are growing that this model is being replaced by a more interventionist one as the defining trend over particularly the past fifteen years has been a marked increase in prescription, intervention and direct state control over HEIs (Hall & Symes 2005:200) (see 2.6.2.11).

6.3.2 Academic freedom and institutional autonomy

The principles of academic freedom and institutional autonomy (the first secondary research question) were explored in Chapter three by means of a literature study within the context of the relationship that exists between government and HEIs (see Chapter two).

The conclusions relating to academic freedom were arrived at taking into account the TB Davie formulation, the incorporation of academic freedom and scientific research in the Constitution of SA (RSA 1996) and several scholarly contributions.

The researcher concluded that the TB Davie formulation was primarily shaped by the context in which it was formulated; therefore it was based on the need to safeguard the institutional autonomy of universities but did this under the pretext of academic freedom (see 3.9). Furthermore, the TB Davie definition of academic freedom does not provide for the following aspects:

- scholarly freedom (*Lehrfreiheit*) (Du Toit 2013:30),
- the student's right to choose where to study (*Lernfreiheit*) (Du Toit 2013:30),
- accountability of HEIs (Du Toit 2013:30),

- the obligations or limitations that are coupled with academic freedom (e.g. that academic freedom may not be exercised in such a way that it infringes the rights of others) (see 3.2 and 3.8).

It is therefore concluded that the TB Davie formulation of academic freedom is no longer appropriate in the post apartheid era (see 3.9). And even though "academic freedom and freedom of scientific research" (RSA 1996:1249) are safeguarded in terms of Section 16(1)(d) of the South African Bill of Rights it is still unclear what this encompasses or entails (see 1.6), because no definition of academic freedom exists in the Constitution (RSA 1996).

After considering both policy perspectives and numerous scholarly contributions, the researcher identified the following features of academic freedom: academic freedom encompasses the freedom or right of anyone engaged in the practice of science to teach and to do research as they deem fit (Malherbe 2003:219) (including the freedom to publish) (Lange 2010:3; Palfreyman 2007:20), without undue influence from either government or institution (Krüger 2013:24-25) (see 3.2 and 3.5). The exercise of this freedom is rooted in the unbiased and objective search for the truth (Waghid *et al.* 2005:1184) (see 3.2 and 3.5). Academic freedom includes the right of academics to take academic decisions collectively and in accordance with the professional standards of particular disciplines (Krüger 2013:24-25) (see 3.2 and 3.5). Du Toit (n.d.:6-8) refers to academic scholarly freedom and academic self-governance (see 3.2 and 3.5) through participation in Senate. However, exercising academic freedom is coupled with corresponding privileges and obligations such as the duty of academics to use their freedom in a manner consistent with scholarly obligations and to perform research and teaching in an honest search for knowledge (Palfreyman 2007:20) (see 3.2 and 3.5). Furthermore, academic freedom and the exercising thereof is subject to the limitations contained in the SA Constitution (academic freedom was according to Altbach (2001:206) never without limitation) (see 3.2 and 3.5). The principles of *Lernfreiheit* i.e. the right of students to choose where they study and what they study (Altbach 2001:206) are also elements of academic freedom (see 3.2 and 3.5).

Having identified the different components of academic freedom, the researcher concludes that when considering academic freedom there should be a clear distinction on the basis of who is afforded academic freedom, namely the individual academic, academics as a group and the student, because the meaning of academic freedom is related to the holder thereof (see 3.5).

The second principle of importance, namely institutions' autonomy relates specifically to HEIs and it is concluded that autonomy means the "power to govern without outside controls" (Berdahl 1990:171-172) (see 2.3.4). The most comprehensive definition of institutional autonomy is provided by Du Toit (n.d.:7) who describes it as "the extent to which the university in its various external interactions with the state, local communities or wider society, in relation to individual or corporate donors, etc. functions as an autonomous corporation with recognised powers of self-government secured from interference by external agencies" (see 3.6). However, this does not imply that HEIs will not remain accountable. In fact, HEIs will always remain accountable, not only to the government, but also to society as a whole. HEIs' accountability to government is rooted in the financial support HEIs receive from government – HEIs have to account for how the funding received was spent. HEIs also have to account for how they are achieving national policy goals for HE. Similarly, HEIs must account to society, because they serve the community within which they exist, with at the heart of the mission of an HEI, the betterment of society.

6.3.3 Powers of the Minister, assessors and administrators

The second, third, fourth and fifth secondary research questions were explored in Chapter four. Bacchi's evaluative policy analysis WPR approach (Bacchi 2009:x-xi) was applied to the Amendment Act (RSA 2012a) to determine what the Minister's powers were before and after commencement of the Amendment Act (RSA 2012a), in so far as that Act relates to the power to appoint administrators and assessors (see 4.2.1 and 4.2.3). The analysis also considered the assessors' and administrators' powers before and after the commencement of the Amendment Act (RSA 2012a) (see 4.2.2 and 4.2.3).

It is concluded that:

- The Minister's powers in relation to the appointment of assessors for HEIs have not been extended by the Amendment Act (RSA 2012a) (see 4.2.1 and 4.3.1.5a). The implications of this are that the Minister's powers to appoint assessors in terms of the Higher Education Act (RSA 1997) have remained unchanged.
- The powers afforded to assessors in terms of Section 9 of the Amendment Act (RSA 2012a:10,12) did not form part of the Higher Education Act (RSA 1997). It is concluded that as these provisions did not exist in the Higher Education Act (RSA 1997) the powers of assessors have significantly been extended by the provisions of Section 9 of the Amendment Act (RSA 2012a). This may have implications for the institutional autonomy of HEIs, because assessors are for example granted the right to enter the HEI's premises, make copies of documents, access information and conduct interviews that directly impacts on the HEI's ability to regulate access to its premises and disclosure of its documents (see 4.2.2 and 4.3.1.5b).
- Previously no provisions existed in the Higher Education Act (RSA 1997) regarding the issuing of directives to a Council that could lead to the appointment of an administrator, the process to be followed or the requirements therefore. The researcher therefore concluded that this constitutes an extension of the Minister's powers (see 4.2.1 and 4.3.1.5c). The Minister is further also empowered to appoint an administrator to take over the management, governance and administration of the HEI and to perform all the functions of the HEI, which was not previously the case (see 4.2.1 and 4.3.1.5c). This, together with the extension of the circumstances under which an administrator may be appointed by the Minister effectively extends the Minister's powers to appoint administrators (see 4.2.1 and 4.3.1.5c). The powers of administrators were also extended by the Amendment Act (RSA 2012a) (see 4.2.3 and 4.3.1.5c). It is concluded that, the Amendment Act (RSA 2012a) has to the extent discussed (see 4.4) expanded the Minister's, assessor's and administrator's powers and that this may have implications for the institutional autonomy of HEIs, and indirectly for academic freedom.

6.3.4 Perceptions of Higher Education officials and academics

The last secondary research question was dealt with in Chapter five. This was a qualitative research study, aimed at seeking an understanding and interpretation of the participants' views with regard the document under investigation, that is, the Amendment Act (RSA 2012a) and its implications for academic freedom and institutional autonomy of HEIs (see 5.1). Nine representatives of three HEIs participated in the study (see 1.8.1). The participants from the participating HEIs were purposively selected on the basis of the fact that they were information rich participants (see 1.8.1). The research question was interrogated through individual semi-structured interviews (see 1.8.2.3). It was concluded that the participants were of the opinion that the Amendment Act (RSA 2012a) may very well impact on the academic freedom and institutional autonomy of HEIs (see 5.3.4 and 5.4). There were, however, differing views regarding how the Amendment Act may impact on the academic freedom and institutional autonomy of HEIs, as well as the extent thereof (see 5.3.4).

Some participants focused on the Amendment Act (RSA 2012a) and its implications, while other participants considered the implications of the Amendment Act (RSA 2012a) in the context of other developments in the HE landscape, such as the CAS, the PQM and the Reporting Regulations for Public HEIs (see 5.3.4). Considering the implications of the Amendment not in isolation but in the context of the broader regulatory landscape resonates with the WPR approach of Bacchi (see Chapter four). Even though some positive comments were made regarding the Amendment Act (RSA 2012a), participants' dominant views of the Amendment Act were negative, with numerous concerns being raised in relation to the Amendment Act (RSA 2012a) and its implications for HEIs in SA (see 5.3.6 and 5.4).

6.4 RECOMMENDATIONS

On the basis of what has been established in this study (see 6.3), the following recommendations are made:

(a) The application of the TB Davie definition of academic freedom for HE in SA should be reconsidered, as this definition is no longer deemed appropriate, for the reasons explored in 3.5, 3.9 and 6.3.2. HEIs should reconsider the definitions of academic freedom and institutional autonomy by engaging in robust debate with one another and with government, aimed at establishing a new, generally accepted definition of academic freedom and institutional autonomy more applicable to the post 1994 period.

(b) HEIs should engage with government to stress the importance of allowing HEIs sufficient time for submission of comments on bills, draft policy documents, or Green or White Papers, taking into account the cycle of HEIs' operations (e.g.; closing dates for December recess), and recognizing that the nature of the consultation processes within HEIs requires substantial time to involve the appropriate decentralised consultative structures, and subsequently submit comments. Similarly government should encourage HEIs to engage with draft documents and position papers, given their importance, in a genuine consultative process, because not all HEIs engage with these draft documents in sufficient breadth and depth. In fact, dedicating certain staff or units at HEIs to take responsibility for receiving such documents and for co-ordinating the specific HEI's response thereto should be considered, as this would promote HEIs' active engagement in the policymaking process and thus give practical effect to one of the dimensions of cooperative governance.

(c) The role of buffer bodies such as HESA and the CHE in the legislative processes should be reconsidered and strengthened to ensure that the inputs from the HE sector be considered and evaluated before legislation is passed. Robust consultations and debate between government and HEIs should take place. In fact, in the spirit of cooperative governance, the aim should be to reach consensus on something as important as legislation and policies that affect the HE sector.

(d) It has been established that the provisions of the Amendment Act (RSA 2012a) confers largely unfettered powers on the Minister, assessors and administrators

(see 4.6.2). Furthermore, numerous provisions of the Amendment Act (RSA 2012a) are badly drafted and open to legal challenge (see 4.6.2). It is recommended that these provisions of the Amendment Act (RSA 2012a) be reconsidered and amended to address the problematic formulation of the relevant provisions.

6.5 FUTURE RESEARCH

The following areas have been identified for future research:

(a) Further research might explore the changing relationship between government and HEIs, against the backdrop of the model of co-operative governance. Such research will explore what co-operative governance entails now, 21 years after the achievement of a democratic dispensation, and what the requirements and conditions are for its fulfilment to become a reality.

(b) There is not consensus in the SAHE sector regarding what academic freedom and institutional autonomy entails. Another possible area of future research is therefore to probe the different views about academic freedom and institutional autonomy and interpret these in the HE context. During the semi-structured interviews one interviewee mentioned that consideration should be given to the development of an instrument that measures the levels and dimensions of academic freedom at HEIs in SA. The development of such an instrument is also an area for possible future research.

(c) Future research could also focus on exploring the effectiveness of assessors and administrators appointed for HEIs and the development of alternative mechanisms to deal with HEIs that are in distress.

(d) This study, addressing one aspect of a HE system in transition, and how the relationship between government and HEIs has developed during this transition, may, for comparative purposed, spur similar studies of other HE systems in transition.

6.6 CONCLUSION

The main research question (see 1.3), as well as the secondary research questions of this study (see 1.3) have been explored and answered comprehensively (see 4.3.1.5). It is, thus, argued that this research study has achieved its objective (see 1.5). It has established that the Amendment Act (RSA 2012a) impinges on the academic freedom and institutional autonomy of HEIs in SA (see 4.3.1.5). The perception study conducted (see 5.3.4) has shown that the nine participants have similar views and that the outcry from scholars and managers of HEIs alike that accompanied the enactment of the Amendment Act (RSA 2012a) (see 1.1) was well founded, especially given the history of a lack of academic freedom and institutional autonomy in SA (see 2.6 and 3.7).

A brief overview was given of how academic freedom and institutional autonomy were affected by government's actions during the apartheid era (see 2.6 and 3.7). With the arrival of democracy the hope was that academic freedom and institutional autonomy of HEIs would be strengthened, which at first glance would have appeared to be the case with the incorporation of academic freedom and scientific research in the Constitution of SA (RSA 1996) (see 3.4.2). However, contrary to this expectation the deteriorating relationship between government and HE culminated in the Amendment Act (RSA 2012a) that impacts negatively on academic freedom and institutional autonomy in a manner that is reminiscent of what was experienced by HEIs during the apartheid era. Given that academic freedom is essential for the existence of an HEI and that institutional autonomy is a prerequisite for academic freedom, the enactment of the Amendment Act (RSA 2012a) and its implications for academic freedom and institutional autonomy were truly a regrettable occurrence for HE and HEIs in SA, demonstrating on the one hand the inability of the Ministry to address specific problems in the sector, and on the other hand a lack of trust in HE to act accountably. Both the HE sector and the Ministry will have to work hard to rebuild a relationship of mutual trust so that together they may achieve what former President Mandela has always maintained, namely that "(e)ducation is the most powerful weapon which you can use to change the world".

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ANNEXURE A

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Date: _____

Dear _____

RE: PARTICIPATION IN RESEARCH PROJECT

The abovementioned matter has reference.

I would like to invite you to take part in the research project with the title:

"The implications of recent legislative changes for institutional autonomy and academic freedom of South African higher education institutions"

This study is about the implications of the Higher Education and Training Laws Amendment Act 2012 for the academic freedom and institutional autonomy of higher education institutions.

We would like you to participate with us in this research because your perceptions about the implications of the abovementioned Act on the academic freedom and institutional autonomy of higher education institutions will be very valuable, as you are considered an authority on higher education in South Africa.
The reason we are doing this study is to determine the potential or real implications of this Act for the institutional autonomy and academic freedom of higher education institutions.

Your participation will be limited to participating in a semi-structured interview with the researcher of which the duration will in all probability not exceed 45 to 55 minutes and will take place a date and time that will be agreed with you.

The possible risks of taking part in this study will be unauthorized disclosure of date. To ensure that this risk does not occur the following measures will be implemented:

1. All data will be kept in a safe and secure location, under the care of the researcher;
2. The transcriber of the recordings of the abovementioned interview will be bound by a confidentiality undertaking or agreement.

It is anticipated that you will benefit from this study as institutional autonomy and academic freedom are crucial to higher education institutions.

While we greatly appreciate your participation in this important study and the valuable contribution that you can make, your participation is entirely voluntary and you are under no obligation to take part in this study. Should you take part in this study, and an issue arises which makes you uncomfortable, you may at any time terminate your participation without any repercussions. If you experience any uneasiness with the way the research is being conducted, please feel free to contact me directly to discuss it, and also note that you are free to contact my study supervisor (indicated above).

Yours sincerely

_____

Mrs JH van Pletzen

Please complete and sign this and return it to the researcher by no later than _____. Keep the letter above for future reference.

Study : **The implications of recent legislative changes for institutional autonomy and academic freedom of South African higher education institutions**

Researcher : **Mrs JH van Pletzen**

Name and Surname : _____

Contact number: _____

- I hereby give free and informed consent to participate in the abovementioned research study.
- I understand what the study is about, why I am participating and what the risks and benefits are.
- I give permission that the researcher may record the interview that will take place on a date, time and place, as agreed between the researcher and I.
- I give the researcher permission to make use of the data gathered from my participation, subject to the stipulations she has indicated in the abovementioned letter.
- I give the researcher permission to submit the recordings of the semi-structured interview for transcription to a third party, subject thereto that such third party is bound by an appropriate confidentiality agreement.

Signature : _____

Date : _____

ANNEXURE B

NON-DISCLOSURE AGREEMENT

FOR

The transcribing services that will be delivered by Tremayne Olivier to JH van Pletzen ("the RESEARCHER").

This Agreement is made on 27 October 2014 (the COMMENCEMENT DATE) by and between Tremayne Olivier with identity number 610625 0085 080 of _____ (hereinafter referred to as "the TRANSCRIBER") and JH van Pletzen (hereinafter referred to as "the RESEARCHER").

THE PARTIES HEREBY AGREE AS FOLLOWS:

The RESEARCHER will provide the TRANSCRIBER with recordings of interviews conducted by the RESEARCHER with the participants during the RESEARCHER'S study.

All information contained in the abovementioned recordings are confidential and proprietary information, and made available in accordance with the following terms and conditions:

1. DEFINITION

1.1 For the purpose of this Agreement, "CONFIDENTIAL INFORMATION" or "INFORMATION" shall mean all the information received by the TRANSCRIBER from the RESEARCHER, contained in the recordings presented by the RESEARCHER to the TRANSCRIBER.

2. PREAMBLE

2.1 The RESEARCHER has agreed to disclose certain of its INFORMATION to the TRANSCRIBER, subject to the latter's agreement to the terms of confidentiality set out herein.

3. PROTECTION AND PURPOSE

3.1 For purposes of this Agreement all INFORMATION supplied or divulged by the RESEARCHER to the TRANSCRIBER will be considered as Confidential and/or Proprietary Information.

3.2 Accordingly all "CONFIDENTIAL INFORMATION" shall be maintained in confidence by the TRANSCRIBER, and shall not be disclosed to any third party and shall be protected with the same degree of care and skill as the TRANSCRIBER normally uses in the protection of his/her own confidential and proprietary information, but in no case with any less degree of reasonable care. The TRANSCRIBER shall not use "CONFIDENTIAL INFORMATION" received from the RESEARCHER, except for the purposes set forth above.

3.3 The TRANSCRIBER acknowledges that all right, title and interest in and to the INFORMATION vests in the RESEARCHER and that it has no claim of any nature in and to such.

3.4 The TRANSCRIBER will not divulge or permit to be divulged to any person any aspect of such INFORMATION.

3.5 The TRANSCRIBER shall take all such steps as may be reasonably necessary to prevent the INFORMATION from falling into the hands of a third party.

3.6 The TRANSCRIBER shall not use or attempt to use of any of the INFORMATION for any purposes whatsoever.

3.7 The TRANSCRIBER shall not use or disclose or attempt to use or disclose the INFORMATION for any purpose other than performing its obligations, to the RESEARCHER.

3.8 The recordings furnished to the TRANSCRIBER by the RESEARCHER pursuant to this Agreement will remain the property of the RESEARCHER and on completion of the transcribing services the TRANSCRIBER will immediately return the recordings to the RESEARCHER. The TRANSCRIBER will not make copies of any such recordings, nor

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3.8 The recordings furnished to the TRANSCRIBER by the RESEARCHER pursuant to this Agreement will remain the property of the RESEARCHER and on completion of the transcribing services the TRANSCRIBER will immediately return the recordings to the RESEARCHER. The TRANSCRIBER will not make copies of any such recordings, nor

will the TRANSCRIBER reproduce, publish or circulate such recordings or the transcriptions thereof.

4. EXCEPTIONS

4.1 The above undertakings by the TRANSCRIBER relating to the confidentiality shall not apply to information which:

4.1.1 the TRANSCRIBER is compelled to disclose in terms of a court order.

4.1.2 is required by law to be disclosed by the TRANSCRIBER.

4.2 The onus of proving the facts necessary to sustain any one of the exceptions listed in sub-paragraphs 4.1.1 to 4.1.2 rests with the TRANSCRIBER.

5. PERIOD OF CONFIDENTIALITY

The provisions of this Agreement shall remain in force indefinitely.

6. JURISDICTION

This Agreement shall be governed by South African law and the TRANSCRIBER hereby irrevocably agrees to the jurisdiction of the High Court of South Africa (Free State, Bloemfontein) in respect of any dispute flowing from this Agreement.

7. WHOLE AGREEMENT

7.1 This document constitutes the whole of this Agreement to the exclusion of all else.

7.2 No amendment, alteration, addition, variation or consensual cancellation of this Agreement will be valid unless in writing and signed by the TRANSCRIBER- and the RESEARCHER.

8. WAIVER

8.1 No waiver of any of the terms or conditions of this Agreement will be binding for any purpose unless expressed in writing and signed by the RESEARCHER and any such waiver will be effective only in the specific instance and for the purpose given.

8.2 No failure or delay on the part of the RESEARCHER in exercising any right, power or privilege will operate as a waiver, nor will any single or partial exercise by the RESEARCHER of any right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege.

9. SEVERABILITY

In event that any of the provisions of this Agreement are found to be invalid, unlawful, or unenforceable such terms shall be severable from the remaining terms, which shall continue to be valid and enforceable.

Signed at Bloemfontein on this 24 day of October 2014.

Witnesses:

1 _____

2 _____

(Signatures of witnesses)

_____

(Signature of the TRANSCRIBER)

Signed at Bloemfontein on this 27 day of October 2014.

Witnesses:

1. _____

2. _____

(Signatures of witnesses)

_____

(Signature of the RESEARCHER)

ANNEXURE C

Interview Protocol

A. Introduction by interviewer and context of interview

Good day

Thank you for participating in this interview today.

It is confirmed that this interview will be recorded.

Should you at any stage during the interview wish to terminate the interview, kindly indicate as such and the interview will immediately be terminated.

Should you have any questions or should you require any clarity regarding any question, please feel free to request clarity.

During the interview, I would like to discuss your perceptions of the implications of the Higher Education and Training Laws Amendment Act 2012 for the relationship between higher education institutions and the government and for academic freedom and institutional autonomy of higher education institutions in South Africa.

B. Questions

Main questions	Clarifying or supplementary questions.
1. The Higher Education and Training Laws Amendment Act specifies that the Minister of Higher Education and Training may intervene with the management and governance of higher education institutions in certain circumstances. Section 9 and Section 10 provide, *inter alia*, for Section 45A which deals with the powers of an Independent Assessor appointed by the Minister, whilst Section 45B deals with the Assessor's right to enter the premises of a higher education institution under investigation. Section 11 provides for the incorporation of Section 49 A to 49E that deals with intervention by the Minister, such as the issuing of directives to councils and the appointment of	• Can you expand a little on this? • In what way? • Why do you say that? • Why do you believe this? • Could you please motivate? • Has this been the case, in your experience?

administrators for higher education institutions. What do you believe the implications of the above-mentioned Act are for the relationship between government and higher education institutions? 2. What do you believe are the implications of the abovementioned Act for academic freedom and institutional autonomy of higher education institutions?	• Can you give me some examples?

ANNEXURE D

APPENDIX A: *Ethical clearance for research*

ETHICAL CLEARANCE GUIDELINES FOR RESEARCH

The aim of this booklet is to assist student and academic researchers as they plan their ethical clearance applications at the university, to conduct their research involving human participants. This booklet is designed as a supplementary guide to the Human Research Ethical Clearance Form of the university, and the principles behind the review process. Nevertheless, researchers should be aware that the ethics review process is much more than merely a form to be completed and a milestone to achieve. Ethical principles should provide a foundation on which the research should be carried out, and guide the attitude and spirit of the researchers throughout the entire process and beyond. We wish you well as you engage with this dimension of your research, as you work to add to the global body of knowledge, and keep in mind not only the end effects of your contribution, but also the effects and repercussions of the processes you engage in to achieve this end.

EXPLANATION OF KEY TERMS

1. Harm/Risk & Mitigation

While not all research involves definite harm, most research may hold some level of risk. Harm is any negative effect which can, directly or indirectly, result from the research. This can include, for example:

- physical damage or pain
- loss of privacy
- loss of time
- financial costs
- loss of competitive opportunities
- negative psychological or social impact
- reputational damage
- negative impact on relationships

Risk is the level of possibility that harm may occur, as well as the seriousness of the harm, should it occur.

All harm or risk of harm must be mitigated. This requires the researcher to plan strategies of minimising risk, and, where harm is unavoidable, to justify the harm and present a strategy to compensate for the harm incurred. While the end should never justify the means, the harm incurred should never exceed the benefits, on the part of the actual participants.

2. Informed Consent/Assent

Consent is permission given by participants to participate in the research, as per pre-agreed stipulations. In order to give consent, a person must be legally able to do so (ie: they must be of a legal age and must be capable of making decisions about their own well-being). Assent is agreement to participate by someone, usually under the legal age of consent, in research. Assent can never be used in place of consent, but should be used in conjunction with it where relevant. In both cases, consent and assent must be 'informed'. This means the people granting permission must fully understand the purpose and process of the research, what the risks are, how these will be mitigated and why the research is taking place.

3. Confidentiality & Anonymity

Participants, be they individuals or institutions, have a right to privacy and there should always be an intention to maintain confidentiality, unless specifically waived by the participant. Confidentiality implies the researcher maintains a tight control of sensitive data and only releases it in an unidentifiable form. Anonymity indicates that no one has access to identifiable data, including the researcher (usually in the case of an anonymous survey conducted among a large group of participants).

In most cases confidentiality cannot be guaranteed, as it is always possible for a breach of data to occur (through hacking or theft, in some cases). In the case where groups of participants are involved, such as with focus groups, no researcher can guarantee that other participants may not talk to third parties. In these cases,

the researcher should demonstrate, within reason, that they have taken all possible steps to secure privacy, and should acknowledge the level of risk of breach of confidentiality in advance to participants.

4. Vulnerable Participants

These are participants who are at particular risk of harm, due to their personal circumstances, and/or are vulnerable to manipulation or force to participate in the research. The most common vulnerability is where the participant is subject to the influence of power relations on the part of the researcher. An example is where the researcher is someone with authority over the participant such as a director in a department researching her own staff, or a lecturer researching his own students. Particular care must always be taken to identify the extra level of risk on vulnerable participants and what additional steps are being taken to mitigate such risks.

5. Conflict of Interest

This occurs where a researcher has a vested interest in, particularly, the outcome of the research. For example, where promotion depends on the researcher finding a certain programme to be highly effective, or where a funder has given a grant, and the furthering of the grant, or future employment of the researcher, depends on a particular outcome in the study. It is important that any relationship that could hint at a conflict of interest, be declared and steps taken to ensure such a relationship does not undermine the integrity of the research.

6. Beneficiation, Reciprocity & Remuneration

Beneficiation is the direct benefit derived from the research by the participants, their community or organisation, and the larger society. The greater the beneficiation at all three levels, the stronger the ethical motivation for conducting the research is. Beneficiation should always outweigh harm or risk of harm. Also, while ideally all three levels should benefit from the research, it is vital to show that the participants themselves benefit directly in some tangible way, such as directly improving practice in a participating professional environment or providing insight on an issue the participants are struggling with.

Reciprocity occurs where certain participants don't benefit implicitly from the research, considering the risks or harm they are subject too (even if it is just wasting their time). In this case, the researcher should compensate them in some way. For example, learners giving up class time to take part in research, should have an extra lesson or possibly enhanced learning materials provided, which compensates them appropriately.

While remuneration (the paying of money or tokens) for participation is an accepted practice in much of the world, it is very important to examine the direct impact of such remuneration on the participants and their communities. A poor community, for example, are vulnerable to manipulation, which is a form of coercion, if remuneration is offered disproportionate to their circumstances. In such cases, particularly those involving vulnerable participants, direct beneficiation is far preferred to remuneration. Where this is not possible, the researcher should endeavour to reciprocate the participants through a more creative means, such as running a special programme for them, enhancing an existing programme, or giving support (such as counselling or training) to make up for the disruption or other harm incurred by their participation.

7. Deception

Deception essentially is not informing participants of the true purpose or methods of research, or deliberately falsifying this information in order to misrepresent or conceal the precise nature of the research. Generally this is not only frowned upon, but in most cases not permitted at all. However, there are a few exceptional circumstances which could permit such activity. In the case where knowledge of the exact nature and purpose of the research, would compromise the findings, deception may be approved. For example, if participants might behave differently to what they normally would, if they were aware of what was being observed, the researcher could justify not informing them in advance of what he was observing. In such a case, not only must the research be proved highly necessary and the deception absolutely justified, the participants should still be aware of any risks in advance and, before such data may be used or analysed, the researcher must provide full disclosure and gain informed consent to use the data. If participants then do not agree to this, none of that data may be used and must be destroyed.

COMPLETING THE ETHICAL CLEARANCE FORM

Students are expected to complete the form in conjunction with their supervisor. Should a specific ethics question arise, with which they feel they need advice on or assistance with, students are free to approach the respective ethical clearance officer who can advise them directly or refer them to an ethics board member with suitable expertise. Students are also welcome to contact the Postgraduate School on campus, where they can receive assistance and advice.

Section A - Researcher Details

Complete this section fully, ensuring the email address is correct, as all correspondence is done via email. Also ensure the start date of the project is at least a month after the application is submitted. Retrospective ethical clearance is not granted for research previously done.

Section B - Project funding, purpose and research design

Funding & conflicts of interest

If specific funding, such as a research grant, is being utilised to carry out this research, this must be declared. This does not include a bursary that covers university fees, but it does include bursary money made available to conduct research in the field. In addition, any other potential conflict of interest should be declared, such as research conducted on a project which the student is linked to in their professional capacity.

Purpose of the research

The applicant needs to indicate why the research needs to be conducted, highlighting its importance, and what the key questions are it seeks to answer. This should be a brief (300 word) outline justifying the research and highlighting what it hopes to achieve. This summary should use layman-terms and be concise, stating the case clearly and simply.

Description of the research

This brief summary should highlight how the research will be done, what kind of data will be gathered, what the researcher will do with this data and what kind of follow-up will there be. Students should ***not*** cut-and- paste their research proposal in here - this must be an executive summary and must answer these questions briefly and clearly. The aim of this paragraph is to give the reviewer an understanding of what you intend to do.

Section C - Proposed research participants

Details of participants

Applicants should indicate here what the characteristics are of the participants who will be requested to take part in this research. Ensure this description aligns with the research questions and intended purpose of the study. Researchers should try to ensure their participant body is as broadly representative as possible, within the ambit of their study.

Recruitment of participants

Detail how these participants will be identified and approached. Remember that confidential information, such as email lists of students kept by a university, may not be used by unauthorised people, unless those on the list have explicitly given permission for this data to be made available for research purposes or third-party access. In many cases, researchers will either have to advertise for volunteers to contact them, or request an authorised individual to send a written invitation to people on their contact list, with instructions to contact the researcher if they would like to be part of the study. In the case of 'snowball sampling', a researcher may request details of individuals from those already engaged in the research, but these must be on an individual basis, and may not involve lists of contact details pulled from confidential databases.

Expectations on participants

Detail exactly what will be required of participants, how long the individual activities will be, as well as how many times they will be expected to participate, and where these activities will take place. Details that may impact on these arrangements should also be discussed, such as security and transport arrangements, catering (if applicable), and any risks and steps taken to counter them.

Vulnerable participants

These include any of the following categories:

- Very young children (0 – 5 years)
- Minors (6 – 18 years)
- People unfamiliar with the language the research is being conducted in
- People with a cognitive disability
- People with a physical disability
- People with any other type of disability
- People suffering from health-related problems (including HIV Aids)
- People who have experienced acute psychological trauma (eg. rape or abuse)
- People in dependent/unequal relationships (eg. in prison or in the military forces)
- University students (not your own)
- University students (your own students)
- Illiterate people or those with a poor level of formal education
- People living in vulnerable life circumstances (eg. poverty or refugee status)
- Elderly people (over 65 years of age)
- Any other perceived vulnerability

Indicate which groups you as researcher will intentionally involve. It is possible you may not intend to involve people from one of these categories, but that this realisation may arise during the course of the study. For example, during an interview a participant may confide that they are victims of abuse. Your planning should take this into account.

Risk mitigation

Identify and detail possible risks to participants, even if only remotely likely. Researchers should keep in mind that there are always risks to participants, even if minor or negligible. Should an applicant indicate 'no risk' on the application form, that application will undergo special scrutiny by the review panel and likely it will be returned to the applicant for re-consideration. See the section previously on risk and harm, when considering this section. Be sure to detail specific steps taken to mitigate the risks. These must be reasonable, specific and practical, and should not be limited to statements such as 'I will be extra careful'.

Section D - Consent and confidentiality

Informed consent

Applicants need to indicate if they have arranged for informed consent from participants. They need to attach samples of all informed consent forms to their application. An informed consent form should consist of a cover page, detailing all aspects of the research, as well as a signature page, where they can sign and provide their own contact details, if necessary. Participants should be able to keep the cover page themselves, for future reference, while the signature page is returned to the researcher.

An informed consent letter should include all of the following:

- Title of the research project
- A brief sentence or two saying what the project is about.
- Why they are being asked to participate (why were they selected).
- The reason for the study.
- All possible risks that have been identified and what has been done to mitigate them.
- A clause on the voluntary nature of participation, allowing them to withdraw from the project at any time without any repercussions.
- A clause indicating what procedure to follow if they are unhappy with any aspect of the way the research is conducted, including contact details of someone who can intervene.
- A clause indicating the confidentiality level of the research, but with a disclaimer that some problems may be referred to a third party if the researcher is not qualified to deal with these (eg: evidence of criminal activity or psychological trauma).

It is important that the informed consent form be clearly understandable and on the correct literacy level of the participant. This may require the form to be translated, or simplified. Some forms (in the case of young children or illiterate adults) may require illustrations to help explain the research. Many may require a verbal explanation when the forms are at first given out. In the case of a student, the contact details of both the student and their supervisor need to appear prominently on the form.

Deception

Indicate if deception will be used. If so, this needs to be justified and mitigating steps indicated. Note: in most cases deception, as discussed previously, is not permitted, unless very well justified.

Third party data

This is data that was originally collected by someone else, but which you wish to make use of. Examples could include lists of students or staff in a university department, or data kept by a government agency. In such a case, it is important to identify why the data was originally collected and what the original suppliers of the data consented to, in terms of how it would be used. In cases of confidential data, the researcher will need not only permission from the data owner, but may also have to request permission from the original provider of the data to use this information. In most cases, the data owner may have to contact the original data provider on your behalf to request their permission.

In the case where data was previously collected for research purposes (by another researcher or by an institution) and the applicant wishes to make use of this data for purposes that are in line with the original consent, the applicant will need to answer the following questions to the satisfaction of the ethics review board:

- Did participants give informed consent initially and were they informed of all reasonable risks? (ie: was this data legitimately collected following ethical procedures).
- How will the identity of the original data providers/participants be protected?
- What steps will the researcher take to mitigate any potential harm?
- Will using this data be beneficial, to both the data owner and the original participants?

Confidentiality

While breach of confidentiality may form part of the earlier section on risks, it is important to state specific steps taken to protect data. It should also be realised by researchers that breaches of data can occur, however unlikely, and the researcher needs to indicate what will be done in such a case. In cases where confidentiality is very important, in regard to particularly sensitive data, it is recommended that the data be de-identified as early as possible in the process, and that the coding key be kept separate from the data itself. An example would be to assign pseudonyms or numbers to participants, and lock a list indicating which participant had what pseudonym, in a separate safe or security cabinet. Avoid keeping identity keys on the same computer as the data, as a single hack attack can steal both files. Keep in mind that should a participant suffer serious reputational damage due to data theft, they may be able to hold the researcher legally responsible, if sufficient security steps were not taken.

In the case of audio or video recorded sessions, particularly those involving vulnerable participants such as children, great care must be taken to secure this data, which should be destroyed once transcriptions have been made. If video/audio or photographic material forms part of the research output, unless confidentiality is specifically waived, the footage needs to be de-identified by methods such as voice-distortion, facial feature obscuring, etc. Note that in the case of highly vulnerable participants (particularly those unable to give legal consent), confidentiality may not be waived, regardless.

Section E - Data analysis and outcomes

Data analysis

Provide details on how the data will be analysed. Ensure the methods to be used are in line with the research intent and are appropriate for what the participants consented to. In many cases, particularly where a participant may be identifiable, even just by inference, the data analysis could be made available to the participant. If a participant believes their input has been distorted in any way, they should have the opportunity of correcting such a false impression. Naturally some data sets, particularly in large quantitative studies or studies where participants were anonymous (ie: unknown to the researcher), this may not be practical or possible.

Research assistants

It is important to give information on research assistants, particularly if these will be used to collect or process sensitive data. It is also important to consider risks to these assistants during the data collection process. For example, will they be in a safe environment? Will they have sufficient supervision and/or training?

Projected outcomes

Indicate who will benefit directly or indirectly from this research. It is important the actual participants receive some benefit themselves (or are otherwise compensated for their participation), as well as the entity or community to which they belong. Finally, the researcher can indicate the broader benefits to society, or academia as a whole.

Avenues of dissemination

Indicate how you as researcher intend to disseminate the outcomes of this research. Will it be published as an article/series of articles? Will it be produced in a report form and provided to selected institutions or community groups? Will it only appear in a student dissertation or thesis format? In cases where individuals or institutions actively participated in the research, particularly where sacrifices of time and energy were made, it is generally a good idea to at least provide these participants with a summary of your findings,

if not a full report. In many cases, research done towards a dissertation or thesis can be more widely disseminated via academic blog posts, listing in online academic databases, Youtube channels or converted into published academic or popular articles or books. Researchers should indicate that they have thought through the best way of publishing their findings, preferably benefitting society as broadly as possible, within the capacity limits of the researcher.

Fairness of research findings

Researchers should indicate what steps they have taken to ensure fairness and integrity of findings. In many cases this would involve triangulation of research using multiple methods of confirmation. For junior researchers it is important to show what kind of guidance they are receiving. An example could be a statistical analysis expert assisting with some analysis, or the findings undergoing a peer review process. In the case of a qualitative study involving interviews and focus groups, the researcher could discuss the findings with participants and confirm the interpretation of data provided earlier by these individuals. It is generally considered insufficient to say 'my supervisor will ensure I do this correctly.'

Section F – Attachments

While the required attachments vary according to the nature of the research, all of the following should be considered:

- Copies of all data collection instruments, including survey forms, interview questions, etc.
- Copies of any psychometric or other tests to be used by research participants.
- Sample copies of all consent and information forms, including translated forms if needed.
- Copies of all written text, advertising or script used to recruit subjects.
- Copies of any third party or sponsorship agreements related to this research.
- Signed approval from any relevant authorities required for this project.
- Short CV of principal researcher (one page).
- Short CV of assistant researchers (one page).
- Copies of prior ethical clearance or denial (including a letter stating revisions made since).
- Relevant budgetary outlines, resource or equipment lists that may impact on this research.
- Any other relevant documentation which may impact on this research.

The following pages show an example of an ethical clearance form and a sample of an informed consent form. Go through these documents bearing in mind the above information and discuss the implications of your research with your supervisor as you plan your proposal.

Note that all submissions need to be done electronically via the website. You can also email the ethics office (BarclayA@ufs.ac.za) for assistance or a direct email link to the forms.

ANNEXURE E

UNIVERSITY OF THE FREE STATE
UNIVERSITEIT VAN DIE VRYSTAAT
YUNIVESITHI YA FREISTATA
UFS UV

Faculty of Education
Ethics Office

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University of the Free State
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30 July 2013

ETHICAL CLEARANCE APPLICATION:

THE IMPLICATIONS OF RECENT LEGISLATIVE CHANGES FOR INSTITUTIONAL AUTONOMY AND ACADEMIC FREEDOM OF SOUTH AFRICAN HIGHER EDUCATION INSTITUTIONS

Dear Ms Van Pletzen

With reference to your application for ethical clearance with the Faculty of Education, I am pleased to inform you on behalf of the Ethics Board of the faculty that you have been granted ethical clearance for your research.

Your ethical clearance number, to be used in all correspondence, is:

UFS-EDU-2013-044

This ethical clearance number is valid for research conducted for one year from issuance. Should you require more time to complete this research, please apply for an extension in writing.

We request that any changes that may take place during the course of your research project be submitted in writing to the ethics office to ensure we are kept up to date with your progress and any ethical implications that may arise.

Thank you for submitting this proposal for ethical clearance and we wish you every success with your research.

Yours sincerely,

Andrew Barclay
Faculty Ethics Officer

ANNEXURE E

UNIVERSITY OF THE FREE STATE
UNIVERSITEIT VAN DIE VRYSTAAT
YUNIVESITHI YA FREISTATA
UFS UV

Faculty of Education
Ethics Office

Room 12
Winkie Direko Building
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10 November 2014

ETHICAL CLEARANCE APPLICATION:

THE IMPLICATIONS OF RECENT LEGISLATIVE CHANGES FOR INSTITUTIONAL AUTONOMY AND ACADEMIC FREEDOM OF SOUTH AFRICAN HIGHER EDUCATION INSTITUTIONS

Dear Ms Van Pletzen

With reference to your request for extension of your ethical clearance with the Faculty of Education, I am writing to inform you that this extension has been granted.

Your ethical clearance number, to be used in all correspondence, is:

UFS-EDU-2013-044

This ethical clearance number is now valid for research conducted until the end of 2015. Should you require more time to complete this research, please apply for an extension in writing.

We request that any changes that may take place during the course of your research project be submitted in writing to the ethics office to ensure we are kept up to date with your progress and any ethical implications that may arise.

We wish you every success with your research.

Yours sincerely,

Andrew Barclay
Faculty Ethics Officer