

SPECIAL ISSUE ARTICLE

ACADEMIC FREEDOM: CONCEPTUALISATIONS, CONTESTATIONS AND
CONSTITUTIONAL CHALLENGES

Latin America: Weak academic freedom within strong university autonomy

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Abstract

In Latin America, the notions of academic freedom or the freedom of science have not had the overarching influence in defining the prerogatives of scholars and the university that we see them exerting over the experiences of Western Europe and the Anglosphere. The governing notion, from whence all other freedoms emerge, is that of university autonomy. In Latin America, university autonomy evolved over the twentieth century as a protection of the university against the encroachment of governments – often authoritarian or outright dictatorial – so they could carry out their missions as they defined them. In Latin America, the locus of what in Europe is understood as scientific freedom is vested in the universities, not in the professoriate. It is assumed that free universities will foster an environment of academic freedom within. The contemporary contestations of university autonomy in Latin America fit squarely into the liberal script, as they seek to make universities more responsive to policy goals in the areas of higher education quality and accountability, efficiency and productivity, expansion of public or private provision, access and equity. Often, universities and their associations have raised autonomy as an objection to these policy agendas.

Keywords: Chile; Córdoba movement; *libertad de cátedra*; UNESCO; university autonomy

Introduction

Universities in Latin America are autonomous. Their autonomy differs somewhat from the US and European experiences in origin, evolution, scope, rationale and, most importantly, relationship to academic freedom. In this article, I seek to explain those differences as a strategy to delineate, by comparison, the contours of autonomy and academic freedom in Latin America. While the description I will offer holds broadly for all countries in the region (for instance, university autonomy is constitutionally protected in all countries except, for different reasons, Cuba and Chile), national nuances exist. I shall not review the peculiarities of each national case here, but instead attempt to focus on commonalities.

The oeuvre of work on university autonomy written in Latin America is enormous and has accumulated for over 70 years. Most of it is celebratory or exhortative in nature, and

therefore of little use for analytical purposes. To make the literature review for this article manageable, I have limited it to works of the last decade or so.

Two limitations in the scope of this article need to be acknowledged. First, the academic freedom or autonomy status of non-university technical and vocational institutions of tertiary or further education, weaker in concept and law than that of universities, will not be elucidated here. Second, the non-Spanish or Portuguese-speaking South America and the Caribbean are also beyond the scope of this work. Higher education in the Anglo, French or Dutch spheres of influence resembles the models of their colonial masters, not the Iberian heritage common to the former colonies of Spain and Portugal, on which we shall focus. In the commentary on national constitutions presented further on, I focus on Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay and Venezuela.

My argument can be summarized as follows: in Latin America, the notions of academic freedom or the freedom of science have not had the overarching influence in defining the prerogatives of scholars and the university we see them exerting over the experiences of Western Europe and the Anglosphere. For reasons I will lay out, the governing notion from whence all other freedoms emerge is that of university autonomy. The political and juridical strength that university autonomy has acquired in the region since the mid-twentieth century cannot be clearly connected, in the historical record, to the liberal script, as university autonomy was not defined and promoted by governments – liberal or not – and nor did it evolve from a notion of human rights, but was exacted from the political system by the leading universities in each country, in a process resembling more the conquest of union rights (those of the university as a social actor) than an acknowledgement of the freedoms of the spirit. However, the contemporary contestations of university autonomy in Latin America fit squarely into the liberal script, as they seek to make universities more responsive to policy goals in the areas of higher education quality and accountability, efficiency and productivity, expansion of public or private provision, access and equity. Universities and their associations have often raised autonomy as an objection to these policy agendas.

The article is structured in three sections. The first part explores the origins, evolution and crystallization of university autonomy in Latin America and the subordinate position of academic freedom, from early formulations in the 1910s and 1920s to its widespread recognition in the regions' national constitutions. For better illustration, the peculiarities of the Latin American experience of university autonomy will be underlined and contrasted with the US and some European cases. The second section presents current understandings of university autonomy and academic freedom, and some of the tensions that can be observed between that idea of university autonomy, espoused by universities and their national and regional associations, and the higher education policy agenda of the last three decades. In the third section, I will zoom in on Chile. University autonomy, as understood and juridically configured in Chile, is a case that deviates from the Latin American norm, not only in the lack of constitutional recognition but, more critically, for the extent of state regulation of higher education that is deemed, legally and politically, compatible with university autonomy, also for the level of market-driven steering that the higher education system has sustained since the 1980s, and for the dominance of the private sector as a whole (at 84 per cent of enrolments). I hope Chile's exceptionality will also, by contrast, further affirm the current notion of autonomy in the rest of the region.

Origin and evolution of the concept of autonomy in Latin America and its crystallization in national constitutions

It is argued,¹ with reason, that the conceptual matrix of the post-independence, nineteenth-century Latin American University was ‘Napoleonic’ – that is, it sought to emulate the idea of a single state university exercising centralized control over all education from secondary upwards, coexisting with a panoply of stand-alone faculties and schools for the instruction in the professions of future civil servants and other professional elites needed for the advancement of economic progress and nation building.² In Simon Schwartzman’s³ words:

Latin American universities are said to be Napoleonic, which means to be controlled and strictly supervised by the central government according to uniform, nationwide standards ... They were meant to be part of the effort to transform the old colonies into modern nation-states, with professional elites trained according to the best technical and legal knowledge available at the time, and educated in institutions controlled by the state and freed from the traditional religious thinking.

This description loosely fits the intended mission (not the functions, as we will see) of universities founded in the nineteenth century as national universities. Good examples are the University of Chile (founded in 1842)⁴ and the University of the Republic in Uruguay (founded in 1838).⁵ Other cases in the same generation of universities include the University of Buenos Aires, Argentina (1821), the Central University of Ecuador (1826), and the University of El Salvador (1841).

However, the institutional weakness and poverty of the new republics of America, the threadbare hold the new states could muster over their territories and populations, the frequency and devastating effect of recurrent civil wars and the thinness of the idea of a nation within their borders are a far cry from imperial France and its schools and universities of the nineteenth century. There was no education, higher or basic, ‘strictly supervised by the central government according to uniform, nationwide standards’ (in the words of Schwartzman, cited above) not because of lack of will but because of lack of means for anything centralized according to standards. Freedom of religion was not available either, for separation of church and state generally occurred later. Schwartzman is right, though, in that early republic universities ‘were meant to be part of the effort to transform the old colonies into modern nation-states’ and that they had professional training – not scholarship, let alone science – as their sole instrument for that purpose.

¹See, among many, MCM de Figueiredo-Cowen, ‘Latin American Universities, Academic Freedom and Autonomy: A Long-Term Myth?’ (2002) 38(4) *Comparative Education* 471; S Schwartzman, ‘Policies for Higher Education in Latin America: The Context’ (1993) 25 *Higher Education* 9; DC Levy, *Higher Education and the State in Latin America: Private Challenges to Public Dominance* (Chicago: University of Chicago Press, 1986) 30.

²K Oh, ‘The State, Science, and Planification: The Coproduction of the French State and Science’ (2018) 47(4) *Development and Society* 663.

³See Schwartzman (n 1) 9.

⁴S Serrano, *Universidad y nación: Chile en el siglo XIX* (Santiago: Editorial Universitaria, 1993).

⁵P Landoni-Couture, ‘Higher Education Systems and Institutions, Uruguay’ in PN Teixeira and JC Shin (eds) *The International Encyclopedia of Higher Education Systems and Institutions* (Dordrecht: Springer, 2020) 1609.

Back to our theme: nineteenth-century national universities were not autonomous from the government. Their rectors, and sometimes their deans and even professors, were appointed by the government. They had no budget independent from that of the Ministry of Education, and programs of study and curriculum reflected the government's priorities.⁶ Schwartzman is also correct in pointing out that a legacy of the Napoleonic model (as opposed to the ideas of W von Humboldt and the experience of the University of Berlin, contemporary of the French Imperial University) was the late and slow reception in Latin American universities of the practice and ethos of scientific research – later than in France, which moved to the idea of a research university from the Third Republic onwards.⁷ The political predominance of professional schools within the universities, such as Law, Medicine and Engineering, exerted a chokehold on the modernization of universities according to the idea of a research university, as the case of the rebellion at the University of Córdoba in 1918 illustrates.

It is almost obligatory to start any account of university autonomy in Latin America with the reforms that began in 1918 at the University of Córdoba, Argentina. There is much mythology about these events, retrospectively interpreted by commentators through the lenses of the posterior evolution of the concept throughout the twentieth century. The student revolt of 1918 was, most poignantly, not about autonomy but rather a boiling point through its adherence to scholasticism, outdated libraries, reluctance to update curriculum, authoritarian governance vested in mediocre professors and general avoidance of change on the part of university authorities.

The best account of the actual demands of the rebellious students is from Mark van Aken. In his telling, the demands of the students were the following:⁸

- (1) Representation of students, along with alumni and professors, on university councils ...;
- (2) selection of professors by competition, with student participation, professors to serve limited terms subject to review ...;
- (3) complete elimination of required attendance ...;
- (4) curriculum reform to include new courses in art, physical education, and social science ...;
- (5) improvement of the quality of teaching by means of *docencia libre*, i.e., more than one professor teaching one course ...;
- (6) university extension and night courses for workers ...;
- (7) social welfare for students ...;
- and (8) university education without fees or tuition ...

These petitions are compatible with the liberal script in the sense that students wanted to modernize a very conservative institution and exert the rights of choice over attendance, professors and the curriculum. At a deeper level, we see a willingness to expand the opportunities to learn and to replace scholastic repetition with true science, in line with the ideals of emancipation and progress.⁹ At the same time, students and their associations were swayed by elements of anti-imperialism, anti-clericalism, socialism, positivism and pan-American nationalism.¹⁰

⁶See Levy (n 1) 31.

⁷See Oh (n 2) 669.

⁸MJ van Aken, 'University Reform Before Córdoba' (1971) 51(3) *The Hispanic American Historical Review* 460.

⁹M Kumm, 'Academic Freedom in Liberal Constitutional Democracies. Justifications, Limits, Tensions, and Contestations' (2024) *SCRIPTS Working Paper No. 42*, Berlin: Cluster of Excellence 2055 Contestations of the Liberal Script (SCRIPTS).

¹⁰R Marsiske, 'Historia de la autonomía universitaria en América Latina' (2004) 26 *Perfiles Educativos* 105.

However, ‘autonomy’ was not part of the student’s plan for reform at the University of Córdoba (a point also made by Marsiske).¹¹ The leading association between this programme and the current Latin American notion of university autonomy rests on the first item in the list: the representation of students, alumni and professors on university governing councils. This was quite revolutionary. This tripartite governance model adopted the name of co-governance (*cogobierno*) later on, as it was almost invariably introduced in the governing model of public universities in Latin America in the following decades (with the alumni share often eliminated or replaced by non-academic staff), and to this day represents a distinctive element of the Latin American model of the university.¹²

It is possible that the 1918 stance on student participation in governance was more a matter of strategy than of principle: from a majority position in the governing structure of the university, students and alumni would be able to ensure that reforms would actually be enacted in the face of a reluctant professoriate.

Be that as it may, Córdoba is the origin and ideological inspiration for a surge of reform proposals led by students’ unions and national and regional students’ associations that swept the region in the following decades.¹³ Since the 1920s, a notion of university autonomy began to take shape, tightly coupled with aspirations for co-governance.¹⁴ The form of autonomy was slightly variable from country to country and over time, but it always featured self-rule as opposed to government control. The issue of co-governance, despite its centrality at Córdoba, had a more chequered reception: while governments throughout the region had granted autonomy to public universities since the 1920s and into the 1950s, student participation was not always part of the menu, even though students were often rifle fodder (sometimes literally) in the political struggle to persuade governments to acquiesce to autonomy.¹⁵

University autonomy was typically first established in public university’s by-laws or other national law during the first half of the twentieth century (a bit later in Central America, as Gutiérrez¹⁶ shows) and then elevated to constitutional status throughout the region, with the exceptions of Cuba and Chile,¹⁷ as countries reformed or established new constitutions in a process that began in the first half of the twentieth century and extended into this century, as the timeline in Janika Spannagel’s article in this special issue shows.¹⁸

¹¹Ibid 3.

¹²A Bernasconi, ‘Is there a Latin American Model of the University?’ (2008) 52(1) *Comparative Education Review* 27; A Bernasconi, ‘Government and University Autonomy: The Governance Structure of Latin American Public Institutions’ in Jorge Balán (ed) *Latin America’s New Knowledge Economy: Higher Education, Government, and International Collaboration* (New York: Institute for International Education, 2013) 1–17.

¹³MJ Abba and DR Streck, ‘The 1918 Córdoba Reform and University Internationalization in Latin America’ (2021) 25 *História da Educação* <<https://doi.org/10.1590/2236-3459/102256>>; P Buchbinder, ‘Pensar la reforma universitaria cien años después’ (2018) 9(25) *Revista Iberoamericana de Educación Superior* 86.

¹⁴A Donoso Romo, ‘Movimientos estudiantiles en América Latina (1918–2011): aproximación historiográfica a sus rasgos compartidos’ (2020) 40(83) *Revista Brasileira de História* 235; C Tünnermann, *Noventa años de la Reforma Universitaria de Córdoba: 1918–2008* (Buenos Aires: CLACSO, 2008).

¹⁵See Tünnermann (n 14).

¹⁶J Gutiérrez, ‘Cien años de autonomía universitaria latinoamericana’ (2020) 10(1) *Revista Rupturas* 139.

¹⁷Uruguay is a special case, as the public Universidad de la República is mentioned in the Constitution to recognize its right to self-rule, but the word ‘autonomy’ is not used.

¹⁸See Spannagel’s article in this special issue.

I have reviewed¹⁹ the constitutional provisions pertaining to universities and higher education in all countries of the region. I find that:

Autonomy is generally defined in the constitutions examined here as the sum of the rights of self-governance (including the selection of authorities and the right to dictate the institution's bylaws and regulations), free administration of the institution's resources, and liberty to create programmes of study, define their curriculum, grant valid degrees, undertake research, admit, and teach students, and hire faculty and staff. In other words, autonomy has governance, academic, and administrative implications. Also derived from the autonomy principle is the responsibility of the government to assure the financial sustainability of the university.²⁰

Moreover, in half of the constitutions of Latin American countries, a specific provision guarantees that universities are autonomous in defining their governance structure – that is, the legislator has no constitutional power to dictate the form of that structure.²¹ A corollary of this prerogative, and more generally of the self-rule notion of autonomy prevailing in the region, is that public universities in Latin America typically do not have boards of trustees or directors representing stakeholders as their superior governing body.

While university autonomy is present in almost all the region's constitutions, the cognate notion of academic freedom *stricto sensu* – that is, the professional scholars' freedoms of research and teaching, which constitute the essence of their vocation and social function, and merits protection from encroachment in the interest of the fulfilment of the idea of the university²² – appear in 63 per cent of the nineteen constitutions I reviewed, and the idea of access to knowledge as a human right is mentioned in 40 per cent of the cases.

The notion closest to academic freedom typically appears as '*libertad de cátedra*' in the constitutions, which I will take to mean freedom of teaching. Arguably, '*libertad de cátedra*' could, in principle, encompass both the freedom of teaching and the freedom of research and thus be taken as Spanish for academic freedom. Indeed, the constitutions of Nicaragua, Costa Rica, El Salvador, Paraguay and Peru speak of *libertad de cátedra* as a stand-alone concept.²³ But it turns out that the constitutions of Mexico, Honduras, the Dominican Republic and Colombia distinguish between the freedoms of teaching (*libertad de cátedra*) and of research, and mention each in sequence. While this is no place to disentangle the 'true' meaning of *libertad de cátedra*, I will come back to this notion and elaborate further on why I think a restricted meaning associated only with teaching is more precise in the Latin American context (not to mention that a Spanish language perfect equivalent to academic freedom is available in the expression '*libertad académica*' – which, it is worth noting, only appears in the Constitution of Ecuador among the eighteen constitutions sifted here).²⁴

¹⁹ A Bernasconi, 'Constitutional Prospects for the Implementation of Funding and Governance Reforms in Latin American Higher Education' (2007) 22(5) *Journal of Education Policy* 509.

²⁰ See Bernasconi (n 19) 521.

²¹ *Ibid* 523.

²² See, for conceptual definitions, the Introduction this special issue.

²³ Guatemala uses the unique notion of freedom of '*criterio docente*' (teaching judgement).

²⁴ Indeed, the Ecuadoran constitution is unique among my cases, in that it uses the notion of academic freedom (*libertad académica*). However, in line with the gist of my argument, it states that the 'autonomy

It is also worth noting that a human right to enjoy the benefits of science or any other formulation of knowledge as a human right is only present in 40 per cent of the constitutions surveyed here (Brazil, Honduras, Argentina, Nicaragua, Dominican Republic, Colombia, Ecuador and Paraguay). My filter is rather broad, as I include statements of rights that could also be deemed as more traditional expressions of freedom of education (freedom to teach and to learn) in the cases of Argentina, Colombia, the Dominican Republic and Ecuador. Yet clear examples of access to knowledge as a human right include, for instance, Brazil – ‘freedom to learn, teach, research and express thought, art, and knowledge’ (art 206 II)²⁵ – and Nicaragua – ‘The state promotes and protects the free creation, research, and dissemination of the sciences, technologies and arts and letters, and guarantees and protects intellectual property’ (art 125, my translation).²⁶

It is somewhat puzzling that the momentum of the American Declaration of the Rights and Duties of Man approved by what would become the Organization of American States in 1948²⁷ would have seemingly fizzled away across constitutional development in the region. As Katrin Kinzelbach reminds us in her contribution to this special issue,²⁸ the Americas pioneered recognition of a human right to ‘participate in the benefits that result from intellectual progress, especially scientific discoveries’ (Article XIII of the American Declaration). Moreover, Kinzelbach found that Latin American delegates were instrumental in promoting what became similarly worded Article 27 in the Universal Declaration of Human Rights²⁹ later that same year. This is, I would surmise, another example of how the hegemony of university autonomy over the twentieth century has trumped other interpretations or sources of academic freedom in Latin America.

This seems to be a consequence of the locus of scientific freedom in Latin America: it is vested in the universities, not the professoriate, and even less in the general population. It is assumed that free universities will foster an environment of academic freedom within. By and large, academic freedom ensues from the institutional prerogative of autonomy of universities. This understanding contrasts with the general thrust of the institutionalization of academic freedom at the international level described Börzel and Spannagel’s article in this special issue.³⁰ They document how academic freedom began to be institutionalized internationally in the 1960s, following the impulse of transnational higher education organizations rather than national governments well into the late 1990s and this century. The 1997 UNESCO Recommendation Concerning the Status of Higher Education Teaching Personnel, as Börzel and Spannagel recount, first defines academic freedom as a professional right and then conceptualizes ‘the autonomy of institutions of higher education as the institutional form of academic freedom’.³¹ Note that this conceptual construction inverts the logic of the dominant Latin American understanding of academic freedom as a consequence of university autonomy.

[of universities and polytechnic schools] guarantees the exercise of academic freedom and the right to seek the truth without restrictions’.

²⁵ See <https://www.oas.org/es/sla/ddi/docs/acceso_informacion_base_dc_leyes_pais_b_1_en.pdf>.

²⁶ See <https://www.oas.org/juridico/spanish/mesicic3_nic_const.pdf>.

²⁷ See <https://www.oas.org/dil/access_to_information_human_right_American_Declaration_of_the_Rights_and_Duties_of_Man.pdf>.

²⁸ See Kinzelbach’s article in this special issue.

²⁹ ‘Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.’

³⁰ Börzel and Spannagel article in this special issue.

³¹ *Ibid.*

The contrast with the origins and evolution of academic freedom in the United States is eloquent. In the United States, the notion and protection of academic freedom emerged from the bottom up from the professoriate, beginning with the American Association of University Professors' (AAUP) 1915 Declaration of Principles on Academic Freedom and Academic Tenure. The Declaration, widely endorsed by the academic profession and by universities, was revised in 1940 in the Statement of Principles on Academic Freedom and Tenure, jointly formulated by members of the academic profession and the Association of American Colleges.³²

In Latin America, university autonomy evolved over the course of the twentieth century as a protection of the university against the encroachment of governments, often authoritarian or outright dictatorial, so they could carry out their missions as they defined them. Since the 1990s, threats to autonomy have been expanded by authors to include business interests, higher education policies espoused by supranational agencies, and marketization and academic capitalism in general.³³ Freedom of the university is the overriding principle; in the case of public universities, it defines a sphere of self-determination within the structure of the state. In the United States, in contrast, freedom of the university – hardly ever called 'autonomy' – is a secondary effect of the freedom of the professoriate.

So far, we have dealt with the autonomy of public universities. The private sector of higher education, however, is vast in Latin America and has deep roots in the universities established by the Spanish Crown, the Pope or both during colonial times, some of which continue to exist, either as private entities or morphed into public universities in the nineteenth century.³⁴ Private enrolments in higher education hover at over 80 per cent in Chile, 70 per cent in Brazil and El Salvador, 60 per cent in the Dominican Republic, and 50 per cent in Colombia and Costa Rica,³⁵ and exist with a minority share in every country of the region except Cuba.

The autonomy of private universities, the vast majority of which were founded since the 1950s,³⁶ has had a very different itinerary from those in the public sector due to the universal constitutional protection of the freedoms of association, education and speech. The autonomy of private institutions from government intervention, like that of any other civil society organization, follows constitutionally from the freedoms of association, education and speech of their members. In other words, no specific recognition of autonomy for private universities is needed in the constitution as those more general guarantees are in place.

The status of private higher education *vis-à-vis* the state reminds us, without too much of a stretch, of the British case, insofar as autonomy derives, in British universities, from

³²MW Finkin and RC Post, *For the Common Good: Principles of American Academic Freedom* (New Haven, CT: Yale University Press, 2009) 30.

³³LC Ríos, 'Autonomía universitaria: revisar sus significados para repensar la universidad argentina en contextos de democratización de la educación superior' in Eduardo Rinesi, Julia Smola, Camila Cuello and Leticia Ríos (eds), *Hombres de una república libre: universidad, inclusión social e integración cultural en Latinoamérica* (Los Polvorines: Universidad Nacional de General Sarmiento, 2016) 87.

³⁴One example of a colonial Catholic university transformed into a public university is the National Autonomous University of Santo Domingo, in the Dominican Republic: see Levy (n 1) 29. Similar cases can be found in Ecuador, Guatemala, Nicaragua and Honduras (Levy n 1) 31.

³⁵AM García de Fanelli, 'Public Funding, Latin America' in PN Teixeira and JC Shin (eds), *The International Encyclopedia of Higher Education Systems and Institutions* (Dordrecht: Springer, 2020) 2378.

³⁶See Levy (n 1).

their status as ‘legally independent corporate bodies’,³⁷ closer in juridical nature to private corporations than to state organs. However, the conceptual construction of autonomy stemming indirectly from the academic freedom of scholars – independence of the professoriate from governmental influence and freedom of speech in teaching – that characterizes the British idea of autonomy,³⁸ and that has acquired statutory legal protection only as recently as 1988,³⁹ differs from the direct grounding of autonomy of private universities in Latin America on the constitutional rights of the corporate body – rights of the university as such, not of its members.⁴⁰ We can see that while the legal structure of autonomy differs for public and private universities, the result is not much different regarding the lesser place of academic freedom in that structure.

The evolution of the concept of university autonomy in Latin America shows no tracks of diffusion into the region of trends found elsewhere in the world. The Latin American understanding of academic freedom seems to be entirely indigenous. Likewise, no diffusion from Latin America to the world seems to have taken place, except for the role of Latin Americans in drafting Article 27 of the Universal Declaration of Human Rights in 1948. The Organization of American States (OAS) has insisted, very recently, on the idea of a human right to ‘seek, generate, and transmit knowledge’, and on the individual and collective right (including that of academics) to engage in knowledge production and dissemination and to the enjoyment of scientific progress in the 2021 Declaration on Inter-American Principles on Academic Freedom and University Autonomy.⁴¹ However, national constitutional language across the region has remained largely distant from this doctrine as the basis for academic freedom, preferring to anchor it in university autonomy, a point also underscored in the same 2021 OAS Declaration, which states that ‘autonomy is an essential prerequisite for academic freedom’.⁴²

Current status and contestations of autonomy and academic freedom in Latin America

Perhaps reflecting the challenges of the time, recent scholarship on university autonomy in Latin America has enlarged the concept to include specifically the academic dimension

³⁷R Pritchard, ‘Academic Freedom and Autonomy in the United Kingdom and Germany’ (1998) 36 *Minerva* 101.

³⁸MB Olmos Giupponi, ‘Academic Freedom from the Perspective of the United Kingdom’ in Ivo De Gennaro, Hannes Hofmeister, and Ralf Lüfter (eds), *Academic Freedom in the European Context: Legal, Philosophical and Institutional Perspectives* (Cham: Palgrave Macmillan, 2022) 242.

³⁹Education Reform Act 1988, section 202(2)(a), which states: ‘[A]cademic staff have freedom within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at their institutions.’ M Davies, ‘Academic Freedom: A Lawyer’s Perspective’ (2015) 70 *Higher Education* 987.

⁴⁰A Abruña, V Baca and A Zegarra, ‘Algunas ideas para el estudio de la autonomía universitaria en el ordenamiento peruano’ (2000) 1 *Revista de Derecho, Universidad de Piura* 9.

⁴¹See Börzel and Spannagel (n 30) 14.

⁴²*Ibid.* However, for a fuller picture of OAS’s more recent positions on autonomy and academic freedom, it is worth noting that the declaration issued in 2019 in the context of a OAS co-sponsored global forum on academic freedom, institutional autonomy and the future of democracy, held at Council of Europe headquarters in Strasbourg, states that ‘higher education can only fulfil its mission if faculty, staff and students enjoy academic freedom and institutions are autonomous’ and that ‘participants recognize that while academic freedom and institutional autonomy are often considered together, one does not necessarily guarantee the other’. See <<https://rm.coe.int/global-forum-declaration-global-forum-final-21-06-19-003-/16809523e5>>.

of autonomy along with the administrative and financial ones. Gutiérrez⁴³ offers a representative catalogue of university freedoms under the umbrella of autonomy:

Academic and technical autonomy, which refer to the competence and capacity to educate, establish its academic organization, create programs, define modes of study, and issue certifications.

Autonomy of governance, comprising the power and responsibility to govern itself, appoint its authorities, and the capacity of its members to participate in governing bodies and in electoral processes to make those appointments.

Legal and administrative autonomy, which includes having an independent legal status as a decentralized state organ, the right to establish its bylaws and regulations, and have its own patrimony which it administers freely.

Financial autonomy, which is based on the capacity to receive public funding and to allocate those resources, account for the use of those funds, and generate other income within its mission, which it can also freely use ...

In a more concise rendering, Serrano Migallón focuses on academic, administrative (or normative) and financial autonomy. This is how he describes it:⁴⁴

University autonomy cannot be understood without academic freedom, administrative freedom, and financial freedom. Academic freedom entails the authority to teach and to learn, and it manifests itself in the search for truth without restriction or coercion. The administrative and normative freedom is expressed in the right of self-determination through the institutions' bylaws and regulations and in power to designate its authorities without external intervention. Financial freedom allows the university to develop through the organization and administration of its patrimony.

Note that academic freedom is just another expression of autonomy here, not its purpose or justification, and exists in the same plane of importance as the other freedoms. Note also that while academic freedom, administrative freedom and financial freedom seem to be freedoms of the university, 'the authority to teach and to learn [which] manifests itself in the search for truth without restriction or coercion' seems to represent freedoms of the scholar rather than being a prerogative of the university.

This vision was confirmed in the declarations stemming from the III Regional Conference on Higher Education (CRES) convened by UNESCO's International Institute for Higher Education in Latin America and the Caribbean (IESALC, for its acronym in Spanish) and held in Córdoba, Argentina, to commemorate the hundredth anniversary of the Córdoba movement. Some 3000 delegates were in attendance, mostly rectors and other university representatives, leaders of professional associations and unions, functionaries in government agencies, representatives of non-government organizations and representatives of student organizations.

⁴³See Gutiérrez (n 16) 153 (my translation).

⁴⁴F Serrano Migallón, 'Autonomía: de quién, para quién, alcance, condiciones' in Felipe Martínez Rizo (ed), *La autonomía universitaria en la coyuntura actual* (Aguascalientes: Universidad Autónoma de Aguascalientes, 2020) 193 (my translation).

The CRES 2018 final Declaration has this to say about autonomy in paragraphs scattered across the text:⁴⁵

The autonomy that is being demanded is that which allows the university to exercise its critical and proactive role vis-à-vis society, without restrictions and limits imposed by the governments of the day, religious beliefs, the market, or particular interests. The defence of university autonomy is an inescapable and highly relevant responsibility in Latin America and the Caribbean. At the same time, it is a defence of the university's social commitment. (p. 50)

The higher education to be created should fulfill its cultural and ethical calling with full autonomy and freedom, thus contributing to practical, political definitions which shall influence the changes needed and desired by our communities. Higher education should be the emblematic institution symbol of the critical national awareness of our Latin American and Caribbean region. (p. 35)

The results of debates and discussions on university autonomy must impact its legal status and should be developed within the framework of the constitution of each of the region's countries. (p. 47)

The processes of design, formulation, and application of higher education public policies must guarantee academic and financial autonomy and, consequently, the sustainability of higher education institutions. (p. 47)

Autonomy is an essential condition if the institutions are to play a critical proactive role in the society. This is based on the right to have access to decision making, to representation and full democratic participation expressed in the co-governance as well as in the transparency and accountability of their actions. (p. 49)

This Declaration, the most recent official statement of the regional higher education community, underscores my point about the subordinate position of academic freedom within the concept of university autonomy: academic freedom is absent. The Declaration only grazes on the concept of academic freedom once, mentioning freedom of teaching as a tradition in this context:

Thus, they [the higher education institutions of Latin America and the Caribbean] shall contribute, with social responsibility and commitment to new proposals which recreate the traditions of autonomy, social transformation, anti-authoritarianism, democracy, freedom of teaching [*libertad de cátedra* in the Spanish language version of the Declaration], and specifically a political influence based on knowledge and reason. (p. 49)

In its Latin American version, autonomy has two sides: a negative 'freedom from' and a positive 'freedom to'. The 'freedom from' refers to external interests and powers – 'the governments of the day, religious beliefs, the market or particular interests', as expressed

⁴⁵See UNESCO-IIESALC Regional Conference on Higher Education 2018. Declaration of the III Regional Conference on Higher Education, <<https://www.iesalc.unesco.org/wp-content/uploads/2020/08/Declaracion2018PortFinal.pdf>>.

in the Declaration. According to the Declaration, positive freedom enables the university to contribute 'to practical, political definitions which shall influence the changes needed and desired by our communities. Higher education should be the emblematic institution symbol of the critical national awareness of our Latin American and Caribbean region.'

In the Latin American concept of university autonomy, the holder and actor of the prerogative is the university as a corporate agent, not its scholars. Autonomy may enable academic freedoms on campus, but that is not its principal value. Universities are autonomous to be able to 'speak truth to power'. The role is highly political, and autonomy is a corporate freedom that holds a buffer of independence from external political and economic actors. Knowledge figures only as the position from whence criticism is exercised: 'a political influence based on knowledge and reason', as stated in the Declaration above.

The single mention of anything close to academic freedom in the Spanish version of the Declaration is made to *libertad de cátedra*, translated in the official English version of the Declaration as 'freedom of teaching'. This brings me back to the earlier discussion of the language related to academic freedom in the Latin American constitutions and to my contention that freedom of teaching is a better translation of *libertad de cátedra* than academic freedom. Freedom of teaching is a part of academic freedom elsewhere in the world. Why would the CRES Declaration reduce academic freedom to 'freedom of teaching' as if this were the defining function of the academic work encapsulated in *libertad de cátedra*? I venture a historical reason: *libertad de cátedra* seems to be a traditional designation for academic freedom in parts of Europe and in all of Latin America. It is telling that only the constitution of Ecuador⁴⁶ has use for the notion of *libertad académica* (art 355), while all other constitutions prefer *libertad de cátedra*.

In this vein, we could see *libertad de cátedra* as inclusive of freedom of research if we consider *cátedra* as a 'chair' – that is, an academic subject area or specialization in charge of a full professor. In this interpretation, the mention of *libertad de cátedra* as a synonym for academic freedom would be a flashback to tradition. This understanding may hold for early twentieth-century France, Germany or, to a lesser extent, Spain, where chairs included research and teaching. But it hardly applies to Latin America, where the teaching function preceded research for several decades. Prior to the development of the sciences in the region – a change that, with few exceptions, began in a few universities in the region in the 1960s and took hold as late as the last three decades – the academic profession was a teaching profession. The only effective freedom professors could claim was the freedom of teaching or, in this narrow sense, '*libertad de cátedra*'.⁴⁷

The contrast is telling with the 2017 report on academic freedom by the University and College Union (UCU), the association of higher education faculty in the United Kingdom, according to which the elements of academic freedom are freedom to teach, freedom to do research, self-governance and tenure.⁴⁸ It is not that guilds of faculty in Latin America could not concur to a similar catalogue of academic freedoms. What is striking is the distance between this discussion and the doctrine of university autonomy.

The need to establish independence from the state while at the same time remaining part of the state, in the case of public universities, resonates perhaps with the plight of German universities since the times of von Humboldt. As in Latin America, the grounds

⁴⁶See <https://www.oas.org/juridico/pdfs/mesicic4_ecu_const.pdf>.

⁴⁷A Bernasconi, 'University Autonomy and Academic Freedom: Contrasting Latin American and US Perspectives' (2021) 2(1) *Higher Education Governance and Policy* 56.

⁴⁸See Olmos-Giupponi (n 38) 244.

of the freedoms of universities in Germany are expressed in the constitution. However, it is again significant that the German Basic Law recognizes freedom to art, science, research and teaching, not to universities.⁴⁹ The organizational configuration of this protection for those exercising these freedoms in the university has to be developed further by legislation and court cases.⁵⁰

In Latin America, as explained, we have the inverted the order of the elements: freedom is a prerogative of the university, from whence freedoms of art, science, research, and teaching may obtain. The subordinate position of academic freedom in Latin America seems to evoke the current situation in France, a higher education system that, two centuries ago, was – as explained above – influential in the minds of the founders of universities in Latin America in the nineteenth century. Beaud⁵¹ argues that the French concept of ‘university freedoms’ has traditionally eclipsed the idea of academic freedom. He maintains that university freedoms are a contemporary holdout of medieval franchises. In his account, two expressions of this privilege stand out: the immunity of university campuses from police intervention, unless authorized by the rector of the university; and a form of trial by peers of faculty members that exempts them, in the case of alleged wrongdoing, from the ordinary disciplinary procedure applicable to other civil servants. The former – territorial immunity – was a part of the Latin American discourse about autonomy but has faded away, possibly as a result of its sterility in the face of authoritarian or dictatorial regimes and more recently as a consequence of society’s little patience for anything that smacks of softness on crime. At any rate, it is intriguing how, in France, as in Latin America, the title holder of freedom is the university corporation, not the professoriate. It should be noted, though, that Beaud believes that notwithstanding these concepts and the French law on universities, French universities ‘have, de facto, no autonomy at all. In reality, they have no educational, administrative, or financial autonomy, for they are, de facto, under state supervision’.⁵²

State supervision, or anything resembling it, is the *bête noire* of Latin American universities. Recall that the CRES Declaration lists ‘restrictions and limits imposed by the governments of the day, religious beliefs, the market or particular interests’ (my emphasis) as those to be rightfully shunned by autonomous universities. Since the 1990s, governments in Latin America have turned their attention to higher education. Concern with quality and equity were paramount, and governments across the region sought to expand access, especially among underserved populations, diversify types of institutions of higher education (including private provision), set up accreditation mechanisms for the assessment of quality and make increases in funding available based on performance indicators, contracts with performance targets negotiated with the government or funds gained in competitive bidding towards goals defined by the government.⁵³

⁴⁹Article 5 [Freedom of expression, arts and sciences]: ‘(3) Arts and sciences, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.’

⁵⁰C Hillgruber, ‘Freedom of Science in Germany: Constitutional Guarantee and Current Hazard Situation’ in Ivo De Gennaro, Hannes Hofmeister and Ralf Lüfter (eds), *Academic Freedom in the European Context. Legal, Philosophical and Institutional Perspectives* (Cham: Palgrave Macmillan, 2022) 189.

⁵¹O Beaud, ‘Academic Freedom in France: A Concept Neglected and Liberties Under Threat’ in Ivo De Gennaro, Hannes Hofmeister and Ralf Lüfter (eds), *Academic Freedom in the European Context: Legal, Philosophical and Institutional Perspectives* (Cham: Palgrave Macmillan, 2022) 205.

⁵²Ibid 213.

⁵³A Bernasconi and S Celis, ‘Higher Education Reforms: Latin America in Comparative Perspective’ (2017) 25 *Education Policy Analysis Archives* 67 <<https://doi.org/10.14507/epaa.25.3240>>.

The flag of university autonomy has invariably been hoisted to oppose such policy-driven changes in the status quo. Claiming autonomy, for instance, public universities in Argentina successfully resisted accreditation in the mid-1990s, so the Law of Higher Education N° 24.521 of 1995 created a watered-down version of accreditation (art 44), called evaluation, to be carried out by academic peers every six years, with no other consequences than the publication of the evaluation report.⁵⁴ In Bolivia, at around the same time, public universities effectively neutralized accreditation legislation so that evaluation is carried out only for private institutions. In contrast, public universities established their own self-run system of assessment.⁵⁵ In Peru, autonomy was unsuccessfully invoked by public and private universities alike to oppose legislation passed in 2014 to evaluate all universities to ascertain whether any of them merited closing for failing to meet minimum quality standards (49 universities were closed).⁵⁶ The constitutional and legal reforms passed in Ecuador between 2008 and 2012 to streamline higher education were met with a similar opposing argument (fourteen universities were closed).⁵⁷

But, as the case of Mexico illustrates, universities have also accommodated to a landscape of increasing government regulation. Since the 1980s, Mexican governments at the federal level have pushed for the ‘modernization’ of higher education through conditional, differentiated and competitive funding, evaluation and accountability, and the use of performance indicators. Universities responded – not without internal tensions – changing their academic and bureaucratic discourses and practices to capture new sources of funding and improve their indicators of quality and productivity in what has been called ‘responsible autonomy’.⁵⁸

University autonomy and academic freedom in Chile

Chile also experienced the reception of the Córdoba ideas. The University of Chile acquired its administrative and financial autonomy and greater academic autonomy in its by-laws of 1931.⁵⁹ These recognize the freedom of university professors to express their opinions or doctrines in the subjects they taught and granted to the university the decisions over admissions of students, but the creation of new schools (faculties) had to be approved by the government. Full autonomy, in the Latin American vein, was obtained in the by-laws of 1971.⁶⁰

⁵⁴J Antonio-Castillo and F Ganga-Contreras, ‘Gobernanza universitaria: análisis de situación desde la perspectiva de la Ley de Educación Superior Argentina’ (2021) 40(2) *Revista Cubana de Educación Superior* 1.

⁵⁵C Weise, ‘Higher Education Systems and Institutions, Bolivia’ in PN Teixeira and JC Shin (eds), *The International Encyclopedia of Higher Education Systems and Institutions* (Dordrecht: Springer, 2020) 852.

⁵⁶M Benavides and A Saldarriaga, ‘La autonomía universitaria bajo dos escenarios: una descripción del caso peruano’ (2022) 12 *Revista de Educación Superior en América Latina* 21; R Cuenca, ‘Expansión, calidad y reforma universitaria: Perú 2000–2015’ in A Didriksson (ed), *Innovando y construyendo el futuro: la universidad de América Latina y el Caribe: estudios de caso* (Guadalajara: Universidad de Guadalajara, 2016) 210.

⁵⁷MA Johnson-Toala, ‘Higher Education Systems and Institutions, Ecuador’ in PN Teixeira and JC Shin (eds), *The International Encyclopedia of Higher Education Systems and Institutions* (Dordrecht: Springer, 2020) 985.

⁵⁸A Acosta, ‘Autonomía universitaria y estatalidad’ (2020) 49(193) *Revista de Educación Superior* 1.

⁵⁹The by-laws of public universities in Chile, as in Latin America generally, are approved by an Act of Congress.

⁶⁰J Bassa Mercado and B Aste Leiva, ‘Autonomía universitaria: Configuración legislativa de su contenido constitucional’ (2019) 17(1) *Estudios Constitucionales* 192.

Private universities, the first of which, the Catholic University of Chile, was established in 1888, with three more founded in the 1920s (both Catholic and lay), had the autonomy of private corporations, discussed above, but were subject to the examination of their students by the University of Chile well into the 1950s, when these examinations began to be phased out. Co-governance, in contrast, was adopted much later and in a very mild version. As a result of the university reforms of 1967 and 1968, initiated by students, the eight universities then in existence gave students and graduates or non-academic staff minority participation in governing bodies and the election of the rectors and deans.

Before these reforms, the discussion of the concept of academic freedom and its relationship to university autonomy had appeared in Chile more in academic writing about the university⁶¹ than in legislation. The university reforms of the late 1960s brought about a more nuanced reflection of the university communities about themselves. They marked the beginning of the modernization of universities along the lines of the Humboldtian ideals.

The next milestone in Chile's juridical expression of university autonomy was the constitutional amendment of 1970, Law 17.398, which lasted until the military coup in 1973. Article 7°, Number 10 of the amended Constitution prescribed (my translation):

State universities and private ones recognized by the State are legal entities endowed with academic, administrative, and economic autonomy.

The State is to provide them with adequate funding to fully accomplish their functions according to the country's educational, scientific, and cultural requirements.

Access to universities shall depend exclusively on the suitability of applicants ... The entry and promotion of faculty and researchers in their academic careers will be decided based on their capacities and skills. The academic staff is free to develop matters according to their ideas, within the duty to offer students the necessary information about diverse or discrepant doctrines and principles.

University students have the right to express their ideas and to choose, as possible, the teaching and supervision of the professors they prefer.

While the validity of these norms was brief, their contents are of interest as they have much in common with the general idea of autonomy prevailing in Latin America at the time. We can see the three primary forms of autonomy (academic, administrative, and economic), coupled with a partial acknowledgment of academic freedoms: freedom of teaching and learning are there, both for faculty and students. Freedom of expression is also recognized. However, freedom of research is absent.

The choice of freedoms to be protected may well be a reflection that this amendment, together with numerous others introduced at the same time to expand fundamental rights, was required by the centrist Christian Democratic party as guarantees to consent to Salvador Allende and his leftist coalition becoming President of Chile after the election had failed to give either of the three presidential candidates the vote spread needed to gain the presidency without congressional ratification. In the heyday of the Cold War and the fear among the opposition to Allende that Chile may turn into another Cuba, the protection

⁶¹J Millas, *Idea y defensa de la Universidad* (Santiago: Ediciones UDP, 2012).

of the freedoms of teaching and choice of teachers by students, unbiased placement of students, and entry and promotion in an academic career based only on merit may have seemed of more immediate ideological relevance than the freedom of research.

Also worth noting is that the obligation of the State to provide universities with adequate funding to fully accomplish their functions is geared toward the country's educational, scientific and cultural requirements. Who is to define those requirements of the country that justify public funding is a matter of importance. Still, in any case, it seems it is not just the universities who have a say, as would be the preferred interpretation of the Latin American idea of autonomy – reticent, as it is, to liberal contestations of autonomy based on the public good democratically defined by the representatives of the people.

The military dictatorship of General Pinochet (1973–90) abolished the constitution in 1973, removed the rectors and replaced them with military officers, and began a political purge of professors, students and non-academic staff. The bases for a new higher education system relying on expanded private provision were laid in Law Decree N° 1 of 1980 (DFL N° 1) on universities. Academic, administrative and financial autonomy were recognized and developed in greater detail (arts. 3 and 4), and academic freedom was instituted (art 5) thus (my translation):

Academic freedom includes the right to open, organize, and maintain educational institutions, heeding the requirements defined by law, and the right to seek and teach the truth according to the standards of reason and the methods of science.

These declarations may seem protective enough, but other norms in the same law blunted them. Articles 6–8 went to great lengths to proscribe behaviour contrary to the juridical order and to ban political or ideological activism in universities. Second, all university rectors were appointed by the government at the time. Third, the general purpose of this law was to open the field of higher education to new, private universities. These had to be approved by the Ministries of Education and the Interior. Therefore, new private universities would be able to enjoy their autonomy and academic freedoms as long as their founders and projects were to the government's liking to merit approval and permission to operate.

Owing to that DFL N° 1, new private universities and other non-university institutions of higher education (also autonomous in Chile) boomed as the conditions for creating new institutions were relaxed towards the end of military rule (1988–90). In addition to political control, it is likely that throughout most of the 1980s, the growth of private institutions was also stunted somewhat, as an anonymous reviewer for this article suggested, by dire economic conditions (Chile was in recession for most of the decade), lack of academic personnel and uncertainty about the long-term business model.

Democracy was restored in 1990, and rectors began to be elected again by the professoriate. Still, the legal foundations of higher education put in place during the dictatorship remained unchanged for a long time, as reforms of the primary and secondary levels of education were prioritized in the 1990s and 2000s. The Constitution of 1980, left by Pinochet, was enormously difficult to modify due to the high congressional majority needed to pass amendments.

The most important overhaul of those legal foundations came with the Higher Education Act of 2018 (Law 21.091), which is currently in force. University autonomy and academic freedom are protected by its Art 2° in this manner (my translation):

a) Autonomy. The [Higher Education] system recognizes and guarantees the autonomy of higher education institutions, understood as the authority to determine

and conduct their institutional purposes and projects in academic, economic, and administrative matters within the framework of the constitution and the law. Moreover, higher education institutions must be independent of any limitations on academic freedom and the freedom to teach [*libertad académica y de cátedra*] within the scope of each educational project, directing their exercise towards the fulfilment of the purposes and other principles of higher education, aiming to achieve the common good and the development of the country and its regions.

...

f) Academic freedom. Higher education must be based on respect and academic freedom, which includes the free expression of opinion, ideas, and information, as well as on the freedom of teaching [*libertad de cátedra*], study, creation, and research for the members of the academic and teaching communities, without arbitrary discrimination, within the framework established by law, with respect for the institutional project and its mission.

Note that the grantor of autonomy is ‘the system’ (the Chilean higher education system, that is) and not the law or the state. This is quite unprecedented to our knowledge and somewhat tautological: the ‘system’ grants autonomy to itself. *Libertad de cátedra* shows up in the definition of autonomy but – and this is quite puzzling – as a form of freedom different from academic freedom.

In its definition of autonomy, the Law on Public Universities (Law N° 21.094) follows a path that resonates more closely with the Latin American concept of autonomy. It recognizes and develops (art 2) the canonical three aspects of it: academic, administrative and economic autonomy. Within academic autonomy, the principle of academic freedom (*libertad académica*) is highlighted, ‘which includes the freedoms of teaching (*libertad de cátedra*), research and study’ (my translation). Note how here, again, *libertad de cátedra* is a different freedom than those of research and study, which bolsters my earlier contention that *libertad de cátedra* in the Latin American context is better understood as freedom of teaching.

Then, in the paragraphs cited above, there is the usual conflation between freedom of speech and academic freedom, rights of an unequal nature but often confounded in academia. Here again, the exercise of these freedoms is bound not just by law but also by respect for the institutional project and the institution’s mission.

Indeed, it is noteworthy in the Higher Education Act of 2018 (Law 21.091) that the exercise of academic freedom has boundaries in that it must not only conform to the law and the constitution but also to the framework of each educational project and be directed ‘towards the fulfilment of the purposes and other principles of higher education, aiming to achieve the common good and the development of the country and its regions’. Not much freedom, one could argue, amidst so many conditions of exercise.

The legislative record of the discussion of Law 21.091 is of little help in understanding how these concepts came about, for the final approved texts follow very closely the wording of the original bill sent by the Executive Branch, in matters of both autonomy and academic freedom. In the case of autonomy, a sentence was removed that required institutions to exercise autonomy responsibly, which was redundant, as the constitution and the Law bracket the exercise of autonomy, and institutions are expected to steer their exercise of autonomy ‘to the fulfilment of the goals and other principles of higher education, seeking to contribute to the common good and the development of the country

and its regions'. Next, the Education Commission of the Senate unanimously approved a motion by Senator Ignacio Walker (Christian Democratic Party, centre) to add to the original phrase 'within the framework of the law' a mention of the constitution so that the final text reads 'within the framework of the Constitution and the law' as limits to autonomy.⁶² According to the record, the reason for this addition was a recommendation by professors of constitutional law based on the lack of constitutional recognition of university autonomy in Chile. The stated argument makes no sense, for what is the point of calling up the Constitution as a limit to autonomy if there are no provisions about it in the Constitution? My interpretation of the norm, as it stands now, regardless of the intent of legislators, is that the regulatory framework of autonomy is not solely a matter of law but of constitutional rights as well, which are of importance in the case of private institutions, as noted above.

In the same session, Senator Andrés Allamand (National Renovation Party, right) gathered the unanimous support of his senatorial colleagues for his motion to rephrase the core of the concept of autonomy to add to it academic freedom and freedom of teaching, not in the original bill. There is no explanation of the grounds of this motion in the record. There is in it the annoying – but by now expected – bit of speaking of academic freedom and freedom of teaching as if the latter were not part of the former, but the proposed and approved motion has the merit of making university autonomy at least in part a question of academic freedom.

The concept of academic freedom was even less altered in the congressional discussion of the government's bill. Only the last sentence – 'with respect for the institutional project and its mission' – is of congressional origin: a motion by Senators Walker and Allamand, in slightly different wording, unanimously approved by the Senate's Education Commission.⁶³

Why does the mission of each institution and its project feature so intensely in the current Chilean concepts of academic freedom and autonomy? That the exercise of university autonomy should consider the constitution and the law goes without saying in the liberal (that is, not absolute) understanding of the exercise of every right. But why should academic freedom restrict itself out of 'respect for the institutional project and its mission' (meaning the mission of the university and its educational project)? Likewise, why should academic freedom and freedom of teaching be exercised 'within the framework of each educational project'?⁶⁴ In my understanding, this is a consequence of Chile's higher education system's great ideological diversity across, but not necessarily within, universities, not just from universities maintained by the Catholic Church and other confessions but also among the public and private lay universities. In other words, it is deemed legitimate in Chile that a university would have a certain philosophical orientation, be it fostering the entrepreneurial spirit among its students, instilling radical citizenship, sharing the Gospel, or building a more humane society. Faculty and students tend to coalesce to universities espousing their world views, but what if they didn't?

⁶²Biblioteca del Congreso Nacional de Chile: 'Historia de la Ley 21.091', 1416.

⁶³Ibid 1421.

⁶⁴An anonymous reviewer for this article pointed out that the concept of an 'educational project' appears to encompass a broader scope than the term 'mission'. The reviewer argued that 'the latter has gradually become more confined in its meaning due to its formal usage in accreditation procedures, where institutions are required to provide explicit statements about their missions. It remains to be seen whether the concept of an 'educational project' can effectively convey underlying principles and ideas that may not be explicitly articulated in institutional missions.' I find this idea intriguing.

Case law on faculty or student behaviour that is 'deviant' from the prevailing orthodoxy of their universities is hard to come by. Moreover, most universities are amply capacious in their ideological overtones, so narrowly defined institutional worldviews tend to be exceptional. Chilean courts have granted extensive deference to university decisions if due process is observed in sanctioning students or faculty, and the sanctions are justified in the contract between the university and the student or professor and other regulations (in private institutions) or the by-laws of the university and in administrative law in public institutions.⁶⁵ The Chilean Constitutional Court, in turn, has upheld legislation limiting autonomy with the argument that such limitations are needed to ensure students' right to quality education.⁶⁶

While academic freedom can be moderated by the framework established by law and must respect the institutional project of the university and its mission, autonomy is also heavily regulated in Chile. Accreditation by an autonomous public agency is mandatory for all institutions of higher education, public and private, lest they lose their authorization to operate. Doctoral programmes and professional programmes in medicine, dentistry and education must be accredited to operate.

Another regulatory agency, the Superintendence of Higher Education, ensures that higher education institutions comply with the law. The Superintendence's powers, aside from imposing fines in case of breach of the law, include the option to move to appoint a general manager to replace the leadership of the university in case of a severe crisis and to recommend to the Ministry of Education the revocation of the authorization to operate if the problem is terminal.

Public universities operate under a general law for public universities (Law N° 21.094), which establishes their shared mission and principles of organization and operation. This law also defines the purposes of public universities thus: 'to contribute to the strengthening of democracy, the sustainable and comprehensive development of the country and the progress of society in the diverse areas of knowledge and domains of culture' (art 1, my translation). They must also collaborate in public policy for the country's cultural, social, territorial, artistic, scientific, technological, economic and sustainable development (art 4).

The Ministry of Education runs a common process for admission of applicants to the university system: universities are free to set their admission requirements, but there is a single national test of academic aptitude administered by the Ministry of Education that sorts out applicants based on their scores. Applications for admission to higher education are processed by a single internet portal administered by the government.

Free tuition is available to students in accredited institutions who belong to the lowest six income deciles. Still, as the government pays tuition in lieu of students, both tuition levels and available slots are capped by the government.

The case of Chile adopts the general Latin American notions of autonomy and academic freedom but also departs from them in notable dimensions. Most of this regulatory framework would be politically impossible to set up in other countries of the region. It is tempting to relate Chile's lack of constitutional recognition of university autonomy to the extent of state regulation in this country, larger than the Latin American norm and possibly the most intense found anywhere in the region.

⁶⁵R Pablo, 'Control judicial del debido proceso en las universidades: análisis desde el derecho comparado' (2020) *Revista de Derecho de la Pontificia Universidad Católica de Valparaíso* LIV(1) 183.

⁶⁶See Bassa Mercado and Aste Leiva (n 60) 207.

My hypothesis is different. In the matter of quality assurance and compliance with the law, the history of the original accreditation Law of 2006 (Law 20.129), which introduced voluntary institutional and program accreditation, and its amendments in 2018 suggest that the basis of strong state regulation of higher education in Chile has been the perception that the private sector had proliferated as a result of loose regulation in a period beginning in the late 1990s and extending into the mid-2000s. There is much presence in the legislative record of arguments expressed by politicians and policy-makers along the lines of ‘the abuse of autonomy’ on the part of many higher education institutions. Politically, the left has pushed for more regulation, while the right has pulled back, arguing on the grounds of autonomy understood as the constitutional right to freedom of education. The current situation reflects shifts in the political balance of forces, first making accreditation possible, albeit voluntary (from 2006 to 2018), and next turning it up a notch to make it mandatory and reinforced by a Superintendence. Public universities (a minority in numbers of institutions and enrolments) have been swept by this momentum, under the argument that regulation should not distinguish universities based on the nature of their ‘ownership’.

The extent of privatization and market competition in Chilean higher education is a concurring explanatory element. Not only are 84 per cent of enrolments private, but private funding accounts for over 50 per cent of all spending in higher education, mostly in the form of tuition payments (both public and private institutions charge significant tuition). Student aid, consisting of free tuition, loans and grants, is demand-driven – that is, disbursed to institutions based on their enrolment of deserving individuals. Chile is an extreme case of academic capitalism: institutions steeped in new public management compete for tuition-paying or subsidized students; they compete for faculty members in a highly mobile market; they compete for research grants, which are the sole means of research funding; they compete for graduate students (also a demand-driven sector); and they compete for consulting and technology development contracts with local firms.⁶⁷

Through this lens, the rather heavy hand of regulation can be understood as a counterbalance of higher education as a market-driven industry. The state has favoured this political economy of higher education, but at the same time has established increasingly strong regulations to deal with market failures such as information asymmetry, free riding, under-provision of public goods, externalities and the like.

Conclusions

The law has configured a very ample space for university autonomy in Latin America, understood throughout the region as a corporate freedom of the university as an institution, albeit one in which the academic freedom of scholars is of secondary importance. Academic freedom is understood as a consequence of university autonomy, not as its purpose or foundation. Almost all constitutions in the region guarantee university autonomy. The constitutional recognition of academic freedom, codified as ‘*libertad de cátedra*’, appears in most constitutional texts. In contrast, the freedoms of research and study as a human right are present in a minority of the constitutions.

⁶⁷JJ Brunner, F Ganga-Contreras and E Rodríguez-Ponce, ‘Gobernanza del Capitalismo Académico: Aproximaciones desde Chile’ (2017) *Revista Venezolana de Gerencia*, vol. Esp, núm. 1, 11; J Labraña and JJ Brunner, ‘La universidad chilena en el contexto del capitalismo académico. Una interpretación socio-histórica’ (2021) 26(90) *Revista Mexicana de Investigación Educativa* 935.

Latin America exhibits a remarkable homogeneity in the concept of university autonomy: an institutional prerogative or privilege of universities that sets them free from governmental control. Universities are beholden to the public good and the service of the communities in their sphere of influence. Still, the form of that service is to be defined solely by the universities, individually or collectively, in their national associations.

Autonomy includes the academic freedom to organize study programs, admit and graduate students, issue certifications, define who is to be admitted to the professoriate and establish the conditions for permanence and promotion in an academic career. The freedoms to teach and research without restriction or coercion are also included here. Administrative autonomy gives universities an independent legal status as a decentralized state organ, the right to establish its by-laws and regulations, and to designate its authorities in the manner they determine. Financial or economic freedom is the right of the university to have its own patrimony, which it administers freely, to receive sufficient public funding and to generate other income.

The Latin American idea of university autonomy is entirely indigenous. Authors have pointed to the influence of the Napoleonic university model during the nineteenth century as the newly independent republics established new universities or reformed those coming from the colonial legacy of Spain and Portugal. Still, that influence was tenuous at best and short-lived. By the 1910s and 1920s, university students had taken up the cause of university reform. They successfully installed a discourse of modernization throughout the region, topped by university autonomy and *cogobierno* or shared governance by faculty, students and alumni (later, administrative staff). No traces of inward diffusion can be found, nor instances of outward influence of these ideas beyond the region.

The cause of autonomy was fought – usually spearheaded by students – and won in public universities across the region throughout the last century. State universities most clearly needed to detach themselves from a state that included them as part of the public service. When autonomy was consecrated in the constitutions, private universities had become part of the landscape, and autonomy was bestowed upon them too. In the case of private universities, the recognition of their autonomy is politically valuable but of little juridical consequence, as the freedom to provide education is a constitutional right on its own.

A limitation of this article is that when accounting for Latin American nations' stances on autonomy and academic freedom, I have considered constitutional language only and the idea of academic freedom that stems from it. However, in contemporary constitutional law, states are not obligated only by their constitutions but also by instruments of international law – certainly by treaties of which they are part but also, increasingly, by soft-law norms, such as the OAS declarations briefly mentioned in section 2. Therefore, I am not making a claim about the current position of Latin American states – which would make it necessary to cover instruments of international law and international human rights law – but only about the concepts one can find across constitutions.

In its more extreme, illiberal rendering, university autonomy would preclude any action from the government in the area of higher education policy. Alas, in the last few decades, governments across the region have had to govern higher education as well, but tiptoeing around autonomy, resorting to incentives to change university behaviour on a voluntary basis or facing the denunciation of a breach of autonomy when they have tried a heavier hand, as with accreditation and accountability. Policy is not totally impeded by autonomy but transformed by the need to negotiate with the university guild.

In Chile, policy-making in higher education has been intense since the return to democracy in 1990. University autonomy, which is not guaranteed in the constitution, has not been a roadblock to policy. Unlike most of Latin America, the public sector of

higher education, elsewhere the stalwart of autonomy, is very small in Chile. The constitutional protections to the freedom of education, association, speech and religion have been sufficient to enable the development of a large private sector in higher education, autonomous by these other constitutional freedoms. The flipside of this private dominance and market-based steering of the higher education system in Chile has been the strengthening of state regulation over time, to a point not found anywhere else in the region.

In my view, the juridical and conceptual hegemony of university autonomy in Latin America has diminished the awareness of university women and men of academic freedom as the nucleus of what constitutes a university. Instead of academic freedom radiating outwards a sphere of protection at the organization's level, which may take the form of university autonomy, Latin America has put the organization first and treats academic freedom as a corollary. It is little wonder that the preferred concept of academic freedom in the region, *libertad de cátedra*, would turn out to be so muddled and weak.

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