Revisiting 'Co-operative Governance' in Higher Education

A Discussion Document

Prof André du Toit

HESA
HIGHER EDUCATION SOUTH AFRICA

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Foreword by
Dr Jeffrey Mabelebele

Higher Education South Africa (HESA)
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About the Author

André du Toit is an Emeritus Professor of Political Studies at the University of Cape Town and has a Drs Phil from Leiden University and a DPhil from the University of Stellenbosch. He has been a Visiting Professor and/or Research Fellow at Yale, Harvard, Princeton, the Free University of Amsterdam, and Aarhus University (Denmark). His research interests include the intellectual history of South African political thought and traditions, transitional justice, the narrative interpretation of political violence in South Africa, and academic freedom. Recent publications include: "Experiments with Truth and Justice in South Africa: Stockenström, Gandhi and the TRC", *Journal of Southern African Studies* 31 (2), June 2005; *Autonomy as a Social Compact* (CHE-HEIAAF Research Report), 2007; "Institutionalising Free Inquiry in Universities during Regime Change: The South African Case", *Social Research* 76 (2), Summer 2009; "Social Justice and Post-Apartheid Higher Education in South Africa", in Martin Hall, Marvin Krislov and David L Featherman (eds), *The Next Twenty-Five Years? Affirmative Action and Higher Education in the United States and South Africa*, 2009; "The Owl of Minerva and the Ironic Fate of the Progressive Praxis of Radical Historiography in Post-Apartheid South Africa", *History and Theory* 49 (2), May 2010; "The 'Dark Sides' of Humanism in South African History", in J W de Gruchy (ed), *The Humanist Imperative in South Africa*, 2011; and "Losing the Academic Freedom Plot? The CHE and the Debate on Institutional Autonomy and Public Accountability", *Kagisano* 8, March 2013. He is currently preparing a work on the genealogy of the South African Truth and Reconciliation Commission (TRC) process focused on (the lack of) an underlying amnesty settlement during the post-apartheid transition to democracy.

Acronyms

ANC	African National Congress
AUT	Advisory Council for Universities and Technikons
CHE	Council on Higher Education
CHET	Council for Higher Education and Training
CTP	Committee of Technikon Principals
CUP	Committee of University Principals
DHE	Department (Ministry) of Higher Education
DHET	Department of Higher Education and Training
DoE	Department of Education
GEAR	Growth, Employment and Redistribution
GNU	Government of National Unity
HE	Higher Education
HEC	Higher Education Council
HEF	Higher Education Forum
HEIAAF	Higher Education, Institutional Autonomy and Academic Freedom
HEIs	Higher Education Institutions
HESA	Higher Education South Africa
HEQC	Higher Education Quality Committee
HSRC	Human Sciences Research Council

HBUs	Historically Black Universities
HWUs	Historically White Universities
NCHE	National Commission on Higher Education
Nedlac	National Economic Development and Labour Council
NEPI	National Education Policy Investigation
NP	National Party
NPHE	National Plan for Higher Education
PSE	Post-Secondary Education
PQM	Programme Qualification Mix
SA	South Africa
SAQA	South African Qualifications Authority
SRCs	Student Representative Councils
TRC	Truth and Reconciliation Commission

Foreword

Throughout the world, the relationship between the state and higher education is changing. Between 1994 and 2014, the South African higher education system witnessed unprecedented policy and regulatory changes in a number of areas. Some of these changes, one could argue, strengthened the sector in many ways. However, others, to borrow from Prof Jonathan Jansen, constitute a "... gradual but systematic erosion of historical standards of autonomy that were ingrained within the institutional fabric of universities, thus redefining conceptions of institutional autonomy as the state systematically acquires new forms of power over the universities through a series of policy and regulatory-based incursions" (Jansen 2004, 5).

In discussing some of these changes within Higher Education South Africa (HESA), there is a feeling that the spirit of co-operative governance which underpinned the relationship between the state and the higher education sector after 1994 is being gradually redefined. Such a spirit is aptly captured in *White Paper 3: A Programme for the Transformation of Higher Education* and reads as follows:

> It is the responsibility of higher education institutions to manage their own affairs. The Ministry has no responsibility or wish to micro-manage institutions. Nor is it desirable for the Ministry to be too prescriptive in the regulatory frameworks it establishes. Diversity and flexibility are important aspects of institutional responses to varying needs and circumstances. *It is only in extreme circumstances that the Minister of [Higher] Education [and Training], as the responsible representative of the elected government of the country, would consider intervening in order to assist to restore good order and legitimate governance and management in an institution* (DoE 1997, section 3.33 – emphasis added).

In addition to this, a number of foundational governance principles on which the relationship between the higher education sector and the state is based are slowly being renegotiated or re-examined. These principles include, but are not limited to, the following:

- No single actor or agency can claim sole responsibility or authority in a one-sided manner for determining the policies and priorities of the higher education system;
- Competing and complementary interests, interdependence and common goals between higher education institutions (HEIs), the state, and broader society must be recognised;
- Increased participation should at all times be balanced by issues such as increased funding, maintaining academic standards, increased levels of institutional efficiency and effectiveness, etcetera; and
- Shared accountability and responsibility require constructive co-operative behaviour from all participants.

A major change in the legislative environment in 2012 was the promulgation of the amendments of various sections of the *Higher Education Act*, no 101 of 1997. Amongst other objectives, these amendments sought to extend the powers and functions of an independent Assessor; to give the Minister of Higher Education and Training the power to intervene in the case of poor or non-performance by, or maladministration in, a public HEI; to provide for the dissolution of the Council of an HEI, as well as the procedure for such dissolution; and to extend the powers of an Administrator to temporarily take over the management, governance and administration of the Council of a public HEI (*Higher Education and Training Laws Amendment Act*, no 23 of 2012).

These amendments have far-reaching implications for the higher education sector, and have redefined the relationship between the state and the higher education sector in fundamental and unpredictable ways. The amendments also highlight that shifts at a conceptual and collegial level, hardly acknowledged publicly by the state and the higher education sector, have happened in terms of this relationship. Related to this, these amendments also demonstrate the extent to which the conceptual understanding of the principles of institutional autonomy, public accountability, academic freedom, and co-operative governance have evolved since 1997 as a result of repeated policy shifts. Undoubtedly, the rules of the game have been rewritten.

This discussion document by Prof André du Toit seeks to reflect on the implications of these developments on the higher education sector in the short, medium and longer term. Although bold in some respects, this document is not a definitive statement on a complex and ever-changing topic. Clearly much is at stake. To that end, we invite scholars, policy-makers and interested parties to debate the issues raised herein. Ultimately, it is in our best interests to reassert the 1997 compact between the state and the higher education sector on matters relating to co-operative governance and related principles which, arguably, appear to be dissolving at an alarming rate. Hard work and a concerted effort is required to develop a useful framework to give effect to the implicit objectives of that compact. Prof du Toit's input is a key building block towards the realisation of those objectives. We invite you to join us in debating these issues.

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5 February 2014

1 Introduction

Problem Statement, Objectives and Approach

1.1 The Issue in Context

Some 20 years on from the concerted launch of a comprehensive restructuring of post-apartheid higher education in South Africa, a series of interventions by the Department of Higher Education and Training (DHET), along with the responses to these from the representative body, Higher Education South Africa (HESA), indicate that we have reached a critical juncture in the governance of higher education, a belated moment of truth – even if its precise nature remains to be clarified. On reflection it would appear that facing up to this moment of truth should not, as HESA's initial responses assumed, involve anachronistic attempts to revive the notion of 'institutional autonomy' once again. Rather, it raises the question whether our foundational commitment to 'co-operative governance' of higher education still has relevance in a post-apartheid, democratic South Africa.

In late 2012, Parliament passed the Higher Education and Training Laws Amendment Act, significantly extending the powers of the Minister to intervene in the affairs not only of 'failing' universities unable to deal with their own crises of governance and financial management, but also making it applicable across the sector to other institutions of higher education (DHET 2012b). In November 2012,

the DHET issued a new set of proposed regulations to replace and substantially extend the existing requirements for universities in reporting to the Ministry (DHET 2012a). And, in early 2013, the Minister announced the establishment of an "oversight committee" to study, evaluate and determine the effectiveness of transformation in universities and to suggest a reporting mechanism (DHET 2013).

From its initial responses, it appears that HESA understood the 2012 draft regulations and legislative amendments as indicating a momentous shift in the foundational governance assumptions on which the relationship between higher education and the state is based. Essentially, it took these as representing a threat to the institutional autonomy of universities in an attempt to bring them under the direct control of the Ministry. In HESA's view, compliance with the proposed compulsory reporting and submission regulations "would raise the spectre of HE [Higher Education] institutions being managed, monitored, controlled and directed similar to a government department within the Executive" (HESA 2013b, 8). A HESA agenda paper on *Policy and Regulatory Changes in Higher Education* concluded that "the Ministry/DHET seems to see universities in the same way as it sees other entities (state organs) falling under the executive authority of the Minister" (HESA 2013b, 10). For its part, HESA repeatedly invoked institutional autonomy as the foundational principle that is at risk and needs to be reaffirmed. This diagnosis of the Ministry's interventions has been endorsed by such leading figures in the higher education sector as the Vice-Chancellor of the University of Johannesburg, Dr Ihron Rensburg:

> The net effect is that universities are transformed into state-owned enterprises, subject to the control and jurisdiction of the Minister and the department. This is very different from how our Constitution and the original Higher Education Act envisaged the co-operative relationship between the state and universities as autonomous entities …. The erosion of university autonomy in these new legislative interventions is downright perilous (Rensburg 2013).

Likewise, from a legal perspective, Adv Jeremy Gauntlett, SC, in a public lecture at the University of Johannesburg, identified the crisis as one of a renewed threat to institutional autonomy similar to that faced by the 'open universities' in 1959 at the time of the Verwoerdian imposition of apartheid legislation on higher education. However, in his view the South African Constitution could now be invoked to

reaffirm the universities' claim to institutional autonomy in the sense of T B Davie's celebrated articulation of the 'four freedoms':

> On to the statute books four months ago crept ... a series of statutory provisions inimical to the institutional autonomy of universities .... [T]hese diminish academic freedom – and in my view, do so unconstitutionally .... [A]cademic freedom itself is now ... 'constitutionalised'. There can be little doubt [especially in view of the particular history of academic freedom, and the assaults on it, in South Africa] that the framers of the Constitution were aware of T B Davie's four freedoms, and meant them to serve as cornerstones, without reciting them .... American and South African legal commentators are *ad idem* that the right to academic freedom "also includes institutional autonomy". It seems to me clear that the approach by the US Supreme Court is likely to influence a South African court's approach, and should be adopted (Gauntlett 2013, 5-6 & 12-13).

However, these responses are misconceived – and doubly so. In the first place, South African universities never managed to achieve anything like institutional autonomy, neither in principle nor in practice. Notwithstanding the open universities' rhetorical invocation of T B Davie's 'four freedoms' in protest to the legal imposition of apartheid in higher education, and contrary to Adv Gauntlett's assertion, institutional autonomy has not been a hallmark of "the particular history of academic freedom, and the assaults on it, in South Africa". Nor has it been a constitutive principle of 'co-operative governance' as the foundational framework of post-apartheid, democratic governance in higher education. On the contrary, the notion of 'co-operative governance' has explicitly ruled out institutional autonomy as a basic right, just as much as it abjured the state's prerogative for direct control of universities. It follows that, in the second place, HESA's own invocation of 'institutional autonomy' as a foundational principle, in response to the Ministry's assertion of directive state control, ironically testifies to a possible breakdown of the foundational framework of 'co-operative governance' of higher education itself. In short, HESA's invocation of institutional autonomy as a foundational principle runs the risk of mirroring the DHET Ministry's unilateral assertions of 'command' authority for and over the HE sector with an equally unilateral assertion of the principle of institutional autonomy. On both sides, what is missing is precisely any shared commitment to a framework of 'co-operative governance'. This is the moment of truth that needs to be faced: *what are the relevance and legitimacy of, and prospects for, a foundational framework*

of 'co-operative governance' for higher education in the light of recent and current developments?

1.2 Shifting the Focus to 'Co-operative Governance'

This is not the first time questions have been raised about the actual status and functioning of 'co-operative governance'. Indeed, departures from, and the possible demise of, 'co-operative governance' has been a constant theme in accounts of South African higher education ever since the introduction of this notion by the National Commission on Higher Education (NCHE) in 1996. Even at the time it was widely noted that, both in substance and procedure, the 1996 *Green Paper* and the 1997 *White Paper*, as well as the 1998 *Higher Education Act* (with subsequent legislative amendments) and the 2001 National Plan for Higher Education (NPHE), significantly departed from the NCHE's original proposal for 'co-operative governance'. Subsequent developments, such as mandatory institutional mergers and implementation of a new funding formula and quality assurance regime, exacerbated these concerns. Already in 2002, a Council on Higher Education (CHE) Task Team Research Report on *Governance in South African Higher Education* concluded that "the concept of co-operative governance, while serving a key role in formulating a democratic higher education system, is now insufficient" (Hall, Symes and Luescher 2002, 107). In 2005, an astute analyst of higher education developments similarly observed that:

> … co-operative governance is a configuration of governance linked to the formal framework of the state in SA [South Africa], and remains the formal policy for governance of South African higher education. However, co-operative governance is not the current reality of the state-sector relationship: the state appears to have modified it in practice (Symes 2005, 25).

And, in 2008, the CHE's Higher Education, Institutional Autonomy and Academic Freedom (HEIAAF) Task Team reported that there is "a cumulative sense amongst higher education institutions … that government's commitment to consultation has weakened after 1997, and that lack of consultation has, at times, approached unacceptable levels" (CHE 2008, 50). In the light of this, HESA's current concerns are nothing new:

> … a culture of consultation between the Ministry/DHET and HESA is non-existent. Instead, such a culture has now been replaced by a 'command and control' culture, in which the Ministry 'instructs' the sector on what to do, and how to do it (HESA 2013a, 10).

In fact, this is simply the latest in an on-going series of similar pronouncements. For a decade and more, qualified observers have been announcing the imminent demise, or even de facto 'death', of 'co-operative governance' as the foundational framework for post-apartheid higher education.

Paradoxically, though, despite such repeated and insistent conclusions that the principles of 'co-operative governance' are no longer in place (if they ever were), debates on higher education policy and practice somehow continue to proceed on the assumption that 'co-operative governance' remains the foundational framework of 'state-sector' relations. Thus, HESA's own response to the proposed new reporting regulations still invokes 'co-operative governance' as supposedly the current guiding framework:

> It is HESA's view that a number of *governance assumptions on which the relationship between higher education and the state is based*, are going to be undermined if these 2012 Draft Regulations were to be enacted …. The concomitant replacement of the steering model with the command and control model would also mean the end of *co-operative governance as the guiding framework that determines and defines the current relationship between public HE institutions and the state* (HESA 2013b, 10 – italics added).

But if 'co-operative governance' is no longer actually functioning as a guiding framework, and has not done so for quite a while, then invoking it in this way is problematic. More than ten years ago the CHE Task Team on Governance in Higher Education already warned that continuing use of the 'rhetoric' of 'co-operative governance', in circumstances where it no longer applied, could be confusing and mystifying:

> As a result of the way that the practice of governance has evolved … the concept of co-operative governance, as defined in the earlier 1990s, is now in danger of becoming a hindrance that confuses policy and inhibits the development of good practice. For many, co-operative governance has become a somewhat

> empty phrase that means little more than 'co-operation in governance', or even 'corporate governance' (Hall, Symes and Luescher 2002, 108).

Indeed, uncertainty and confusion about the very meaning and function of 'co-operative governance' has become a recognised feature of higher education policy debates. If the CHE's Task Team on Governance in Higher Education went on to call for "a clear statement of principles" (Hall, Symes and Luescher 2002, 108), the HEIAAF Independent Task Team in 2008 still reported that the submissions it received from across the higher education sector "revealed – albeit 'between the lines' – interpretative variance and even confusion about co-operative governance" (CHE 2008, 22). Accordingly, Conclusion 1 of the HEIAAF Task Team Report started off with the need for "clarifications of the concept and status of co-operative governance" (CHE 2008, 71). But, unfortunately, the Report itself did not provide such clarifications.

All of this raises some basic questions regarding the 'co-operative governance' of higher education:

- What are the significance, status and function of 'co-operative governance' as foundational framework of higher education policy?
- In what way, or on what grounds, did 'co-operative governance' become the foundational framework of higher education policy? How is it related to the Constitution: can and should 'co-operative governance' be regarded as a constitutional principle?
- Insofar as 'co-operative governance' applies to state-sector interactions, what is its relation to (i) the state, (ii) government and/or government departments, (iii) other 'organs of state', and (iv) institutions of higher education?
- What is the relation between 'co-operative governance' and (i) institutional autonomy, (ii) state supervision/steering, and (iii) state interference? What is the function of 'co-operative governance' in relation to (i) viable and self-regulating institutions of higher education, and (ii) 'failing' universities experiencing financial or governance crises?
- If there have been shifts and changes in the general functioning of 'co-operative governance' over time, what have been their nature and trajectory? Is there some point where 'co-operative governance', as such, can no longer be said to be in place? If so, what would be the consequences and implications?
- Does 'co-operative governance' amount to a constitutional principle and, if so, what are the implications and consequences of that? Can that provide an

independent basis for a legitimate critical challenge by the higher education sector to perceived political interference by the government?

- What are the functions and consequences of continuing to invoke the rhetoric of 'co-operative governance' in circumstances where it is no longer in place?

This study will begin to explore some of these interrelated questions in an attempt to clarify the significance and relevance of 'co-operative governance' in the current circumstances.

1.3 Focus and Key Themes

This investigation will attempt to present a focused reconstruction of the genealogy of 'co-operative governance' as a foundational framework for the governance of post-apartheid higher education. On the one hand, the study will be briefly located in the context of the legacy of apartheid higher education governance and, on the other hand, refer to the development (in anticipation of the transition to democratic governance) of the analytical conceptualisation of different 'models' for state-sector relations, such as state 'control', 'supervision' and 'steering'. It will then provide an account of the emergence of the notion of 'co-operative governance' during the NCHE process, as well as a consideration of 'co-operative government/governance' as constitutional principles, more generally. The following sections will first analyse the trajectory of the official articulation and implementation of 'co-operative governance' with reference to the 1996 *Green Paper*, the 1997 *White Paper*, the 1998 *Higher Education Act*, and the 2001 NPHE, and then analyse the post-2001 trajectory of state 'steering' and 'interference', as well as the higher education sector's responses to these, differentiating between 'steering' by legislative change, by planning, by funding, and by quality assurance. The concluding sections will first review the different interpretations and alternative adaptations of 'co-operative governance' developed within the higher education sector in response to these trajectories, and then consider the implications of facing up to the breakdown of 'co-operative governance'.

It should be noted that this agenda entails a deliberate narrow focus on the core issues of (system-wide) higher education *governance*. Though it will need to cover a lot of ground, this focus will necessarily exclude many of the most important concerns of post-apartheid higher education, except insofar as they are relevant to the core issues of higher education governance. Thus, such major concerns as those of 'autonomy', 'access', 'equity', 'redress', 'participation', 'efficiency', 'responsiveness', 'accountability',

'transformation', and even 'academic freedom', will not be addressed directly or in their own right, but only insofar as they may have a direct bearing on the core issues of governance. This is by no means to say or imply that these are not major concerns of and for post-apartheid higher education. In various respects, they may well be of greater concern; but, as such, they require to be considered in their own right and relevant contexts. Here the focus will not primarily be on 'institutional autonomy', 'equity' or 'transformation', etcetera, but on the core issues of higher education *governance*. Neither does this mean that 'institutional autonomy', 'accountability' or 'participation', etcetera will be entirely excluded from consideration. There may well be ways in which 'institutional autonomy' and/or 'participation' is very pertinent to the core issues of higher education governance, and these will have to be taken into account. Thus, as we have already seen, the paradigm of 'institutional autonomy', rightly or wrongly, still figures prominently in current debates of higher education governance in South Africa. And so we will have to consider the relevance of this paradigm insofar as it has a bearing on the trajectory of 'co-operative governance'.

It should also be noted that the focus on higher education governance itself will be partial, insofar as it is primarily concerned with the macro or 'external' context of state-sector interaction and not with the micro or 'internal' context of institutional or university governance. Thus, we will address the system-wide structures and processes of higher education governance, not the equally vital roles of Council, Senate, Faculty, Department, Student Council, Staff Association, etcetera, within the university community itself. Nor will we be concerned with the impact of local communities, different social constituencies, or market forces. These must no doubt all be encompassed in a holistic view of 'co-operative governance', but that will not be the focus of this investigation.

Even so, the following thematic concerns will structure our account of the genealogy and trajectory of 'co-operative governance' in post-apartheid higher education:

- *The Significance, Status and Functions of 'Co-operative Governance' as Foundational Framework of Higher Education Policy:*

  'Co-operative governance' does not have a defined legal status, nor is it a substantial policy objective. It was proposed by the NCHE in 1996 as a founding declaration of commitment, an exercise in "self-binding" on the part of all parties involved in the governance of higher education, because "… [for] co-operative governance to succeed, all stakeholders need to

commit themselves to a code of conduct based on the acceptance of joint responsibility for the future of higher education in South Africa" (NCHE 1996, 177). In this sense the significance of 'co-operative governance' has been compared to that of a performative speech act, such as that of entering into marriage vows. How did this foundational commitment come about, and what authority or standing does it have? The notion of 'co-operative governance' was not part of the higher education policy discourse prior to the NCHE which, for its part, linked it to the new Constitution (NCHE 1996, 291). What the NCHE had in mind was the constitutional principle of 'co-operative government' as this applied to relations between the national government and provincial authorities. But just what is the relationship between intergovernmental 'co-operative government' and 'co-operative governance' in higher education, and should the latter be regarded as a constitutional principle like the former? This must also have implications and consequences in case of a possible breakdown of the foundational commitment to 'co-operative governance': can or must such a breakdown be restored – how, and by whom? What are the conditions for a sustainable framework of 'co-operative governance' in higher education, and how would this apply in South African conditions?

- *'Models' – 'Co-operative Governance' and Alternative Conceptualisations of the System-Wide Governance of Higher Education:*

  In anticipation of the post-apartheid transition to the democratic governance of higher education, and prior to the introduction of the notion of 'co-operative governance', policy analysts proposed a number of different 'models' for possible state-sector relations in the system-wide governance of higher education, including 'state control', 'state supervision', 'state steering' or 'state leverage', etcetera. Is 'co-operative governance' to be conceived as a further 'model' of this kind, or just what is its relationship with these other 'models'? Moreover, what are the assumptions regarding the nature and function of the 'state' underlying such 'models' if we bear in mind the distinction between 'state' and 'government', especially in the context of a new democracy (as well as the paradigm shift from 'government' to 'governance' in the global context)? Could 'government control', 'government supervision', or 'government steering' be substituted for 'state control', etcetera; and, if not, what would the relevant differences in system-wide governance relations amount to? In the

latter case, what would the implications be for control/supervision/steering by the *state* and not the *government* of other 'organs of state', possibly including universities and various higher education institutions and bodies? To what extent, and in what ways, would this relate to the Constitution? Conversely, would a breakdown of 'co-operative governance' imply a relapse to steering/supervision/control by *government*?

- *'Co-operative Governance' and the Paradigm of Institutional Autonomy:*

  Given the obstinate spell cast by the rhetoric and historical myth of 'institutional autonomy' in South African discussions of higher education governance, it will be necessary to review the record of actual claims to institutional autonomy in relation to the genealogy and trajectory of 'co-operative governance'. To what extent, and under what conditions, did historically white universities (HWUs) enjoy a measure of "pragmatic autonomy" under apartheid governance of higher education? What were the implications of the principle of 'co-operative government/governance' in the new Constitution for the possible recognition of a right to institutional autonomy? How did claims to institutional autonomy figure in the context of the NCHE process, and what were the implications of the NCHE's proposed framework of 'co-operative governance' for the recognition of institutional autonomy? What was the official stance adopted by the Department of Higher Education (DHE) on the issue of institutional autonomy in its response to the proposed framework of 'co-operative governance'? What were the implications and consequences of the trajectories of 'co-operative governance' and/or 'state steering' for the residual institutional autonomy of universities, and to what extent did the higher education sector base their responses on the principle of institutional autonomy? To what extent did the lapse or breakdown in the framework of 'co-operative governance' result in a revival of the rhetoric of institutional autonomy, and what are the consequences of that?

- *'Interference' – 'Co-operative Governance' and the Significance of 'Buffer Bodies' in Dealing with 'Failing' Universities Experiencing Crises of Governance:*

  Not to be confused with a further 'model' of 'state interference' to be located on some continuum between (comprehensive) 'state control', at the one end of the scale, and 'state steering' or 'state supervision' at the other end, the issue of 'interference' actually signals the crucial problem of reconciling the

imperatives of system-wide governance with the responsibilities of dealing with particular 'failing' institutions within a framework of 'co-operative governance'. To what extent was (ad hoc and political) 'interference' identified as a systemic challenge for the governance of higher education in the initial conceptualisations of 'co-operative governance'? What was the underlying diagnosis and assumptions of the NCHE's proposals for the role of different kinds of 'buffer bodies' in dealing with particular crises of institutional governance, which might serve to avoid potential (political) 'interference' by the state damaging to 'co-operative governance' of higher education at a systems level? What were the longer-term implications and consequences of modifications of these NCHE proposals by the Department of Education (DoE) utilising the role of 'buffer bodies' for the ensuing trajectory of 'co-operative governance'? What are the underlying conditions for, and typical features of, higher education systems having regular recourse to political forms of crisis intervention? What are the conditions for a sustainable framework of 'co-operative governance' at a systems level which could obviate the need for political crisis interventions?

We will regularly return to each of these four thematic concerns in the course of the following critical reconstruction of the genealogy and trajectory of 'co-operative governance' in higher education. However, our overarching concern remains that of the core problem of a potential or actual breakdown of the foundational commitment to 'co-operative governance' itself: at what stages and in which ways did the framework of 'co-operative governance' threaten to break down?; what were the main factors and developments contributing to such potential breakdowns?; how did the higher education sector respond to this and what, if any, alternative options to 'co-operative governance' were considered or proposed?; and where does that leave HESA in determining its current response to the Ministry's most recent interventions?

1.4 Approach and Limitations

This background study will be based on available documentation and reports and will not attempt to present any new primary research. The main contours and key developments of post-apartheid higher education, including those affecting governance issues, have been extensively investigated and documented elsewhere. Apart from more specialised academic research and analyses, there is a substantial

series of reports and public documents, including the 1996 NCHE Report, *A Framework for Transformation*; the DoE's 1996 *Green Paper*, 1997 *White Paper*, 1998 *Higher Education Act* (with subsequent amendments), and the 2001 *National Plan for Higher Education*; the Council for Higher Education and Training (CHET) survey, *Transformation in Higher Education* (2002); the CHE Task Team's Research Report on *Governance in South African Higher Education* (2002); the CHE's historical overview, *South African Higher Education in the First Decade of Democracy* (2004); Ashley Symes' commissioned report, *Overview of Recent and Current Debates in South African Higher Education: Academic Freedom, Institutional Autonomy and Public Accountability* (2005); the CHE's HEIAAF Task Team's Report on *Academic Freedom, Institutional Autonomy and Public Accountability in South African Higher Education* (2008), with an associated set of commissioned research reports and many other similar publications. Taken together, these provide a more than adequate and available account of the origins, development and current state of higher education governance in post-apartheid South Africa. There is thus no need to set out the basic elements, or main stages and key issues, of the governance of higher education all over again.

Even so, it has become apparent from current debates that a great deal of this historical record has somehow been forgotten, while its relevance is being confused and not properly understood. Accordingly the approach taken in this study will be to revisit and critically reconstruct the historical record relevant to the current core issues of higher education governance, in particular those bearing on the significance and function of, and prospects for, 'co-operative governance'.

It should also be noted that our focus will be limited to a reconstruction of the genealogy and trajectory of 'co-operative governance', as such, and will not extend to the associated proposals and debates of possible variations on, or alternatives to, this approach to higher education governance. Since the NCHE, and in relation to the implementation of the NPHE as official policy framework, there have been a number of significant discussions in this regard. These include:

- the 2002 CHE Task Team's proposal of *'conditional autonomy'*;
- the 2004/05 CHET proposals for *'differentiated steering'*; and
- the 2008 HEIAAF Task Team's proposal of *'continuous engagement'*.

In their own right, these discussions raised important issues and alternative perspectives, but they cannot be accommodated within the present account, except insofar as they had a direct bearing on the present topic of 'co-operative governance' itself.

2 The Genealogy of 'Co-operative Governance'

Within the context of South African higher education, the notion of 'co-operative governance' was first articulated by the NCHE in its seminal 1996 Report. However, the Commission's proposals did not spring fully-formed from the NCHE itself; rather, the ground for the NCHE's deliberations was prepared by a prior series of investigations and study reports, including the Report of the National Education Policy Investigation (NEPI) Research Group on *Post-Secondary Education* (1992), (elaborated upon in Prof Ian Bunting's work, *A Legacy of Inequality: Higher Education in South Africa*, 1994), and the African National Congress (ANC) higher education policy document, *Draft ANC Policy Framework for Education and Training* (1994). In anticipation of the coming post-apartheid, democratic transition, these studies began to develop not only a substantive agenda for the restructuring of higher education governance relations, but also the conceptual framework which would henceforth inform much of the policy debates in this area in terms of a series of 'models' of 'state control', 'state supervision', 'state steering', 'state interference', etcetera. These were then taken up by the NCHE and adapted for its own purposes, which crucially involved the notion of 'co-operative governance', and in time became part of the distinctive discourse of higher education governance, which continues to prevail in current policy debates and analyses. However, this historical sequence implicitly

raise important questions about the relationship between the conceptual framework of various 'models' of state-sector governance relations which had been articulated in these and other study reports, on the one hand, and the NCHE's own notion of 'co-operative governance' which was subsequently grafted onto these, on the other hand. In particular, this concerns the underlying assumptions of the relationship between 'state' and 'government'. As Jonathan (2006, 6) has pointed out, "until 1994 'state' and 'government' had been indistinguishable in SA throughout colonialism and apartheid". Significantly, this conflation of 'state' and 'government' still applied to the various 'models' of state-sector governance relations articulated in the NEPI Report, as well as in the ANC Draft Policy Document – nor was this conflation of 'state' and 'government' recognised or addressed in the subsequent appropriation of the state 'models' terminology into the prevailing discourse of higher education governance. Arguably, though, the NCHE's articulation of the notion of 'co-operative governance' implicitly involved a paradigm shift from the earlier conflation of 'state' and 'government'. As we will see, this unwitting shift brought about major ambiguities and confusions regarding the significance and implications of 'co-operative governance'.

2.1 The Legacy of Apartheid and the Origins of the NCHE Process

The consequential and intractable legacies of apartheid higher education are well known, more especially the obdurate structures of social exclusion, structural inequality, and racial discrimination. Less well-known are the enduring legacies of apartheid governance in higher education. A major case in point is precisely the apartheid conflation of 'government' and 'state'. In practice, this meant that under apartheid the governance of higher education, to a very large extent, took the form of 'state control' in the sense of 'government control'. This was manifestly evident in the case of the historically black universities (HBUs), which had been founded and administered as creatures of the government policy and ideology of 'separate development'. In contrast, the HWUs appeared to enjoy a substantial measure of institutional autonomy, at least on the face of it. However, as Bunting (1994, 44) pointed out at the time, South African universities had no legal or statutory autonomy:

> … higher education institutions [did] not, as far as the previous South African government was concerned, exercise any degree of autonomy *by right*.

> Universities and technikons, it [was] claimed, have been granted a measure of autonomy by the state for *reasons of administrative efficiency only*.

An earlier report termed this a kind of 'pragmatic autonomy':

> The current government has said that it has decided on grounds of administrative efficiency to give to universities a high degree of autonomy …. But the same government that granted this pragmatic autonomy to universities as far as some administrative aspects are concerned, has also infringed in serious ways upon the academic freedom of universities (NEPI 1992, 44).

The apartheid legacy was thus effectively that of de facto, as well as statutory, *government control* as the basis for the governance of higher education. As such, this posed a basic question for the post-apartheid transition to democracy: would that only amount to a change of regime, with 'government control' by a new ANC-led government replacing that of the previous National Party (NP) government? Or could it mean a transition from 'government control' to some new form of democratic governance of higher education in a democratic state? The latter was actually a shared objective of popular and sustained anti-apartheid struggles for increased public control of higher education as such, as Muller, Maassen and Cloete (2006, 290) observed: "The anti-apartheid struggle created the expectation of strong civil society participation in public affairs within a framework of government [sic!] steering". Significantly, this perspective also informed the ANC draft policy document (1994, 21 & 23) which stated:

> A unitary education system and democratic systems of governance that facilitate the participation of all legitimate interest groups have been consistent demands of the democratic movement …. The ANC believes that democratic governance is the key to the transformation of apartheid education …. Governance at all levels of the integrated national system of education and training will maximise democratic participation of stakeholders, including the broader community, and will be oriented towards equity, effectiveness, efficiency, accountability, and the sharing of responsibility.

At the time, this strand of the ANC's policy approach was characterised as a 'participatory' model, and held to be inconsistent with the 'statist' model (actually,

that of 'government control') which also informed this ANC perspective (Bunting 1994, 229). Indeed, the nature of any such 'participatory' approach to the governance of higher education remained quite vague and loosely conceived; what is clear, though, is that it was *not* primarily looking to directive or top-down government control as the basis for the governance of higher education.

The apartheid legacy of government control in state-sector relations also effectively limited the possible functions of 'buffer' bodies in the governance of higher education. In the apartheid era these were limited to the *Advisory Council for Universities and Technikons* (AUT) and two so-called 'interest' bodies, the *Committee of University Principals* (CUP) and the *Committee of Technikon Principals* (CTP). Though statutory bodies, these had no allocative or policy-making functions, leaving the government free to deal directly with higher education institutions, individually and collectively, without any obligation to consult these intermediary bodies on the basis of their professional expertise. In effect, this meant that the government, in the guise of the Ministry, was able to 'interfere' with the affairs of higher education institutions on its own terms, whether to achieve its policy and ideological objectives, or to deal with on-going crises of governance. The basic question this posed for the post-apartheid transition to democratic governance of higher education was whether state-sector relations would continue to allow government control of this kind – that is, direct state 'interference' in the affairs of higher education institutions, bypassing the statutory roles of specialised and dedicated 'buffer' bodies. Or could the transition to democratic governance of higher education involve the introduction of statutory, intermediate bodies with co-responsibility for crisis management, which might obviate the need for political 'interference' in higher education?

2.2 Conceptualising 'Models' of State-Sector Relations

At a conceptual level, the challenge of overcoming the legacy of apartheid in the governance of higher education required some conception of what was involved in "the development of alternatives to hierarchical government control, … [that is] to the traditional mode of state-dominated co-ordination" (Muller, Maassen and Cloete 2006, 300). For this purpose the 1992-93 NEPI study project on *Post-Secondary Education* drew on the comparative analysis of trends in the governance of higher education by international scholars such as Van Vught and Kooimans: "Van Vught (1989), for example, introduced a central planning and self-regulation model of government steering, later elaborated into state control and state supervision models"

(Muller, Maassen and Cloete 2006, 300). In this way, along with the 1994 ANC draft policy document and related discussion documents, the NEPI initiative introduced a new conceptual vocabulary which would inform the 1995-96 NCHE process – and, indeed, a great deal of higher education policy discussions on governance issues over the following decade and more. For the NEPI Report the basic alternative was that between a 'state-directed system' and a 'state-supervised system':

> *A state-directed system:* in this system a central state authority takes the major decisions affecting individual PSE [Post-Secondary Education] institutions …. *A state-supervised system:* this option depends on the notion that PSE institutions should be self-regulating …. The central authority uses either pre-audits (planning and budgets) or post-audits (assessment of outcomes) to shape the PSE system …. The main feature of this model is thus that a central government, through negotiation, establishes a set of rules which guide the self-regulatory behaviour of decentralised institutions (NEPI 1992, 86).

Other 'models' of state-sector relations were introduced as variations on this basic alternative of 'state control' as against 'state supervision' in the governance of higher education. Thus, the NEPI Report considered *'state steering'* and/or *'state leverage'* as variations on the model of 'state supervision':

> A variation on the state-supervised option is a *'state-leverage' option* in which the state uses mechanisms such as funding to influence the PSE system in indirect ways …. In the state-leverage option … some external authority sets only broad policy parameters for the PSE system, and uses leverage to manage the decisions of institutions (NEPI 1992, 87).

Next to these 'models' of 'state control', 'state supervision' and 'state steering' (or 'state leverage'), a 1996 article (Moja, Muller and Cloete) by some of the participants in the NCHE process introduced a further notion, that of *'state interference'*, which was subsequently adopted in the NCHE Report. Though tempting to take this as a further 'model' of state-sector relations in the governance of higher education – with 'state interference' presumably at some mid-point of a conceptual continuum ranging from 'state control', at one end of the scale, to 'state-supervision' at the other end – would be mistaken and confusing. Rather, as Cloete and his co-authors later explained, 'state interference' does not involve a systemic notion of higher education governance at all:

> *State interference* involves arbitrary forms of crisis intervention …. Characteristic of this form of control … is the conflation of the political (managing institutional crises) with the professional (an independent civil service, freed from political interference, able to implement policy) (Cloete *et al.* 2002, 89).

Instead, the notion of 'state interference' relates to the difficult issue of how state responses to crises of institutional governance in particular cases may impact on general state-sector governance relations.

At a generalised and abstract level, the distinctions between these different 'models' of 'state control' and 'state supervision' or 'state steering', etcetera, might seem clear enough. In practice, though, their interpretation and application in the context of the South African post-apartheid transition proved to be problematic in ways that were of considerable consequence for the NCHE's notion of 'co-operative governance' in higher education. The underlying reasons for this had to do with the fact that the conceptual framework of these 'models' of state-sector relations, such as 'state control' and 'state supervision' or 'state steering', did not in the first instance refer to the development path of South African higher education in particular, but was nevertheless taken to apply to it. Thus, the model of 'state control' in the governance of higher education was primarily derived from the example of such continental European higher education systems as those of France, Germany and the Scandinavian countries. When introducing the 'model' of state-direction in the governance of higher education, the NEPI study immediately referred to these cases as exemplars:

> … in countries such as France, Germany and Sweden, government planning commissions determine what the shape of the PSE system should be and what its enrolments should be. These commissions also set guidelines for PSE curricula, and confirm or veto senior academic appointments (NEPI 1992, 86).

'State control' in this continental European tradition of higher education governance served to guarantee academic freedom, while allowing little or no statutory basis for institutional autonomy. In principle, as well as in practice, this is far removed from the Anglo-Saxon tradition of higher education governance, which is the familiar frame of reference for South African universities. So, what did that imply for the relevance of the 'state control' model of higher education governance in the context of the South African post-apartheid transition? For obvious reasons, in the South African context, the model of 'state control' of higher education could hardly

be taken otherwise than as applying to the discredited and illegitimate apartheid government control of higher education. Only, in terms of the proposed 'model' of 'state control' proposed by NEPI, soon to be taken up by the NCHE, this need not be the case: apartheid government control of higher education was not at all the same kind of thing as the governance of higher education on the European model of France, Germany or Scandinavia. Indeed, in principle the question might even be raised whether a transition from apartheid government control of higher education to something like the European model of 'state control' in the governance of higher education might not provide a legitimate form of democratic governance. In short, what remained unresolved in the abstract formulation of the model of 'state control' was the assumed relationship between 'government' and 'state'. If the model of 'state control' referred to apartheid government control of higher education, then this was evidently ruled out from consideration in the anticipated transition to post-apartheid, democratic governance; but if 'state control' referred to state-sector relations on the model of the governance structures of continental European higher education systems, then that would be a different story. After all, a key dimension of the post-apartheid transition involved the replacement of apartheid *government* control by governance structures appropriate to a democratic *state.*

Similar ambiguities appeared in the interpretation and application of the model of 'state supervision'. Effectively, this model referred to the more familiar Anglo-Saxon tradition of higher education governance, well-known for long having privileged institutional autonomy as the alternative to direct state control and the mainstay of academic freedom. But, while 'state supervision' relied on decentralised self-regulation by higher education institutions, this did not necessarily imply a principled commitment to institutional autonomy. As described in the NEPI study, in "a *state-supervised system* … most decision-making is decentralised to PSE institutions, with the central authority focusing on a few critical variables only". And, to repeat: "The main feature of this model is … that a central government, through negotiation, establishes a set of rules which guide the self-regulatory behaviour of decentralised institutions" (NEPI 1992, 86). With reference to the Thatcher-era reforms of the British higher education system it added that "the current reforms in Britain are a mixture of a state-directed and a state-leverage system" (NEPI 1992, 87). So, far from taking it to be an integral component of the model of 'state supervision', the NEPI study associated institutional autonomy with the legacy of apartheid governance of higher education: "The current [that is, National Party] government has said that it has decided on grounds of administrative efficiency to give to universities a high degree

of autonomy" (NEPI 1992, 44). For its part, it ruled out institutional autonomy as a principle in the democratic governance of higher education: "Universities, for example, cannot be permitted in a future system to exercise the full range of decisions that they have under the current system" (NEPI 1992, 119-120). In short, though conceived as an alternative to direct 'state control' in the continental European tradition of the centralised governance of the higher education system, 'state supervision' did not imply the abdication of the state's oversight and directive roles in favour of autonomous self-regulating institutions of higher education. As some of the NEPI participants later explained in the context of the NCHE process:

> In the *state-supervision* model … the state sees it as its task to supervise the higher education system in terms of assuring academic quality and maintaining a certain level of accountability by recruiting the self-regulatory capacities of decentralised decision-making units. The *government role* is limited to monitoring and influencing the framework of rules that guides the behaviour of the actors. In the traditional British and US approach to policy, the influence of *the state proper* is considered to be appropriately weak (Moja, Muller and Cloete 1996, 146-147 – italics added).

It may be noted, though, that in this explanation the terms 'state supervision' and 'government role' are still used interchangeably so that it remains unclear what the relationship between the government and 'the state proper' might be. As Bunting (1994, 229) pointed out at the time, this was a prominent feature of the 1994 ANC draft policy document: "Parts of its discussion are consistent with … a 'statist' model of educational governance … one in which the Minister and the Ministry exercise *direct control* over the educational structure at all levels (a 'direct state-control' model)".

These ambiguities and contrary tensions persisted in the NCHE's path-breaking articulation of the notion of 'co-operative governance'; however, that notion itself did not yet appear in the preparatory publications of the NEPI initiative, or in the 1994 ANC draft policy document.

2.3 The NCHE and the New Paradigm of 'Co-operative Governance'

Significantly, the notion of 'co-operative governance' was first introduced and proposed in the context of the NCHE process. The Commission was established

at the end of 1994 and reported in September 1996. Established by the ANC-led Government of National Unity (GNU) under President Nelson Mandela – running concurrent with the deliberations of a new democratic Parliament, sitting as a Constitutional Assembly to finalise the new Constitution – the NCHE process was a notably inclusive and participatory endeavour of policy-formation, with representative involvement drawn from civil society, the labour movement, business, and a whole range of other constituencies. While the preceding NEPI study and the 1994 ANC draft policy document were primarily produced by educational experts and policy-makers from within the higher education sector, the NCHE Report was informed by a wider range of social and political perspectives, experiences and aspirations on the part of key protagonists in the social and economic anti-apartheid struggle, as well as the negotiated political settlement which launched a post-apartheid democracy. The NCHE was both a contributor to, as well as a representative product of, this extraordinarily inclusive and consultative founding process of policy-making – and its own thinking reflected this in various ways, not least that of articulating the notion of 'co-operative governance' as the centrepiece of its vision of higher education governance in a democratic South Africa. This inner connection was signalled in the NCHE Report itself, with particular reference to the new Constitution:

> At the heart of the Commission's proposals for higher education policy-formulation, co-ordination and implementation lies the concept of co-operative governance. This has resonances in the wider social and political context of post-apartheid South Africa …. [and in] the new national Constitution (NCHE 1996, 291).

The NCHE's new paradigm of 'co-operative governance' was not conceived with only higher education governance in mind; it was certainly also informed by the momentous social and political dynamics of this founding moment of the South African post-apartheid transition. More specifically, though, it was articulated in the new conceptual vocabulary of the various 'models' of state-sector relations in higher education governance introduced by the NEPI initiative. This raises the question: just what was the relation between the NCHE's notion of 'co-operative governance' and the various 'models' of 'state control', 'state supervision', 'state steering', etcetera, in the governance of higher education? Did the NCHE Report manage to graft the new paradigm of 'co-operative governance' seamlessly on to the previously introduced conceptual vocabulary for state-sector relations? Or was the union of these distinct

strands not so smooth, drawing on diverse assumptions and with divergent objectives in mind? And, to what extent did the NCHE's introduction of the notion of 'co-operative governance' resolve some of the existing ambiguities concerning the relationship between 'government' and 'state' in higher education governance or, perhaps, further compound the implicit confusion?

2.3.1 Framing the NCHE's New Approach of 'Co-operative Governance': The Relevance and Function of the Models of 'State Control' and 'State Supervision', etcetera

The NCHE set out its proposed new notion of 'co-operative governance' in Chapter 7 of its final Report. It was framed by an account and discussion of "three models of relationships between government and higher education" (NCHE 1996, 174): two of these were the 'models' of 'state control' and 'state supervision', introduced by the NEPI initiative, and the third involved a notion of 'state interference', further adding to this new conceptual vocabulary for discussing state-sector relations.

The NCHE Report briefly characterised the 'state control approach' and the 'state supervision model' in general terms, and in line with the by now familiar NEPI conceptualisation:

> In summary, *state control* is a model where the system is created by the state, almost completely funded by it and whose key aspects are controlled either by the bureaucracy or the politicians …. In the *state supervision* model, the state sees its task as supervising the higher education system to ensure academic quality and maintain a certain level of accountability …. In this model, the government is an arbiter who watches the rules of a game played by relatively autonomous players who changes the rules when the game no longer obtains satisfactory results (NCHE 1996, 175).

These summary accounts are also presented in general and neutral terms, even if the 'state control' model is characterised as having negative effects for institutional innovation.

But the third model, that of 'state interference', is a somewhat more complex matter. To begin with, the report signals that 'state interference' may not actually be a 'model' of state-sector relations in higher education governance comparable to those of 'state control' and 'state supervision':

> In the *state interference* model, the term 'interference' is used to signify that it is not a systematic control or intervention policy model. Rather, interference occurs when higher education institutions become sites of opposition to the state's development path (NCHE 1996, 175).

Moreover, 'state interference' is also singled out for criticism as "an unattractive model for South Africa" even if it had been prevalent in Africa and elsewhere: "This model undermines institutional autonomy, co-operation principles, confidence, and trust among constituencies. In the long[er] term, it leads to an unstable system" (NCHE 1996, 176). Certainly, the NCHE Report was not presenting 'state interference' as a possible option for state-sector relations in higher education, to be considered along with other possible 'models'. Rather, it was concerned with identifying a definite threat to the governance of higher education in the African context (an issue to which we will return below).

How did the NCHE Report conceive of the relationship between these different 'models' of state-sector relations and its own approach to 'co-operative governance'? The Commission evidently associated 'co-operative governance' with the model of 'state supervision' rather than that of 'state control'. It explicitly affirmed that, in its view, 'co-operative governance' "… can be broadly located within the framework of state supervision" (NCHE 1996, 176) but, as the phrase 'broadly located' indicate, it did not take the relationship to a particular 'model' all too strictly or literally. At another point, the report states that "co-operative governance offers a strong steering model" (NCHE 1996, 179), but did not appear to be concerned with the finer distinction between 'state steering' and 'state supervision'. Notably, it made no attempt to justify or motivate its proposal of 'co-operative governance' with any reference to the nature of 'state supervision'. Instead, the different models of 'state control' and 'state supervision' primarily served to characterise and locate 'co-operative governance' in more general terms.

On occasion, the NCHE Report did refer to 'co-operative governance' itself as a new 'model': "Considering that conditions in South Africa do not favour a conventional state supervision model, the Commission proposes a model called co-operative governance" (NCHE 1996, 176-177). However, this should not necessarily be taken literally. It may actually be confusing to consider 'co-operative governance' in this way as a 'model' on a par with other models, such as those of 'state control' or 'state supervision'. The 2002 CHE Task Team on Governance in Higher Education noted that "the National Commission proposed its philosophy of co-operative

governance as a version of the 'state supervision' model that has been well tried in a number of other countries". But it then went on to add:

> … it is important to observe that, while the concept of co-operative governance emerged from the more general idea of state supervision, the first cannot be reduced to the second. As a category of governance, state supervision encompass a wide range of forms … [while], as defined in South Africa, co-operative governance requires more than a system in which the state supervises – rather than controls directly – higher education (Hall, Symes and Luescher 2002, 28-29).

In other words, it is not helpful or accurate to think of 'co-operative governance' as a model of this kind at all.

This brings us back to the NCHE's third 'model', that of 'state interference', which it did not consider a proper model of state-sector relations in higher education governance. The additional notion of 'state interference' was actually introduced in a 1996 article by Moja, Muller and Cloete with reference to an identified trend in the governance of higher education systems in post-independence Africa:

> In parts of Africa, the political rule is usually weak though ambitious, the bureaucracy poorly trained, dispirited and corrupt, organised civil society virtually non-existent and the government itself sporadically repressive …. The main features of this unfortunate vicious cycle are a government whose hegemony is not established, a weak civil society, a weak bureaucracy, few mediating mechanisms between government and higher education institutions, and no conflict mediating procedures (Moja, Muller and Cloete 1996, 147 & 150).

Indeed, this article indicated that " 'intervention' is used to signify that it is not a systematic control policy model" (Moja, Muller and Cloete 1996, 148); rather than a general model for state-sector relations in the governance of higher education, 'state interference' serves to signal a potentially major problem facing higher education governance, that of the state resorting to ad hoc political interventions as a form of crisis management in dealing with local institutional governance failures. Elsewhere it becomes clear that this was indeed a problem troubling the NCHE in the South African transitional context:

> Since May 1994, there have been calls for the Minister of Education to 'intervene' in several institutional 'crises'. The issues have varied from allegations of corruption, of staff and students being 'ungovernable', and of 'recalcitrant managements' who do not want to change, to loss of confidence in the management or Council of an institution (NCHE 1996, 197).

The Commission was concerned to prevent South Africa from slipping into such a "model of state interference", where ad hoc political interventions would come to replace system-wide regulation, and specifically proposed that:

> *... the Minister and the two intermediate bodies negotiate to establish which ministerial actions, procedures and interventions are acceptable and under which conditions. The agreements reached after such negotiations should be incorporated into the proposed new Higher Education Act* (NCHE 1996, 197).

The problem of ad hoc political interventions in response to local failures of institutional governance would indeed remain a persistent challenge to higher education governance in South Africa. The NCHE was prescient in identifying such 'state interference' as a threat to sound state-sector relations in higher education governance. But its particular policy proposals for avoiding this threat should not be confused with a general 'model' for state-sector relations in higher education governance. The question then remains how the status and function of 'co-operative governance' – the general approach which it did propose – should be considered.

2.3.2 The NCHE's New Notion of 'Co-operative Governance' and the Paradigm Shift from 'Government' to 'Governance'

In the NCHE Report, the Commission indicated that its proposed new notion of 'co-operative governance' should not only be located in relationship to the different 'models' of state-sector relations in higher education governance, but should also be understood in terms of a more general shift from 'government' to 'governance'. In doing so, the report touched on the unresolved underlying issue of the assumed relationship between 'government' and 'state', which had troubled the interpretation and application of the various 'models' of state-sector relations developed by the NEPI initiative. Unfortunately, the NCHE Report also did not

succeed in articulating a clear and consistent conception of the relationship between 'state' and 'government'.

When first introducing the notion of 'co-operative governance', the NCHE Report noted its relationship to a more general distinction and paradigm shift, that of involving the concepts of 'government' and 'governance':

> *Co-operative governance:* in formulating its proposals for new forms of governance in higher education, the Commission was conscious of the need to distinguish the concept of 'governance' from that of 'government' (NCHE 1996, 171).

With reference to Kooimans (1993), the Commission indicated that it had taken account of recent international and domestic experience which had led to a re-conceptualisation of the state-civil society distinction:

> Recent literature on governance emphasises the mutual dependence between state and civil society, with the dichotomy between self-regulation and state intervention which has been central to traditional discussions on political order becoming obsolete (NCHE 1996, 172).

The Commission took on board these comparative international trends, with their implications for re-conceptualising the relationship between civil society and the state as applicable to the South African post-apartheid transition to democratic governance. Accordingly, in its own words:

> … the Commission has operated within a governance model based on new patterns of interaction between government and society. As such it is a response to demands for democratic interrelationships in a society struggling to democratise …. Key elements in the governance model put forward by the Commission are partnerships, co-operation and the effective articulation of interests …. In short, it is the interaction between different constituencies, traditionally identified as the government and civil-society actors … [which] provide the cornerstone of the approach to governance chosen by the Commission (NCHE 1996, 171).

Democratic transitions are not just a matter of regime change, replacing one 'government' with another, but involves a transition from authoritarian rule to

the interactive consultative governance structures of a democratic 'state'. This is intrinsically bound up with the paradigm shift from 'government' to 'governance'. As Cloete and his co-authors later explained: "This shift, from government from the centre to government becoming a powerful partner in a multitude of governing arrangements, is part of a movement from government to governance, a process of redefining and reconfiguring the state" (Cloete *et al.* 2002, 90-91). It was this paradigm shift which the NCHE Report sought to reflect in its new notion of 'co-operative governance' – even if some of its formulations still confused the roles of 'government' and 'state'. Thus, the NCHE's introductory reference to 'governance' cited above actually went on to state that "*government* is taken to refer to *the state's* formal power, leadership and authority structures" (NCHE 1996, 171 – italics added). Taken at face value, this literally defined 'government' as having the same attributes as the 'state'. As we will see, the NCHE's own confusion between 'government' and 'state' would contribute to the persisting ambiguities in the reception, interpretation and application of its proposed notion of 'co-operative governance' by the DHE.

2.3.3 The NCHE's Proposal for 'Co-operative Governance' as a Founding Declaration of Commitment

A better clue to the significance and function of the NCHE's proposed notion of 'co-operative governance' is to be found in taking it as a founding *declaration of commitment* to the kind of inclusive and interactive governance relations required in a democratic state. Rather than considering 'co-operative governance' as similar to one or the other of the various 'models' of state-sector relations in higher education governance, or as a policy framework of some kind, it may better be regarded as a performative speech act, such as that of entering into marriage vows. The function of marriage vows does not provide a 'model' for a marriage relationship, or to serve as a policy framework for marriage; rather, as a jointly performed act of self-binding, marriage vows have a constitutive function in establishing the marriage relationship itself. In the same way, a founding declaration of commitment to 'co-operative governance' would have a constitutive function in establishing the democratic governance of higher education in a post-apartheid South Africa. In the telling words of the NCHE Report:

> A central aspect of self-binding is responsibility, which is a requirement for modern governance that cannot be legislated. For co-operative governance to

> succeed, all stakeholders need to commit themselves to a code of conduct based on the acceptance of joint responsibility for the future of higher education in South Africa (NCHE 1996, 177).

Note that the founding declaration of commitment to 'co-operative governance', the performative act of self-binding by the parties involved, should not be confused with the regulative content of a 'code of conduct'. A code of conduct could function as object or as expression of the founding act of joint commitment, but it is the need for that founding declaration itself with which the NCHE Report was concerned. Note also the NCHE Report's observation that such a founding declaration of commitment "cannot be legislated". In other words, in proposing its notion of 'co-operative governance' the NCHE was not proposing some supreme 'code of conduct' to be legislated as framework for the governance of higher education; rather, it was arguing for the equivalent of a new founding compact, a kind of 'social contract', relating to the governance structure of higher education. This was also how the NCHE's notion of 'co-operative governance' was interpreted by the 2002 CHE Task Team on Governance in Higher Education which stated:

> Co-operative governance is rather an argument for a social contract in which diverse parties agree to suspend particular interests in the interest of reconstruction and development (Hall, Symes and Luescher 2002, 30).

It is also in this sense that the NCHE Report's own characterisation of 'co-operative governance', already cited in section 1.3 above, may best be understood:

> At the heart of the Commission's proposals for higher education policy-formulation, co-ordination and implementation lies the concept of co-operative governance. This has resonances in the wider social and political context of [a] post-apartheid South Africa …. Similarly, in the higher education realm, the notion of co-operative governance is proposed by the Commission as a way of transcending the antagonisms between state power and institutional autonomy (NCHE 1996, 291).

In short, the NCHE's proposed notion of 'co-operative governance' functions, first and foremost, as a founding declaration of commitment to the democratic governance of higher education in a post-apartheid South Africa.

However, the status and force of such a founding declaration, as expressed by the NCHE in its report, was by no means clear. The NCHE was not a Constituent Assembly providing a forum and means for a self-binding founding compact on the governance of higher education; nor was it in a position to speak for, or act on behalf of, the key parties and main stakeholders involved in the governance of higher education. Formally, the NCHE was a Commission of Inquiry appointed by the government to consult with a wide range of interested parties and stakeholders, and on that basis it could make findings and formulate recommendations and proposals in its report. But its proposals only had advisory status; they were addressed to government, as well as to institutions of higher education and other relevant parties, who could adopt and take action on them, but they had no other status or force in and of themselves. As far as 'co-operative governance' was concerned, the NCHE could thus *call on* the government and other relevant parties to enter into such a collectively self-binding founding declaration of commitment to democratic governance in higher education. But it was beyond the powers of the NCHE to enact such a declaration of commitment itself. The status and force of any such founding declaration of commitment to 'co-operative governance' in higher education would have to depend on whether, and to what extent, the government and other relevant parties would take up the NCHE's proposal for 'co-operative governance' in response to its call.

Moreover, in this scenario the nature and content, as well as the sustainability of such an approach to 'co-operative governance', would be contingent upon not only the NCHE's proposal, but much more upon the actual policy approach adopted by the government and/or by the institutions of higher education and other stakeholders who chose to enter into such a founding compact for 'co-operative governance'. Consider the crucial question of what happens when the founding compact for 'co-operative governance' in higher education founders or comes apart, whether because the government changes its policy approach and increasingly exercises its prerogative of directive control and interference, or because certain universities assert claims to institutional autonomy or suffer crises of institutional governance and mismanagement. What recourse would, or could, other parties have under such circumstances to reinstate the letter and spirit of the former shared commitment to the 'co-operative governance' of higher education? In which ways, or in what sense, could they effectively invoke the terms of that founding declaration which had committed all parties, including the government, to the practice of 'co-operative governance' in higher education? The answer must be that, unless the founding declaration of commitment to 'co-operative governance' in higher education had been given some

force in law, it is difficult to see how there can be any such effective recourse; much less, ready ways and means to restore the founding compact of 'co-operative governance'. Sadly, if a marriage really breaks down in practice, the mere reiteration of marriage vows as such offers little prospect of restoring the former union of consent. In and of itself, the founding declaration of commitment to 'co-operative governance' does not provide a guarantee that could be invoked when this voluntary exercise of self-binding fails in practice: as long as it works, a shared practice of 'co-operative governance' may be self-confirming, an example of a 'virtuous' feedback loop; but when it begins to founder and come apart, this too may cumulatively escalate into a 'vicious' cycle, further undermining whatever grounds for trust and co-operation remain.

2.3.4 Key Issues of 'Co-operative Governance' in the NCHE's Proposals

Based on its basic conception of, and approach to, 'co-operative governance', the NCHE Report elaborated a range of more specific findings and proposals on different aspects of the governance of higher education. In its own words:

> … [a] main feature of the proposed framework is an emphasis on co-operation and partnerships in the governance structures and operations of higher education. The tendency towards academic insularity and institutional self-reliance will have to make way for a recognition of the functional interdependence between multiple actors and interests with a stake in higher education (NCHE 1996, 7).

We need not go into all of the more specific proposals but will only focus on some of the key thematic issues identified in section 1.3 above.

2.3.4.1 Implications and Consequences of the NCHE's Approach to 'Co-operative Governance' for the Recognition of Institutional Autonomy

Taking some passages of the NCHE Report on their own, it might appear that the Commission endorsed the institutional autonomy of universities as a basic principle for higher education governance. Thus, the NCHE Report described the nature of its proposals, in this particular regard, as follows:

> *The Commission proposes that the principles of academic freedom and institutional autonomy be maintained as key conditions for a vibrant higher*

> *education system. Its proposals on co-operative governance therefore preclude any form of state control over, or arbitrary state interference in, the affairs of institutions. However, co-operative governance does not mean government indifference to higher education* (NCHE 1996, 194-195).

The first two sentences in this passage endorsed the principle of institutional autonomy without apparent qualification; however, it may be noted that the final sentence indicated some unspecified qualification related to the approach to 'co-operative governance'. Likewise, the Commission's formal proposal in this regard hinted at possible qualifications, but without explicitly specifying these:

> *Proposal 4: Academic Freedom, Autonomy and Accountability –*
> *The Commission recommends that all authorities recognise the right to academic freedom for all individuals engaged in responsible academic work, and the right to autonomy for higher education institutions in fulfilling their educational and academic roles, within the context of the increased accountability implied by the principle and the system of co-operative governance* (NCHE 1996, 196).

Evidently, the Commission supported the institutional autonomy of higher education institutions as a right, but also took care to state that this had to be exercised "within the context of the increased accountability implied by the principle and the system of co-operative governance". Much could depend on just what this proviso implied. Indeed, in this context the NCHE Report went on to conclude, *inter alia*, that "institutional autonomy will no longer be the final word in assessing academic performance" (NCHE 1996, 196).

The summary account of its approach provided at the outset of the NCHE Report similarly expressed continuing support for institutional autonomy, while also qualifying that with reference to 'co-operative governance':

> … [it] has implications, firstly, for relations between the state and higher education institutions. The Commission's proposals seek to mediate the apparent opposition between state intervention and institutional autonomy. The directive role of the state is reconceived as a steering and co-ordinating role. *Institutional autonomy is to be exercised within the limits of accountability.* A co-operative relationship between the state and higher education institutions should reconcile

> the self-regulation of institutions with the decision-making of central authorities (NCHE 1996, 7-8 – italics added).

What is clear, though, is that institutional autonomy was no longer regarded as an absolute or stand-alone principle. It had to be accommodated within the framework of 'co-operative governance', which might well serve to qualify or limit it in some yet to be specified ways. In the final analysis, it was not the principle of institutional autonomy, but the requirements of 'co-operative governance' which would be decisive.

2.3.4.2 Implications and Consequences of the NCHE's Approach to 'Co-operative Governance' for 'State/Government Control'

In general terms, as we have seen, the NCHE aligned itself with the model of 'state steering' rather than 'state control' with regard to state-sector relations in the governance of higher education. But, what were the more specific consequences and implications of that in terms of its proposed approach of 'co-operative governance'? In a key section of Chapter 7 of the NCHE Report dealing with 'co-operative governance', it listed a number of basic 'Principles and Assumptions'. The first of these read as follows:

> No single actor or agency can claim sole responsibility or authority for determining the policies and priorities of the higher education system (NCHE 1996, 179).

To say the least, this is somewhat cryptic, not to say obscure. What particular actor or agency did the NCHE have in mind, and why should it be a matter of principle that this actor or agency cannot claim sole responsibility or authority for determining the policies and priorities of the higher education system? Previously, when introducing its approach to 'co-operative governance' with reference to the international literature on the paradigm shift from 'government' to 'governance' (see section 2.3.2 above), the NCHE Report used a similar but somewhat expanded formulation:

> The presumption is that no single actor (*including government*) can address and resolve social problems. Modes of governance in complex societies are thus necessarily interactive. This is especially appropriate in the South African context where *the state* and civil society have to be reconstituted (NCHE 1996, 171 – italics added).

From this it appears that the NCHE was concerned to reject the model of 'state control' where that was equated with '*government* control', but did not want to rule out a steering role for *the state* in the governance of higher education. Implicitly this turned on the underlying distinction between 'government' and 'state' (along with the recognition that the government, as an 'organ of state', had to function in interaction with other 'organs of state', including institutions of higher education in the governance of higher education in a democratic state). Insofar as the underlying distinction between 'government' and 'state' remained implicit, this key principle remained cryptic and, as we will see, liable to generate confusion in the interpretation of the state's role in 'co-operative governance'.

Matters become somewhat clearer if the above first 'principle and assumption' is read together with some of the other 'principles and assumptions' listed here:

> - Within the context of national goals, *the government* will play a steering and co-ordinating role with the participation of higher education stakeholders.
> - Higher education must become part of a co-operative and co-ordinated *state* in which participating constituencies and actors maintain their identities, remain autonomous, and have a variety of powers and functions ranging from decision-making to implementation and monitoring (NCHE 1996, 179-180 – italics added).

What this brings to the fore is that, in the Commission's approach to 'co-operative governance', it is *government* 'control' that is being ruled out, but that this still allowed a key role for government as part of a co-operative and co-ordinated *state*. *Government* is conceived as one of the 'organs of state' and, as such, could have a steering and co-ordinating role in conjunction with other stakeholders in the governance of higher education. But this required the participation of these other stakeholders in the decision-making, implementation and monitoring of higher education governance. Clearly, a lot depended on the nature and quality of the 'participation' of these other stakeholders – it was that which marked the difference between unilateral top-down government 'control' and its role in multilateral, co-operative state 'steering'. What government could no longer claim was that it had, in the Commission's words, 'sole responsibility or authority for determining the policies and priorities of the higher education system'. Tellingly, this point tended to be misunderstood in subsequent interpretations of the NCHE's approach to 'co-operative governance'. Denying the government unilateral and/or ultimate 'control'

of higher education governance was construed as a commitment to a process of 'negotiation without end'. In this vein, the 2002 CHE Task Team on Governance in Higher Education warned that " 'co-operative governance' could not be read as a metaphor for negotiation without end" (Hall, Symes and Luescher 2002, 38). Similarly, the 2008 HEIAAF Task Team cautioned against a notion of 'consultative steering' that "could mean endless rounds of consultation, as well as consultation on every big and small issue, with the attendant risk of inaction/paralysis" (CHE 2008, 64). But, the NCHE's rejection of *government* having the first and last word in the governance of higher education did not rule out the possibility of other authoritative ways of resolving on-going consultation and multilateral negotiations within a system of *state* 'steering'. It only implied that these other ways of bringing on-going negotiations to an end was not the prerogative of the *government* only, but could involve other 'organs of state' as well. Understood in this way, the 'participation' of other stakeholders might even be consistent with a sense in which government could retain 'final authority' within the approach of 'co-operative governance':

> Co-operation between organs of state would thus imply dialogue between the higher education sector and government, both during the framing of relevant legislation and after its enactment … though final authority lies with the government-of-the-day on behalf of those who elected it (Jonathan 2006, 7).

In summary, and for an incisive account of the 'steering' role of government according to the NCHE's approach to 'co-operative governance', we can refer to that provided by Symes (2005, 6):

> The state supervision system in SA was conceived as a system of 'co-operative governance', in which government would not be a single agent but would have a range of roles and obligations in a variety of co-ordinated arrangements. This choice was consistent with the South African *Constitution*, which declares that all organs of state (whether these be government departments, or any institution exercising a public power or performing a public function) must co-operate with one another in mutual trust and good faith.

As we will see, though, the subsequent trajectory of 'state steering', as interpreted and initiated by the DHE, consistently involved moves away from the NCHE's understanding of government 'steering' as necessarily informed by consultative and

multilateral interaction with other stakeholders. Time and again, this amounted to a relapse into earlier conceptions of 'government control'. Government would, once more, be postulated to be the only agent with ultimate authority for determining the policies and priorities of the higher education system.

2.3.4.3 Political Interference and the Role of 'Buffer Bodies': The NCHE's Proposals for a Higher Education Forum, as well as a Higher Education Council

In section 2.3.1 above, we saw that the NCHE Report introduced a third 'model' of state-sector relations in the governance of higher education, next to those of 'state control' and 'state supervision/steering' – that of 'state interference'. It was argued that this may better be taken not as a further 'model' of state-sector relations, but rather as an indication of the Commission's concern with a potentially major problem facing higher education governance, that of the government resorting to ad hoc political interventions as a form of crisis management in dealing with local institutional governance failures. Its notion of 'state interference' thus designated the threat of a tendency to increasing *political* interventions in the absence of proper systemic regulation of state-sector relations. In the Commission's view, other organs of state, in particular various 'buffer bodies' mediating the relationship between the government and institutions of higher education, could play a vital role in obviating the need for political interventions of this kind. Accordingly, the NCHE Report proposed the introduction of two such 'buffer bodies', a Higher Education Forum (HEF) as well as a Higher Education Council (HEC).

In general terms, the NCHE Report motivated its proposal for 'buffer bodies', such as the HEF and HEC, by arguing that intermediate statutory institutions of this kind could be a means towards reconciling the tension between state intervention and institutional self-regulation in the consultative and negotiated 'steering' of higher education governance:

> The Commission's proposals seek to mediate the apparent opposition between state intervention and institutional autonomy. The directive role of the state is reconceived as a steering and co-ordinating role. Institutional autonomy is to be exercised within the limits of accountability. A co-operative relationship between the state and higher education institutions should reconcile the self-regulation of institutions with the decision-making of central authorities. The viability of such reconciliation will depend … [to] a significant degree upon

> the success of a proposed intermediary body with delegated powers, and of proposed structures for consultation and negotiation (NCHE 1996, 7-8).

More specifically, the Commission based its proposals, in particular that for an HEF and HEC as two functionally differentiated intermediate bodies, on an analysis of the relevance of two sets of interrelated distinctions in the governance of higher education:

> (i) the functional distinction between intermediate bodies limited to *consultative* and *advisory* roles only, on the one hand, as against those which have actual *decision-making* and/or *allocative* powers of some kind, on the other hand; and
> (ii) the functional distinction between intermediate bodies serving a *representative* function for particular stakeholders or interest groups, on the one hand, and those constituted on the basis of relevant but politically impartial *expertise* and/or commitment to public service, on the other hand.

These two sets of distinctions are taken to go together in a particular way: that is, that intermediate bodies consisting of representatives of particular stakeholders and/or interest groups should appropriately be limited to consultative and advisory roles only, but that expert-based and public service-oriented intermediate bodies may also have decision-making and allocative powers. In the NCHE Report's own words:

> An important principle in the different arrangements … is that direct constituency representation is found mainly in advisory bodies (whether strong or weak), while allocative and co-ordinating functions are performed by experts or career bureaucrats (NCHE 1996, 185).

It is not difficult to relate this analysis to the distinction between *government* and *state,* as already introduced and discussed above. Effectively, the NCHE are postulating two different kinds of intermediate or 'buffer bodies'. One kind of intermediate body has an essentially *political* role; it serves to represent particular constituencies or stakeholders articulating and mobilising their interests in interaction with the government; and as such, it should appropriately be limited to consultative and advisory functions only. The other kind of intermediate body has an *official* and *administrative* role; its qualifications for this role are based on relevant expertise and a commitment to the public interest; and as such, though not part of

the government, it may have allocative and decision-making powers appropriate to an organ of state. In this particular case, the HEF proposed by the NCHE was conceived as a former kind of 'buffer body', while the statutory HEC, also proposed by the NCHE, was conceived as a latter kind of 'buffer body'. Both were intended to obviate the perceived danger of the tendency of 'state interference' in response to local crises of institutional governance.

As indicated in section 2.3.1 above, the Commission's novel notion of 'state interference', as well as its underlying analysis in support of the mediating role of 'buffer bodies', was informed by the 1996 article of Moja, Muller and Cloete. In that article, the authors unpacked the generic notion of 'state control' by distinguishing between the different logics of *administrative control* and *political control*. They illustrated this analytical distinction with reference to the significantly different forms of 'state control' in the case of European countries, such as France, Germany or Scandinavia, compared to Eastern Europe and post-independence Africa:

> The continental model, at least in its Central European manifestation, is clearly an *administrative* not a *political control* model, where professional bureaucrats, produced by the higher education system itself, manage the system. This model is substantially different in Eastern Europe or Africa, where heavy-handed politicians attempt *political control* through the security apparatus and through the control of appointments (Moja, Muller and Cloete 1996, 146).

They summarised the key differences in the logic of *administrative control* and *political control* thus (Moja, Muller and Cloete 1996, 145):

Forms of Social Authority

	Political	Administrative
Aim	Democracy through Representation and Co-operation	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

This is an analytical distinction, however; in practice, administrative and political forms of control are bound to be combined in various ways. Moja, Muller and Cloete (1996, 146) also pointed out the conceptual confusions as much as the practical consequences inherent in conflating administrative and political control:

> To mistake a political process with stakeholder accountability for an administrative process with professional answerability is to risk conceptual and political confusion. Above all, it serves neither democracy nor interdependence to install a stakeholder steering mechanism where a professional one is required, and vice versa.

They were especially concerned with the unfortunate precedents set in the political interference by governments in post-independence Africa, as already cited in section 2.3.1 above:

> In parts of Africa, the political rule is usually weak though ambitious, the bureaucracy poorly trained, dispirited and corrupt, organised civil society virtually non-existent, and the government itself sporadically repressive …. The main features of this unfortunate vicious cycle are a government whose hegemony is not established, a weak civil society, a weak bureaucracy, few mediating mechanisms between government and higher education institutions, and no conflict mediating procedures (Moja, Muller and Cloete 1996, 147 & 150).

The implication clearly was that in South African circumstances the potential threat of 'state interference' needed to be obviated, not only by 'buffer bodies' suited to forms of political mediation (such as the NCHE's proposed HEF), but also by 'buffer bodies' with the qualifications and capacity to provide effective forms of administrative control (such as the NCHE's proposed HEC). Incidentally, it may be noted that the Commission did not regard the HEF as the only such 'buffer body' that would be required for the representation and political mediation of stakeholder interests. Thus, it specifically pointed out the need for a range of further representative bodies in addition to a statutory HEF:

> It is suggested that, as a matter of urgency, umbrella national structures should be established that will ensure accountable representation, leadership and

> effective participation for staff and students. The Commission believes it is important that the SRCs [Student Representative Councils] should form the basis of a single national representative body. It is imperative that staff have an effective national structure that can engage in higher education transformation and the negotiation of salary and service conditions (NCHE 1996, 185).

More specifically, the Commission's motivation of its proposal for establishing the HEC as a statutory body with "allocative and planning functions, as well as management responsibility for a variety of agency functions" (NCHE 1996, 188), clearly reflects this understanding of the nature of *'administrative control'* characteristic of 'organs of state', as opposed to the nature and function of *'political control'* by the government:

> It is international practice for allocative and co-ordinating functions to be performed by people who are not directly representing their constituencies. The argument for letting a Council perform the allocative and co-ordinating function, rather than the Department, is based on the principle of the legitimacy of peers. In addition, the expertise available within the higher education system has to be accessed in a way that is not linked to any one stakeholder interest. International strategies include the establishment of councils/commissions with credibility within the higher education community. In the new SA context, the principle of establishing bodies with policy-formulation, funding-allocation and planning functions outside government departments is being widely adopted …. The Commission proposes that the HEC should not have direct stakeholder representation (NCHE 1996, 187-188).

The Commission's proposals for establishing two functionally different bodies, an HEF and an HEC, was likewise premised on the underlying distinction between, on the one hand, representative 'buffer bodies' which could assist in *political* mediation and, on the other hand, professionally qualified 'buffer bodies' which could assist in *administrative* control:

> An attempt is made by the Commission not to conflate direct interest with expert opinion, but to recognise the contribution of both groupings: the first, a Higher Education Forum, would allow greater representation and participation of organised constituencies. The second, a Higher Education Council, would

> provide expertise that is not directly representative of sectoral or institutional interests (NCHE 1996, 185).

The Commission's overall diagnosis evidently was that, in order to obviate the perceived threat of ad hoc government 'interference' in response to local institutional crises of governance, both an intermediary mechanism for *political* mediation as well as suitable support structures for *administrative* control would be needed, but that these should remain distinct.

2.3.4.4 The Founding Commitment to 'Co-operative Governance' as a Constitutional Principle?

In section 2.3.3 above, we argued that the NCHE's proposed notion of 'co-operative governance' could best be understood as a founding declaration of commitment to the democratic governance of higher education in a post-apartheid South Africa. However, we also found that the status and force of such a founding declaration of commitment, as expressed by the NCHE in its report, was by no means clear. The NCHE was not a Constituent Assembly providing the forum and means for a self-binding founding compact on the governance of higher education. The Commission could only *call on* the government and other relevant parties to enter into such a collectively self-binding founding declaration of commitment to democratic governance in higher education. Moreover, its nature, content and sustainability would be contingent upon the actual policy approach adopted by the government and/or by the institutions of higher education and other stakeholders who chose to enter into such a founding compact for 'co-operative governance'. Unless a founding declaration of commitment to 'co-operative governance' in higher education was given some force in law, or grounded in some independent validating source, any such voluntary exercise of self-binding would require to be sustained by 'virtuous' feedback loops and/or be susceptible to potential 'vicious' cycles undermining its internal grounds for trust and co-operation.

Significantly, though, the NCHE Report did identify an independent source, not tied up in the closed circle of such self-reinforcing and/or self-destroying social compacts, that could provide appropriate and enduring grounds for a founding commitment to 'co-operative governance' in higher education – the new Constitution. It did so in two ways: on the one hand, by invoking the inclusive negotiated settlement which characterised South Africa's post-apartheid transition and issued in the new Constitution; and on the other hand, by referring to the

specific constitutional principle of 'co-operative government' entrenched in the Constitution. The NCHE Report's crucial passage explicating the basic concept of 'co-operative governance', cited in part above (and previously in section 1.3), reads in full as follows:

> At the heart of the Commission's proposals for higher education policy-formulation, co-ordination and implementation lies *the concept of co-operative governance. This has resonances in the wider social and political context of [a] post-apartheid South Africa. In the new national Constitution,* the concept underpins the relationship that is to be established between national government and the provincial authorities, and can be seen as an attempt to find a creative political solution to the contestation over federalist and centrist models of state power. Similarly, in the higher education realm, the notion of co-operative governance is proposed by the Commission as a way of transcending the antagonisms between state power and institutional autonomy (NCHE 1996, 291 – italics added].

This suggests that, as far as the NCHE was concerned, the new notion of 'co-operative governance' should not be regarded as an invention of the Commission, nor is its relevance and application restricted to the field of higher education only. On the contrary, the notion of 'co-operative governance' is grounded in the Constitution itself, and it expresses a constitutional principle that applies to other contexts of intergovernmental relations, as well as to the sphere of higher education. The specific example mentioned here is that of the quasi-federal relations between national, provincial and local authorities, but elsewhere it appears that the Commission also had such co-operative arrangements and institutions in mind as that exemplified at the time by the National Economic Development and Labour Council (Nedlac) (NCHE 1996, 187).

Taking the notion of 'co-operative governance' in this way as grounded in the Constitution and as expressing a particular constitutional principle opens up an important and constructive perspective on the problem discussed above of possible recourse in circumstances when a founding compact for 'co-operative governance' founders or comes apart. In the first place, grounding the notion of 'co-operative governance' in the Constitution suggests that the terms of a voluntary compact of self-binding involved in a shared commitment to 'co-operative governance' is not only up to the particular parties concerned – it is actually enjoined by the Constitution itself.

And secondly, when a particular founding compact begins to founder or come apart, then the parties concerned could, in principle, invoke the relevant constitutional principle as a means towards restoring it. The Constitution may better be conceived of not as an "overarching, all-encompassing super law" (Du Plessis and Sarkin, 2000), but rather, as Jonathan (2006, 7) explained, "a detailed statement of binding commitments to the people which embodies the notion of subsidiarity, whereby the constitutional framework delegates the fulfilment of those pledges to diverse organs of state and to civil society groups". Broadly speaking, the founding commitment to 'co-operative governance' in higher education can be understood as giving effect, in the particular context of higher education governance, to the more inclusive general compact embodied in the Constitution.

It needs to be added that this interpretation of the NCHE's notion of 'co-operative governance' in higher education, as grounded in a more general constitutional principle, is complicated in at least two ways. First, as we have seen, notions of such a constitutional principle or of constitutional principles more generally, did not really figure in the genealogy of 'co-operative governance' in higher education up to this point. By and large, that genealogy concerned the development of a discourse internal to the higher education sector with little or no reference, at least on the face of it, to the Constitution or constitutional principles. Moreover, the application of this constitutional principle in such other fields as that of intergovernmental relations between national, provincial and local authorities is quite far removed from that of higher education governance, and the analogies and/or structural similarities are by no means familiar or obvious. Second, the constitutional principle concerned was, strictly speaking, that of 'co-operative *government*', not 'co-operative *governance*'. At the very least, this poses some terminological complications, which may or may not reflect substantive problems, more so in the light of the paradigm shift from 'government' to 'governance' (discussed in section 2.3.2 above).

It follows that a more serious investigation of 'co-operative governance' in higher education governance, as grounded in a constitutional principle or not, will have to look beyond the confines of higher education discourse and policy debates to the relevant aspects of the position of the constitutional principle of 'co-operative government' in the area of intergovernmental relations. This will be investigated in section 3 below.

3 'Co-operative Government' and 'Co-operative Governance' as Constitutional Principles

As we saw in section 2.3.4.4 above, the NCHE alluded to the new Constitution as a pertinent ground for its proposed notion of 'co-operative governance':

> In the new national Constitution, the concept [of 'co-operative governance'] underpins the relationship that is to be established between national government and the provincial authorities (NCHE 1996, 291).

Strictly speaking, though, this reference to the Constitution was not without complications: it did not only involve a different sphere to that of higher education – that of intergovernmental relations between national, provincial, and local government authorities – but the constitutional principle concerned was also termed 'co-operative government', not 'co-operative governance'. The Commission was well aware of this difference in terminology and sphere of application, and also explicitly noted it:

> In formulating its proposals for new forms of governance in higher education, the Commission was conscious of the need to distinguish the concept of governance from that of government, particularly insofar as government is

> taken to refer to the state's formal power, leadership and authority structures (NCHE 1996, 171).

Unfortunately, the NCHE Report did not pursue the relationship between the notion of 'co-operative government' in the context of intergovernmental relations and that of 'co-operative governance' in the governance of higher education in any greater detail; nor did it make any serious attempt to clarify the status and relevance of 'co-operative governance' as a constitutional principle. For present purposes, it will thus be necessary to investigate some of the main considerations relevant to this issue. That will require a brief review of literature on the constitutional principle of 'co-operative government' in the context of intergovernmental relations, even if that will take us away from the particular field of higher education governance itself. The question is in which ways, or to what extent, the constitutional principle of 'co-operative government' might apply to 'co-operative governance' in the governance of higher education as well.

3.1 Academic Freedom as a Fundamental Right

The primary location of constitutional principles relevant to higher education is the inclusion of academic freedom as part of the basic Bill of Rights in the 1996 Constitution. Section 16(1)(d) of the Constitution reads:

> Everyone has the right to freedom of expression which includes –
> ... (d) Academic freedom and freedom of scientific research.

The NCHE also took this as a reference point for its own account of 'co-operative governance' in higher education:

> Academic freedom and autonomy must be located within the context of the 1996 Constitution. In the Bill of Rights (Chapter 2), academic freedom is part of the clause on freedom of expression (NCHE 1996, 193).

With regard to 'co-operative governance' as a constitutional principle, though, there are at least two sets of complications. First, section 16(1)(d) does not primarily deal with governance but, as the NCHE also acknowledged, is part of the clause on freedom of expression. It will require an authoritative determination by the Constitutional Court to confirm whether, taken together with other relevant constitutional principles, this

basic right to academic freedom has implications for the governance of higher education and, if so, in what sense. Second, no test case has yet been brought to the Constitutional Court which would have enabled it to make such an authoritative determination of the significance and application of the constitutional right to academic freedom in more specific terms, and certainly not with regard to the governance of higher education. In the current context of HESA's concerns with the 2012 amendments to the *Higher Education Act*, as well as the *Draft Reporting Regulations for Universities*, it would be of considerable importance to obtain a relevant ruling from the Constitutional Court. Unfortunately, though, in the absence of any authoritative determination by the Constitutional Court this must remain an open question. The 2008 HEIAAF Task Team, for example, concluded that in its view the constitutional principle of 'co-operative government' should *not* be taken to have implications for the significance of 'co-operative governance' in higher education:

> In the absence of any test in the courts, the Task Team has difficulty accepting that the constitutional notion of co-operative government – insofar as government and universities are concerned – is identical or intrinsically connected with co-operative governance (CHE 2008, 23).

However, as things stand we cannot be sure whether the Constitutional Court would agree with this or not. But we can investigate the implications of other relevant constitutional principles, such as that of 'co-operative government' in the context of intergovernmental relations, for which more specific determinations are available.

3.2 'Co-operative Government' as a Constitutional Principle

The constitutional principle of 'co-operative government' in intergovernmental relations is well-established, and it has been more specifically elaborated in a number of respects and in various contexts. In general terms, it serves a similar function of expressing a founding declaration of commitment to inclusive and interactive governance (see section 2.3.3 above), though with regard to intergovernmental relations. In the words of Strand:

> The notion of co-operative government … amounted to a declaration of commitment by governments in the different spheres that the decentralised and complex democratic structure would not be used for divisive purposes.

> Governments and institutions would seek consultation and compromises in their internal, as well as intergovernmental affairs (Strand 2000, 223-224).

While the Constitution, in section 40(1), determines the three spheres of national, provincial and local government as 'distinctive, interdependent and interrelated', the principle of 'co-operative government' speaks to the way governments must govern in order to achieve their overall constitutional objectives (Steytler and De Visser 2012, 16-3). Pimstone sets out some of the numerous constitutional obligations thus associated with 'co-operative government':

> They include the duties of spheres to co-operate with each other in mutual trust and good faith by fostering friendly relations, to assist and support each other, to inform and consult around matters of common interest, to co-ordinate actions and legislation, adhere to agreed procedures and avoid legal action against each other …. Each government sphere continually has to consider both its own needs and the needs of other spheres with which it engages …. All spheres are called upon to establish mechanisms for informational exchange, for joint planning, strategising, policy-formulation and co-ordinated legislative output …. Organs of state have the utmost duty, under the co-operative system, not to take to the courts (Pimstone 1998, 8-9 & 15).

He also observes that all these obligations, from the most benevolent to most intrusive, are to be located firmly within the co-operative model; they are not obligations to be undertaken *against* other spheres of government, but rather *with* them, in support of their integrity and capacity (Pimstone 1998, 9).

Significantly the NCHE Report noted that this constitutional principle of 'co-operative government' applied to the higher education sector as well:

> Chapter 3 of the new Constitution makes the principle of co-operative government and intergovernmental relations applicable to all spheres of government and all organs of state within each sphere. Higher education institutions, according to an interpretation of clause 239, could be included under the definition of 'organs of state' (NCHE 1996, 194).

What this meant was that the basic values and principles of public administration also applied to institutions of higher education as 'organs of state':

> These principles include responsiveness to public needs and encouraging the public to participate in policy-making, accountability and transparency fostered by providing the public with accurate information (NCHE 1996, 194).

In constitutional perspective, the governance of higher education was not a special preserve to be left alone to pursue its own distinctive practices and conventions of self-regulation; public institutions of higher education were 'organs of state' and, as such, subject to the implications and consequences of the constitutional principle of 'co-operative government' more generally. Unfortunately, the NCHE left this as a passing observation, and did not spell out the nature of these implications and consequences of the constitutional principle of 'co-operative government' for higher education governance in more specific terms or systematic ways.

3.3 'Co-operative Government' and the Paradigm Shift from 'Government' to 'Governance'

It is not obvious whether the variance between the constitutional principle of 'co-operative *government*' and the NCHE's notion of 'co-operative *governance*' should be regarded as a trivial terminological difference, or whether it might reflect a significant conceptual distinction. Certainly, in the light of our account of the paradigm shift from 'government' to 'governance' in section 2.3.2 above, the use of the term 'co-operative government' might well indicate the persistence of assumptions predating a paradigm shift of this kind, in which case linking the constitutional principle of 'co-operative government' with the NCHE's notion of 'co-operative governance' would be anomalous and confusing. As we saw in section 2.3.2 above, the term 'governance' was introduced in preference to the more traditional usage of 'government' precisely to reflect new patterns of interaction between formal government and a range of other structures, constituencies, stakeholders and formations typically taking the form of co-operative partnerships. The question is whether the use of the term 'co-operative government' was compatible with this new perspective on 'governance' or not.

A look at the literature on intergovernmental relations and accounts of the constitutional principle of 'co-operative government' soon reveals a special concern with re-conceptualising the notion of 'government'. This is typically explained, with reference to recent trends and comparative developments, in terms of a need to move away from traditional assumptions of hierarchy and top-down controls

within the formal confines of government structures. Thus, instead of conceiving of intergovernmental relations between national, provincial and local authorities in terms of different 'levels' of government, set up in strict hierarchical order, these should rather be considered in terms of interactive 'spheres' of government. (Tellingly, an edited volume by Doreen Atkinson and Maxine Reitzes on the new constitutional dispensation for local government was entitled, *From a Tier to a Sphere: Local Government in the New South African Constitutional Order*). In this view, the shift from 'levels' to 'spheres' of government is not merely an incidental change of metaphors, but is vital for an understanding of 'co-operative government':

> A sphere is recognised not on its own, but in interaction with other spheres; and a system of co-operative government is unsustainable without the recognition of the integrity of each sphere …. In an idealised sense, the notion of 'sphere' marks a shift to a conception of non-hierarchical government, greater equivalence of status, latitude for self-expression, and an essential inviolability (Pimstone 1998, 6).

It is this non-hierarchical and interactive relationship between different 'spheres' of government which is at the heart of the principle of 'co-operative government' in the Constitution:

> Section 40 introduces the notion of 'interdependent and interrelated government' …. [Indeed,] Section 40 is the door to a whole chapter, Chapter 3, dedicated entirely to co-operative government, which features a detailed statement of principles that all spheres are enjoined to observe. The word 'interdependence' is significant: 'interdependence' implies a mutual dependence of spheres of similar status, something of an equality of interrelationship …. A system of co-ordination and consensus between spheres reflects the real complexity of our constitutional order, the existence of concurrent powers enjoyed by different spheres, and the competition between spheres for resources (Pimstone 1998, 7).

More systematically, Steytler and De Visser spell out the constitutional framework for 'co-operative government' with reference to the relevant clauses:

> Section 41(1) of the Constitution binds all spheres of government, and organs of state in each sphere of government, to the following basic principles of co-operative government and intergovernmental relations. First and foremost is … [a] common

> loyalty to South Africa and its people, committing every sphere to securing the well-being of the people of South Africa …. Secondly, the distinctiveness of each sphere must be respected, with each sphere remaining within its constitutional powers and exercising those powers in a manner that does not encroach on the geographical, functional or institutional integrity of another sphere (section 41(1)(e)-(g)). Thirdly, collectively the spheres of government should provide effective and coherent government (section 41(1)(c)). Fourthly, intergovernmental relations must not detract from transparent and accountable government (section 41(1)(c)) …. Fifthly, spheres of government must 'co-operate with one another in mutual trust and good faith' (Steytler and De Visser 2012, 16-4 & 5).

Implicitly, this interactive and non-hierarchical conception of 'co-operative government' was evidently meant to contrast with and supplant traditional notions of hierarchical 'levels' of government. It needs to be added, though, that the interactive co-operation between different 'spheres' of government did not negate the overriding authority of central government in certain specified circumstances:

> Although the terminology of 'spheres' was meant to indicate equality, overriding powers remained with national government. [The provisions of the Constitution] stipulated conditions for the right of national government to assume executive and administrative functions in any one province or provinces. Basically, national government could decide that a provincial government failed to perform according to a number of criteria, and then take over provincial power in that province (Strand 2000, 224).

Even so, 'co-operative government' between interactive 'spheres' of government is a quite different conception from that of traditional notions of 'a hierarchical government structure'.

From the above, it should be clear that, despite the terminological persistence of 'government', its re-conceptualisation as a framework of interactive 'spheres' is closely connected to the paradigm shift from 'government' to 'governance'. Indeed, in a footnote Pimstone specifically refers to the shift from 'government' to 'governance' and suggests that it permeates the Constitution:

> 'Governance' as opposed to 'government' implies a particular style of interactive governing. See, particularly … [sections] 9 and 25 of the Constitution, the

> characteristics of which permeate the entire constitutional text (Pimstone 1998, 3 – note 3).

In short, we can safely conclude that in relation to the Constitution the terminological variance of 'co-operative government' and 'co-operative governance' is of little consequence, and that the general implications and consequences of the constitutional principle of 'co-operative government' also extend to the significance of 'co-operative governance' in higher education.

3.4 'Co-operative Government' and the 'Organs of State'

As we already cited in section 3.2 above, the NCHE Report stated that the constitutional principle of 'co-operative government' applied to higher education institutions as 'organs of state':

> Chapter 3 of the new Constitution makes the principle of co-operative government and intergovernmental relations applicable to all spheres of government and all organs of state within each sphere. Higher education institutions, according to an interpretation of clause 239, could be included under the definition of 'organs of state' (NCHE 1994, 193).

At first sight this characterisation of universities as 'organs of state' strikes one as not only unfamiliar, but alarmingly as an incorporation of higher education institutions into the realm of government. Even though South African universities have been public institutions, statutory creatures of the state, they are decidedly not an arm of government, and have (at times) emphatically asserted a measure of institutional autonomy. However, in this context the relevant point relates to the basic distinction between 'government' and 'state' (see section 2.3.4.2 above): characterising universities as 'organs of state' serves precisely to assert that they should *not* be conceived as 'arms of government'. As Jonathan made clear, to avoid conflating 'government' and 'state' it is crucial to realise that government is only one 'organ of state' in interaction with other 'organs of state', including institutions of higher education:

> Among the organs of state … are the government-of-the-day, the civil service and the public institutions of and for higher education …. *Institutionally*, therefore,

> the role players in the democratic oversight of higher education are threefold: government and its departmental bureaucracies, relevant statutory bodies, and the higher education sector itself (Jonathan 2006, 7-8).

The 2008 HEIAAF Task Team summarised this position as follows:

> [As 'organs of state', universities] … are bound by the constitutional scheme of co-operative *government* and intergovernmental relations (section 41) which provides that organs of state must co-operate in mutual trust and good faith and adhere to agreed procedures: when the state is directed to take legislative measures, organs of state are bound by these. Thus, co-operation between organs of state is seen in these analyses to imply dialogue between the higher education sector and government during the framing of legislation and after its enactment, though final authority lies with the government-of-the-day (CHE 2008, 24).

As we will see below, the HEIAAF Task Team Report made a point of disagreeing with this interpretation: "The relationship between the government and higher education institutions is not equivalent to co-operative government by organs of state as constitutionally defined" (CHE 2008, 71). However, it does not appear that the HEIAAF Task Team took sufficient account of the basic distinction between 'government' and 'state' in coming to this conclusion.

For our purposes there appear to be sufficient grounds to agree with the NCHE's own claims that (i) the constitutional principle of 'co-operative government' may be extended to apply to the notion of 'co-operative governance' in higher education governance; and (ii) as such, it also applies to institutions of higher education as 'organs of state' (that is, *not* as 'arms of government') in their interaction with government, as government itself is an 'organ of state'.

4 'Co-operative Governance' after the NCHE

In September 1996, the NCHE submitted its report, including its proposals for 'co-operative governance', "with great acclaim, consensus and fanfare" (Muller, Maassen and Cloete 2006, 289) as the first in a series of founding documents for an ambitious project to transform post-apartheid higher education. As already noted, the NCHE process had been a notably inclusive and participatory process of basic policy-formation with representative involvement drawn from stakeholders in the higher education sector, as well as civil society, the labour movement, business, and a range of other constituencies. There then followed an extended period during which the DoE (in effect, its Higher Education Branch) proceeded with the different stages of policy-determination and legislation from the initial 1996 *Green Paper*, the different iterations of the 1997 *White Paper* and the 1998 *Higher Education Act* (with subsequent amendments), to the 2001 NPHE. This official policy-making process did elicit inputs from relevant political constituencies, but higher education institutions and other stakeholders were not systematically involved in further consultation, except insofar as the Ministry called for comments on its *Green Paper* and *White Paper*. Unlike the NCHE, this official post-NCHE process was not an exercise in 'co-operative' or 'consensual' decision-making inclusive of key representatives of the higher education sector; in effect, the government in the guise of the Ministry of

Higher Education reverted to official policy-making, legislative and administrative procedures. During this same period, higher education institutions did not await the outcome of official policy-determination before engaging in diverse and significant new initiatives of their own. In the CHE's survey of *South African Higher Education in the First Decade of Democracy* (2004), this is described as follows:

> A largely unanticipated pattern of change and development emerged in South African higher education …. The pattern of development after 1994 makes it clear that change is not exclusively driven by the state and national policy. It has in the recent past also been propelled from within the higher education sector (as HEIs and stakeholders acted in line with sectional interests and varying interpretations of policy), and by [the] economy and society (as market forces and shifting social demand for higher education came to bear) (CHE 2004, 36-37).

But these various local initiatives and responses from within the higher education sector did not specifically address the NCHE Report and its proposals for 'co-operative governance' in higher education; nor were these taken up by sector-wide representative bodies, such as the (former) CUP or (the later) HESA. As the 2008 HEIAAF Task Team observed, at that time higher education institutions:

> … did not necessarily have the capacity or the incentive to further policy goals on their own – and the sector made no collective input to the planning process between 1997 and 2001 (CHE 2008, 47).

In lieu of that, the post-NCHE engagement with the notion of 'co-operative governance' was, in the first instance, largely left to the official policy-making processes of the DoE. Inevitably, this meant that authoritative deliberations on the NCHE's proposals for reconfiguring state-sector relations, in general, and the specifics of 'co-operative governance', in particular, were left to the protagonists within government. We will return below to the implications of this decidedly 'one-sided' reception and further articulation of the NCHE's proposals for 'co-operative governance'.

Analysts and commentators have broadly agreed on the significant trends and/or stages in the course of the overall post-NCHE official policy-making process. In one way or another, these involved, at least on the part of the government, a shift towards a stronger 'steering' approach. Thus, in a 2006 book contribution, "Modes

of Governance and the Limits of Policy" – based on and updating the analyses in the 2002 edited volume which had referred to "the shift on the part of the state from co-operative governance to 'coerced co-operation' " (Cloete *et al.* 2002, 484) – Muller, Maasen and Cloete described this shift as follows:

> After 1997, the policy process gradually became less participatory and democratic, and it seemed to some that we were returning to something of a top-down style of policy imposition reminiscent of an earlier era …. The consultative and participatory process of policy-formulation and the first cycle of the three-year planning dialogue gave way to a much stronger state-steering approach, driven by government's frustration at the lack of progress made towards achieving transformation goals (Muller, Maassen and Cloete 2006, 289 & 300).

Likewise, the 2002 CHE Task Team found:

> Taken in comparative perspective, the evolution of SA higher education policy from the publication of the White Paper in 1997 to the release of the NPHE in 2001 also marks a path from a comparatively loose system of state steering, with guarantees of autonomy, block grant funding, and the expectation of self-regulation by individual institutions, to a system of conditional autonomy in which substantive autonomy continues to be guaranteed, while the state exercises increasing control over procedures of funding and academic accreditation (Hall, Symes and Luescher 2002, 92-93).

No doubt, on closer analysis some differences as to the precise nature of the shift towards stronger state steering, or the particular stage at which it took place, will be found. The 2002 CHE Task Team also asserted that in some sense the official policy-making process had been consistent all along: "It is also clear that there has been consistency from the formulation of the policy in 1997 through the publication of the NPHE in 2001" (Hall, Symes and Luescher 2002, 38).

These analysts were also careful to note that the shift towards a stronger 'steering' approach in official policy-making did not take place in isolation from broader social and economic processes. Thus, the 2006 Muller, Maassen and Cloete book contribution argued that in key respects the official policy-making process had been overtaken by external developments outside its control, including international trends and market forces, in effect resulting in a 'hybrid' approach:

> If one reads solely through the policy documents and avowals of educational politicians, it seems that the DoE started off with a participation approach, only to change course half way [through] to a market approach overlaid with deregulation and flexible mode features (Muller, Maassen and Cloete 2006, 303).

Symes summarised the conclusions of this analysis of the shift in official policy-making viewed in the wider social and economic context as follows:

> First, the participation approach to higher education governance in South Africa was frozen at the symbolic stage owing to [the] weak infrastructural power of the state. Second, decisions taken at the highest level of state in response to global current[s] and resulting in the GEAR [Growth, Employment and Redistribution] macro-[economic] policy, led to sectoral policies and approaches that asserted the 'hegemony of finance'. Third, this effectively pushed higher education into the market, while espoused policy still clung to the state steering model and the rhetoric of participation, equity, and social justice. The result is a hybrid approach: a partially regulated market system of governance, with residual features of co-operative governance (Symes 2005, 19-20).

The 2008 HEIAAF Task Team, for its part, noted that this shift in official policy-making towards stronger state steering actually happened *despite* the government's lack of clear strategic objectives:

> The *White Paper* (1997) stated that the principles it outlined (including academic freedom, institutional autonomy, and public accountability) would establish the practice of steering …. At the time the *White Paper* was adopted, government did not have a clearly thought-out strategy for restructuring higher education …. This set of circumstances provided the backdrop for the NPHE in 2001, widely regarded as marking a shift in government's mode of steering higher education (CHE 2008, 47).

What this means is that the significance and implications of the official post-NCHE policy-making process, as articulated in the *Green Paper* and *White Paper* and other official documents, should not be taken at face value but have to be critically interpreted. The apparent contradictions and pervasive ambiguities in these official texts need to be taken seriously without assuming that there is necessarily one

definitive answer only. We will not be able to consider all of the many and various issues at stake in this process, but will focus only on the official determination of 'co-operative governance' and the key issues involved in that determination.

4.1 The DoE and the Notion of 'Co operative Governance': From the 1996 *Green Paper* to the 2001 NPHE

From what has gone before, it goes without saying that, in more ways than one, the DoE was an interested party in determining its response to the NCHE's proposed approach of 'co-operative governance' in higher education. In line with the basic underlying distinction between 'government' and 'state (see section 2 above), and as a consequence of accepting the paradigm shift between 'government' and 'governance' (see section 2.3.2, etcetera, above), this approach implied a significant downgrading of the role of a government department such as the DoE now to be conceived as only one 'organ of state' in interaction with others. Henceforth, if the NCHE's proposals were to be accepted, 'state control' of higher education governance would no longer be equated to 'government control'. As an interested party, the DoE could well be expected to have significant reservations and qualifications about having to endorse such an approach. It actually had good reasons to reject the proposed approach of 'co-operative governance', and/or to distance itself from it in principle.

Significantly, though, the DoE made it clear from the outset in the *Green Paper* and the *White Paper* that, in principle and in general terms, it accepted and endorsed the NCHE's proposed approach to 'co-operative governance':

> The Ministry endorses this [the NCHE's proposed model of co-operative governance] as an appropriate model of governance for higher education in South Africa (DoE 1996, 37).

The *Green Paper* did go on to contextualise this endorsement, but did so in terms which did not imply any significant qualification:

> While the Ministry endorses the NCHE's concept of co-operative governance, it believes that this model needs to be grounded in the context of autonomous institutions working co-operatively with a pro-active government and in a range of partnerships (DoE 1996, 37).

The subsequent *White Paper* did not explicitly use the term 'co-operative governance', but expressed clear support in the following terms:

> The Ministry reaffirms its commitment to the principles of academic freedom and institutional autonomy within the framework of public accountability as fundamental tenets of higher education (DoE 1997, 24).

This has been taken by commentators as a clear endorsement of the principles of the 'co-operative governance' approach:

> The *White Paper* accepted these broad tenets, advocating that governance should enable co-operative rather than conflicted contestation of different interests (CHE 2008, 20).

At the same time and, as it were, almost in the next breath, the *Green Paper* and the *White Paper* proceeded to take different positions on a number of key issues vital to the 'co-operative governance' approach in the sense advocated by the NCHE. As we will see below, even if the *Green Paper* and the *White Paper* never explicitly opposed 'co-operative governance' in general terms, the Ministry's more specific responses and interpretations did from the outset seriously qualify the NCHE's proposed new approach to 'co-operative governance' in ways which must raise questions as to whether it had ever been fully committed to 'co-operative governance' after all. Certainly, the DoE's support of the 'co-operative governance' approach in higher education governance was all along, at best, highly ambiguous.

When it came to the specific provisions of the 1998 *Higher Education Act* and of the 2001 NPHE this ambiguity remained, though the linkage with the supposed approach of 'co-operative governance' became ever more tenuous. Thus, the 2001 NPHE evidently represented a move towards an approach of leveraged 'state steering', with the DoE setting indicative system-wide targets; planning and funding was to serve as strategic mechanisms, the principal levers for steering higher education by providing incentives and sanctions within an appropriate regulatory framework. However, as the 2008 HEIAAF Task Team pointed out "it was silent on the fit between these and co-operative governance, although it reiterated the *White Paper's* emphasis on the balance to be maintained between institutional autonomy and public accountability" (CHE 2008, 48).

Before going on to consider the official determination of 'co-operative governance' in higher education more closely with reference to the *Green Paper*, the *White Paper* and the *Higher Education Act*, it is worth considering the significance of the fact that the DoE did *not* explicitly oppose the NCHE's proposed approach of 'co-operative governance' in higher education. As we saw above, this proposal had been the salient outcome of the participatory and consensual NCHE process, which had been inclusive of representatives of the main stakeholders in the higher education system; more broadly, it reflected the values and imperatives of the post-apartheid transition to democratic governance as embodied in the new Constitution; and specifically, it was claimed to be based on a constitutional principle, that of 'co-operative government'. If the *Green Paper* and the *White Paper* had rejected the NCHE's proposal of a 'co-operative governance' approach to higher education from the outset and had, instead, openly insisted on the former approach of 'government control' in the state's relationship to the higher education sector, then the onus would have been on the Ministry to justify that approach as well. Moreover, open opposition to the NCHE's proposal for a 'co-operative governance' approach to higher education governance would implicitly have pitted the Ministry against the new Constitution and the requirements of the constitutional principle of 'co-operative government'. In principle, the new constitutional order meant that policy-determination was no longer the prerogative of the government only, but had to take account of the relevant constitutional principles and requirements, in this case that of 'co-operative government'. In other words, in responding to the NCHE Report and its proposal of a 'co-operative governance' approach to higher education, the Ministry was no longer in the position where it could by sovereign fiat determine what was appropriate and acceptable. Official policy-determination had to be justifiable with reference to the Constitution and applicable constitutional principles. It follows that a key question has to be to what extent the *Green Paper* and the *White Paper* explicitly or implicitly provided justifications of this kind when it differed from the NCHE's proposals.

4.1.1 Post-NCHE 'Co-operative Governance' and the Paradigm Shift from 'Government' to 'Governance'

In section 2.3.4.2 above, we discussed the NCHE's somewhat cryptic formulation of its notion of 'co-operative governance' to be the following key 'principle and assumption':

> No single actor or agency can claim sole responsibility or authority for determining the policies and priorities of the higher education system (NCHE 1996, 179).

We argued that the NCHE was concerned to reject the model of 'state control' where that was equated with '*government* control', though it did not want to rule out a steering role for *the state* in the governance of higher education.

In formulating the official policy-determination, the 1996 *Green Paper* clearly had this 'principle and assumption' of the NCHE in mind when it countered that:

> … the Ministry accepts that … Government has the responsibility ultimately to determine priorities among competing claims, to set general policy objectives and regulatory frameworks, to allocate available resources according to principles such as equity and efficiency, and to monitor and report on progress towards achievement of objectives (DoE 1996, 38).

It may be noted that the *Green Paper* did not actually claim that the government had 'sole' responsibility for determining higher education policies and priorities, only that it had the 'ultimate' responsibility to do so. It also acknowledged that this should be understood as not in a 'commanding' sense, but as a 'steering and co-ordinating role':

> Within the context of national goals, the government will play a steering and co-ordinating role *with the participation of higher education stakeholders* …. government should exercise its authority and its powers over higher education in a transparent, equitable and accountable manner and in pursuit of the common good (DoE 1996, 38 – italics added).

All the same, it will be clear that the *Green Paper* was concerned with affirming the 'controlling' and/or 'steering' role in higher education governance of the *government* rather than of the *state.* In this respect, the *Green Paper* was making clear that it was not following the NCHE in the paradigm shift from *government* to *governance.*

The following formulation of the 2002 CHE Task Team somewhat better approximated this distinction, even if it still confused 'the Minister' with 'the state':

> The 1997 policy and legislation make it clear that *the state*, in the form of the Minister of Education, is at the head of the hierarchy of authority and responsibility. The White Paper specifies that *government* should have a

> 'pro-active, guiding and constructive role' in higher education (Hall, Symes and Luescher 2002, 37 – italics added).

The relevant implication of the paradigm shift from *government* to *governance* was rather that the Minister, as head of one 'organ of state', no longer was the sole fount of authority and responsibility, but had to act in partnership with other 'organs of state' as determined by the Constitution.

Tellingly, the 2008 HEIAAF Task Team still persisted with the same confusion of 'government' and 'state' without due regard to the determining role of the Constitution implied by the paradigm shift from 'government' to 'governance':

> In a democratic society, the elected government is mandated to make policy and allocate resources. *The Minister of Education is the final authority in governance of the higher education system*, while obliged by law under most circumstances to consult with the sector, its institutions and its stakeholders, and to take advice from the CHE where prescribed and warranted (CHE 2008, 27 – italics added).

The implications of 'co-operative governance' as a constitutional principle must be not merely that the Minister is obliged by law to consult with the sector, its institutions and stakeholders, but that strictly speaking the Minister is also no longer the sole and final authority in governance of the higher education system.

4.1.2 Political Interference and the Role of 'Buffer Bodies': The DoE and the Establishment of the CHE

In general discussions the issue of 'political interference' has often been conceived mainly in terms of (threatened) violations of the institutional autonomy of universities and other institutions of higher education. As we have seen in section 2.2 above, this is an inadequate and potentially misleading conception. Thus, in European systems of higher education such as those of France, Germany and the Scandinavian countries, the model of 'state control' has proved compatible not only with guarantees of academic freedom but also with the absence of political interference. It was argued that the issue of 'interference' is better understood in terms of an insufficiently systemic practice of higher education governance at the level of state-sector relations, leading to ad hoc and arbitrary government interventions in having to deal directly with local crises of institutional governance. As we saw in section

2.3.4.3 above, the NCHE, based on an analysis of the general role of 'buffer bodies' and on a distinction between *administrative* and *political* forms of control, proposed a dual set of 'buffer bodies' conceived to have distinct functions, with the HEF as a primarily representative body contributing to the *political* mediation of state-sector relations, and the HEC as a professional and expertise-based body contributing to aspects of *administrative* control in higher education governance.

The post-NCHE process of the official determination of a higher education policy-making approach by the DoE addressed the issue of 'political interference' at two different, though implicitly interrelated, levels. At one level, the 1996 *Green Paper* and the 1997 *White Paper* formulated the official response to the NCHE's proposals for a dual set of 'buffer bodies' in the form of the HEF and the HEC, and substituted the DoE's own proposal of a single 'buffer body', the CHE, in their place. At a different level, the Ministry had to respond to various local crises of institutional governance, resulting in calls for increased powers for the Ministry to enable more effective crisis interventions; in due course, these were then incorporated in the 1998 *Higher Education Act* and its subsequent amendments. We will consider each of these sets of developments more closely and in turn, before returning to the issue of their systemic connection to higher education governance.

(i) 'Buffer Bodies':

According to the 1996 *Green Paper*, the Ministry considered the system governance model proposed by the NCHE, involving two new statutory bodies with different functions, as "neither appropriate nor efficient" (DoE 1996, 40). The reasons provided for the DoE's objections included the following:

> - Such an arrangement would in practice create complicated and potentially ambiguous relations between the Minister and the Department, the two statutory authorities, and stakeholders ….
> - There are also concerns about the costs of establishing and operating the proposed new bodies and about the potential for duplication of work by the Forum, the Council, and the Department. Given existing capacity constraints, it would be prudent to concentrate rather than disperse the available expertise (DoE 1996, 41).

On the face of it, these considerations were primarily of a practical nature, concerned with simplifying the organisational structure, as well as with cost

and efficiency. At a merely practical level, these objections may well have had some force. However, in this context they also assumed and implied a particular systemic conception of higher education governance and of state-sector relations. Considered in that light, it is as much and more significant what the *Green Paper* did *not* take into account in its response to the NCHE proposals: there was no mention of the NCHE's attempt to differentiate between *political* control and *administrative* control with regard to state-sector relations in the governance of higher education, or any understanding of the NCHE's rationale for the introduction of other 'organs of state' next to the DoE that could contribute to a more democratic form of *state* control. More generally, these objections reflected a traditional approach to bureaucratic structure untouched by the paradigm shift from 'government' to 'governance'. Significantly, there was also no attempt to take the relevance of the constitutional principle of 'co-operative government' and intergovernmental relations into account. The *Green Paper* appeared to proceed on the assumption that it was the prerogative of the Ministry, subject to government approval and legislative requirements, to determine the 'appropriate' format and function of 'buffer bodies' in state-sector relations.

Much the same applied to the Ministry's preferred alternative arrangement regarding the format and function of 'buffer bodies'. The *Green Paper*, and subsequently the *White Paper* in identical wording, proposed the introduction of the CHE as a single statutory body with primarily advisory functions:

> The Ministry is of the view that a single advisory body should be established by statute to provide independent, strategic advice to the Minister of Education …. The membership of the CHE will reflect a balance of stakeholder interests and expertise on the basis of knowledge and understanding of higher education issues (DoE 1996, 40).

In thus proposing the establishment of the CHE as a single statutory body, the *Green Paper* in effect rejected (or simply disregarded?) the NCHE's distinction of the principled and functional differences between different kinds of 'buffer bodies': that is, those which were representative of particular constituencies and stakeholders and so capable of serving as *political* intermediaries, on the one hand, and those based on professional qualifications or expertise and so capable of serving in *official* or *administrative* capacities, on the other hand. Lumping these 'options' together in constituting a hybrid 'buffer body' could not but be incoherent

and dysfunctional: rather than creating a 'balance' of stakeholder interests and expertise-based perspectives, this risked confusion regarding the very nature and function of the CHE as the proposed new statutory body. In practice, though, it was clear that the Ministry meant the representative nature and 'political' role of the CHE to be predominant: the *White Paper* proposed that the CHE would consist of 26 constituency representatives together with only 3 persons co-opted on account of their experience and expertise (DoE 1997, 25). In due course, the 1998 *Higher Education Act* confirmed the composition of the CHE as primarily a representative body, while including some element of expertise-based participation:

> In its composition, the CHE Board has to be broadly representative of the higher education system, of the demographics of the SA public in terms of race, gender and disability, *and include persons who have deep knowledge and understanding of higher education and research and appreciate the public role of higher education* (Luescher 2013, 100 – italics added).

This is a far cry from the HEC envisaged by the NCHE as an independent statutory body with allocative and decision-making powers. Taken together with the fact that the CHE would primarily have an advisory function and hardly any allocative or decision-making powers, it is clear that the Ministry had determined to limit, if not entirely preclude, possible *official* and *administrative* functions on the part of other intermediary bodies. There was to be little or no place or function for new and other 'organs of state' in the governance of higher education.

In effect, that left the DoE with sole and ultimate responsibility for the transformation of higher education. The *Green Paper* asserted that notions of 'co-operative governance' and statutory 'buffer bodies' could not be allowed to detract from the Ministry's controlling role in the governance of higher education:

> Resource allocation functions will be the responsibility of the Higher Education Branch of the Department. While the Ministry seeks strong independent advice, and is committed to broad consultation as part of the approach of co-operative governance, it must also accept ultimate responsibility for transforming higher education. To that end, the Ministry needs to exercise its statutory authority, consistent with its undertaking to the electorate and with parliamentary accountability, to play its role in the necessary processes of change (DoE 1997, 43).

The *White Paper* endorsed this position and made it clear that the Higher Education Branch of the DoE would take on major planning and fund-allocation functions (DoE 1997, sections 3.15 & 3.31), while the CHE would assume advisory functions with limited executive responsibility in relation to quality assurance only. In this regard, an analysis by Moja and Hayward (2001, 118) concluded that the *White Paper*:

> … created the impression that the CHE – which the NCHE had proposed to be a semi-autonomous body between institutions of higher education and government – was now defined primarily as an arm of the Ministry of Education.

On this score, all that remained of the NCHE's new vision of 'co-operative governance', and of its proposed independent role of 'buffer bodies' as statutory 'organs of state', was that the Ministry had to consult with the CHE as a statutory advisory body and to provide reasons if it did not accept that advice:

> The Minister will be obliged to take the advice of the CHE into account and, under normal circumstances, provide reasons in writing if he or she does not accept its advice (DoE 1997, 27).

This was also confirmed in the 1998 *Higher Education Act*, which prescribed that the Minister must give reasons in writing is she or he rejects the CHE's advice.

It should be added that the CHE has been able to play a role of some significance in South African higher education over the past decade and more. A recent account summarised the contributions of the CHE in these terms:

> The CHE has been an important role player in debates concerning co-operative governance in higher education in SA through Task Teams on Governance (2001-2003) and on HEIAAF (2005-2008), and on matters of institutional differentiation and funding through its Size and Shape Standing Committee, and Funding and Financing Standing Committee. The SA quality assurance agency, the HEQC [Higher Education Quality Committee], is a permanent committee of the CHE responsible for quality assurance (Luescher 2013, 100-101).

Even so, as a statutory 'buffer body' the CHE, due to the ways in which its composition and functions had been determined by official legislation and policy, is incapable of functioning as an independent 'organ of state' in co-equal and

co-operative partnership with the Ministry in mediating state-sector relations in higher education governance as envisaged in the NCHE's vision of 'co-operative governance'. The question remains what difference this has made to the increasing incidence of 'political interference' in higher education governance over the past decade and more.

(ii) 'State Interference':

As we saw in section 2.3.1 above, the issue of government crisis interventions in response to local crises of institutional governance already emerged during the NCHE process. At the time, the NCHE Report (as previously cited) noted:

> Since May 1994, there have been calls for the Minister of Education to 'intervene' in several institutional 'crises'. The issues have varied from allegations of corruption, of staff and students being 'ungovernable', and of 'recalcitrant managements' who do not want to change, to loss of confidence in the management or Council of an institution (NCHE 1996, 197).

The NCHE Report did not go into the merits or circumstances of any particular instances of such government intervention. Instead, the NCHE was concerned that these might see South Africa "slipping into a model of state interference" (NCHE 1996, 197). To prevent this, the NCHE proposed that the Ministry should negotiate with the proposed intermediary bodies to establish general guidelines and criteria for state intervention across the sector, that is:

> … which ministerial actions, procedures and interventions are acceptable and under which conditions. The agreements reached after such negotiations should be incorporated into the proposed new Higher Education Act (NCHE 1996, 197).

Significantly, the NCHE was especially concerned with the implications and possible consequences of ad hoc government interventions for systemic state-sector relations in higher education governance.

In the late 1990s (that is, concurrent with the post-NCHE process of determining an official higher education policy framework and approach), the issue of circumstances warranting government crisis intervention very much remained on the agenda as "several higher education institutions displayed evidence of mismanagement and institutional governance systems threatened to collapse, or

[had] collapsed" (Symes 2005, 8). In response, the *Green Paper* and the *White Paper* in principle affirmed that it was the Ministry's responsibility to ensure accountability for the use of public resources, and that the government thus had the right to intervene and restore accountable governance. They also moved to provide for the Ministry to be invested with the necessary powers for effective intervention; and, in successive stages, these executive powers were extended and increased. Thus, the 1996 *Green Paper* affirmed the right of the Ministry to appoint an independent *Assessor* to report on institutional governance, but limited that to special circumstances:

> The Ministry will reserve the legal right to seek independent assessments and advice when it considers that necessary …. Assessors will be appointed directly by the Minister with a brief to report directly to the Minister. Assessors will have powers to obtain the information necessary for them to make independent assessments. The right to send an Assessor to an institution will be exercised in exceptional circumstances, such as those that may bring the institution into disrepute on the basis of mismanagement, corruption, or persistent turmoil (DoE 1996, 47).

The 1997 *White Paper* endorsed the Ministry's right to appoint an independent Assessor, not only when the Council of an institution requests that but also in 'exceptional circumstances':

> The Minister will have the legal right to seek independent assessments and advice on the condition of a higher education institution when circumstances arise … which warrant investigation …. The right to send an Assessor to an institution may be exercised where the Council of an institution so requests, or in exceptional circumstances that involve financial or other maladministration of a serious nature or which are seriously detrimental to the effective functioning of the institution (DoE 1997, 29).

The 1998 *Higher Education Act* and its subsequent amendments empowered the Minister to appoint an *Administrator* for a higher education institution in which financial or other maladministration had occurred (1999), and an Administrator was later empowered to take over the functions of a Council deemed to have resigned and to direct the policy and practice of an individual institution by direct intervention (2002). More generally, in the words of the 2002 CHE Task Team on Governance in

Higher Education, the official policy and legislation was concerned to make it clear that:

> … the state, in the form of the Minister of Education, is at the head of the hierarchy of authority and responsibility. The White Paper specifies that government should have a 'pro-active, guiding and constructive role' in higher education (section 3.7). It also makes it clear that this role justifies direct intervention when this is in the interests of ensuring transformation or preventing mismanagement …. Indeed, the policy specifies that the state has an obligation to intervene in such circumstances, in the interests of public accountability (section 1.24) (Hall, Symes and Luescher 2002, 37).

What was the significance of this rationale (government intervention in the "exceptional circumstances" of particular crises of institutional governance) for the approach of 'co-operative governance'? It is important to distinguish this systemic question from that of the justifiability of the various crisis interventions taken in isolation. In principle, it is conceivable that the particular circumstances of some, or even of all the various crisis interventions, may fully warrant direct government interference when considered in its own right, while at the same time undercutting the general systemic basis of 'co-operative governance' in terms of state-sector relations. The basic question is whether, or under what circumstances, direct state interference of this kind could be compatible with a 'co-operative governance' approach to higher education governance.

At that time, as Symes reported, there were indeed concerns about the systemic implications of the *Higher Education Act* and its amendments for application of a 'co-operative governance' approach:

> Concern arose within the higher education sector around these amendments because they were seen to set general limits upon the autonomy of all institutions, rather than to set particular limits according to the circumstances of particular institutions (Symes 2005, 8).

Likewise the HEIAAF Task Team also recalled that:

> … commentary at the time [of the post-1998 amendments to the *Higher Education Act*] warned of the dangers of setting general limits on all institutions

> irrespective of their financial condition, rather than specific limits on particular institutions in unique circumstances, and some assertions of micro-management were levelled against the DoE (CHE 2008, 49).

Notably, the HEIAAF Task Team Report then proceeded to discount these critical concerns in the light of subsequent developments:

> A few years on, there seems to be wide acceptance that standard approval and reporting provisions support the consistent public accountability of institutions (CHE 2008, 49).

But this amounts to a question-begging rejoinder: the question at issue was precisely whether state interventions enabled by the provisions of the 1998 *Higher Education Act* and its subsequent amendments would be liable to result in 'standard' approval and reporting provisions supporting the 'consistent' public accountability of institutions, or whether they were more likely to result in ad hoc and pragmatic *political* settlements at the discretion of the government authorities involved. Similar questions are raised by the comments of the 2002 CHE Task Team on Governance in Higher Education: having stressed the *White Paper's* insistence on the Ministry having ultimate authority and responsibility for higher education governance, as cited above, the CHE Task Team then added the following interpretation:

> Taken within the context of a commitment to co-operative governance and institutional autonomy, this means that the Minister cannot intervene on a whim; intervention can only be justified on fiduciary grounds, or if a public higher education institution is evidently not pursuing the policies for tertiary education which form part of the government's mandate (Hall, Symes and Luescher 2002, 37).

But this once more begs the very question at issue: is government intervention as conceived in, and enabled by, the provisions of the 1998 *Higher Education Act* and its amendments compatible with a commitment to 'co-operative governance'? If so, then one would expect that precisely the kind of qualifications spelled out here (precluding the Minister from arbitrary interventions, requiring justifications on fiduciary grounds only, etcetera) would have been incorporated into the terms of the legislation. But, if these implications have to be read into the *Higher Education Act* and its amendments

by taking it "within the context of a commitment to co-operative governance", then the construction is close to being circular. To say the least, the question has to be raised what the implications and consequences of these provisions might be if they are taken, not in the context of the NCHE's commitment to 'co-operative governance', but in terms of the professed commitment to the supremacy of government control of the *Higher Education Act* and the official policy of the Ministry itself.

4.1.3 Implications of Post-NCHE Official Policy Determinations for the Recognition of Institutional Autonomy

In section 2.3.4.1 above, we saw that the NCHE supported a right to institutional autonomy but did not regard it as an absolute or stand-alone principle. It had to be accommodated within the framework of 'co-operative governance' which might well serve to qualify or limit it in some ways. Indeed, the NCHE Report indicated that institutional autonomy would no longer be "the final word" in assessing academic performance. The DoE's 1996 *Green Paper* reinforced this qualification in even stronger terms:

> Institutional autonomy will no longer be absolute in assessing academic performance (DoE 1996, 39).

But the *Green Paper* did not go so far as to assert that institutional autonomy had no place or value, or that the government would not be prepared to allow some measure of institutional autonomy:

> It is not in the interests of higher education for Government to micro-manage institutions. Nor is it desirable for the Ministry to be too prescriptive in the regulatory frameworks it establishes. Diversity and flexibility are important aspects of institutional responses to varying needs and circumstances (DoE 1996, 45).

The 1997 *White Paper* used similar formulations, but substituted the language of 'responsibilities' for that of 'interests' and 'desirability':

> It is the *responsibility* of higher education institutions to manage their own affairs. The Ministry has no *responsibility or wish* to micro-manage institutions (DoE 1997, 28 – italics added).

The significance and implications of this particular wording warrants closer consideration: thus, it is worth noting that management of their own affairs is a 'responsibility' of higher education institutions and not a 'right'. Likewise, if the Ministry does not 'wish' to micro-manage institutions, and has no 'responsibility' to do so, that does not exclude the possibility that, if needed, the Ministry may be empowered to do just that. In effect, this position corresponds quite closely to what had been the approach of the apartheid government in granting universities a form of 'pragmatic autonomy' – that is, a measure of autonomy by the state for *reasons of administrative efficiency only* (Bunting 1994, 44), but not as a matter of right (as we saw in section 2.1 above).

As we saw in the previous section, the *Green Paper* and the *White Paper* did indeed propose provisions empowering the Ministry to intervene directly in the governance of institutions of higher education, and these were incorporated in the 1998 *Higher Education Act* and subsequent amendments; nor were these limited only to the "exceptional circumstances" where external crisis management of failing institutions might warrant that. The *Higher Education Act* also set the scene for institutional mergers to be brought about by giving the Minister more extensive powers to merge two or more public higher education institutions, or to close an institution after consultation with the CHE. Subsequent amendments in 2000 "required every public higher education institution to secure the approval of its Council and, under certain circumstances, the concurrence of the Minister to enter into a loan or overdraft agreement or to develop infrastructure" (CHE 2008, 49).

Taken together, these official declarations at best indicated a pragmatic toleration of some sort of institutional autonomy along with a readiness to overrule that if and when needed. At certain points it was made clear that from an official perspective, 'institutional autonomy' was actually regarded as a latent obstacle and even a potential threat to 'change and transformation':

> The Ministry will not, however, allow institutional autonomy to be used as a weapon to prevent change and transformation (DoE 2001, section 1.5).

The underlying assumption was that, in the final analysis, it was the Ministry's responsibility and prerogative to ensure that higher education governance served the policy objectives as determined by a democratically elected government. As cited in section 4.1.1 above, this had indeed been the starting point of the *Green Paper* (DoE 1996, 38), while the *White Paper* postulated that government should

have the 'pro-active, guiding and constructive role' in higher education (DoE 1997, section 3.7). In principle, and by implication, this marginalised the potential role and recognition of institutional autonomy.

As we saw in the previous section, higher education institutions were alarmed by the provisions in the 1998 *Higher Education Act* and subsequent amendments empowering the Minister in various ways to intervene directly in institutional governance. The 2008 HEIAAF Task Team reported that "at the time, some higher education institutions interpreted these amendments … as having negative implications for institutional autonomy" (CHE 2008, 49). These critical concerns were increased by the publication of the 2001 NPHE, both with regard to the shifts in the political objectives of the official government approach and as far as the implications and consequences of these for the recognition of institutional autonomy:

> Two key concerns were raised by the higher education sector and role players in response to the NPHE: first, the plan seemed to emphasise efficiency and responsiveness goals at the expense of democratisation, equity and redress goals; and second, the implied degree and scope of state steering in the *Plan* [the NPHE] seemed set to impinge directly on institutional autonomy (Symes 2005, 9).

Some years later, these concerns were strikingly highlighted in Prof Jonathan Jansen's T B Davie Memorial Lecture, *Accounting for Autonomy: How Higher Education Lost its Innocence* (Jansen, 2004). Provocatively, Jansen began by citing an informal poll of university leaders and administrators to the effect that, with one exception, all believed that South African universities had come to enjoy less autonomy under democratic rule than under the apartheid regime. Symes summarised Jansen's main conclusion as follows:

> Restructuring and the new policy/planning apparatus are less significant changes for higher education than the systematic erosion of autonomy through specific interventions that impose state curbs on who and what is taught, and how (Symes 2005, 18).

She went on to describe how Jansen's lecture stimulated a new round of public debate on institutional autonomy in the months that followed, eventually issuing in the CHE's HEIAAF Project (2006-2008).

However, insofar as this debate and Jansen's lecture assumed that the marginalisation of institutional autonomy by the NPHE was a departure from a different consensus on 'co-operative governance', this is not borne out by the historical record. As we saw, the NCHE Report significantly qualified its support for institutional autonomy and did not regard it as a stand-alone principle or right; while the *Green Paper* and the *White Paper* consistently, and with increasing insistence, made it clear that although, in the government's view, there might be some pragmatic uses for a measure of autonomy, it was also clear that institutional autonomy could not be allowed to obstruct the implementation of official policy objectives. In a sense, the higher education sector's alarms at these perceived threats of the *Higher Education Act* and the NPHE amounted to a belated realisation that the assumed consensus on 'co-operative governance' was not actually in place. Ironically, this then took the form of a renewed invocation of a principle, that of the right to institutional autonomy, that had not been part of the NCHE's consensus on 'co-operative governance'.

4.2 The Post-NCHE Process and the Failure to Consummate the Founding Commitment to 'Co-operative Governance'

Analysts and commentators have been uncertain as to how the post-NCHE process of determining the official framework for higher education governance should be viewed in relation to the NCHE's proposed approach of 'co-operative governance'. The fact that the *Green Paper* and the *White Paper* repeatedly declared that the DoE endorsed the NCHE's 'co-operative governance' framework, even as they also proceeded to qualify and contradict key elements in it, appears to have confused assessments of the overall thrust and outcome of this process. While there is some agreement that the post-NCHE process, which issued in the 2001 NPHE, involved some kind of 'shift' towards more intrusive forms of state 'steering', there appears to be considerable uncertainty about the more specific nature, location, and outcome of this 'shift'. Thus, the 2002 CHE Task Team on Governance in Higher Education returned to the topic of such a 'shift' quite a number of times, suggesting somewhat different assessments in each case. One of its assessments takes the NCHE process as part of an overall 'process of consultation' by the government, which had run its course with the DoE's adoption of the NPHE:

> In publishing its 2001 NPHE, the government has indicated that the process of consultation that began with the initiation of the NCHE six years earlier has now ended (Hall, Symes and Luescher 2002, 39).

This formulation is based on a key statement in the NPHE (see section 4.3 below) and seems to imply that adoption of the Plan brought a determinate end to a consultative process, including the NCHE itself, that had been more open-ended. In that case, it represented a substantive 'shift' to more directive 'steering' and policy implementation. However, in the same context the 2002 CHE Task Team Report also suggested that the DoE's position and approach had actually been consistent all along, in which case the NPHE did not represent a significant 'shift':

> It is also clear that there has been consistency from the formulation of the policy in 1997 through the publication of the NPHE in 2001 …. The foundations for the 2001 NPHE were, therefore, explicitly laid five years earlier when it was clear that 'co-operative governance' could not be read as a metaphor for negotiation without end (Hall, Symes and Luescher 2002, 38).

Actually, the latter part of this formulation is rather ambiguous: it could be taken to mean either that the NCHE's proposed approach of 'co-operative governance' should not be interpreted to involve 'negotiation without end', or that the DoE had already at an early stage made it clear that it was not prepared to go along with such an approach. In either case, it asserted that there had not been a significant shift in the DoE's position and approach from the 1996 *White Paper* to the 2001 NPHE. But there could be no question that there was a significant difference between the NCHE's proposed approach of 'co-operative governance' to higher education in 1996, and the DoE's official confirmation of the 2001 NPHE as a higher education policy framework. So, when and where did that difference come about, and what did it involve?

In this regard, the 2002 CHE Task Team also provided another and, perhaps, more perceptive account of the post-NCHE process, one not only concerned with the DoE's official policy determinations, but also with the nature of the higher education sector's responses, or the lack thereof:

> It is clear that the wish was for a governance system in which higher education institutions participate voluntarily – the call for unity in the cause of national reconstruction and development which underpinned the recommendations of the 1996 NCHE and the concept of 'co-operative governance'. It is equally clear that, in the Ministry's view, such co-operation has not been forthcoming (Hall, Symes and Luescher 2002, 38-39).

As we saw above, the 2008 HEIAAF Task Team also noted that "the sector made no collective input to the planning process between 1997 and 2001" (CHE 2008, 47). What this account suggests is not so much that at some point there had been a significant 'shift' towards more directive government 'steering' during the post-NCHE process, but that this official process had been decidedly 'one-sided'. From the 1996 *Green Paper* to the 2001 NPHE all the running in determining the nature and scope of 'co-operative governance' was made on the official side, while the higher education sector, for its part, did not significantly engage in this process at all.

At this point we need to recall our earlier discussion on 'co-operative governance' in terms of the need for a founding declaration of commitment to democratic governance in higher education. In section 2.3.3 above, we found that the NCHE's proposal for 'co-operative government' could best be considered as a call for such a declaration of commitment to establishing democratic governance in higher education in a post-apartheid South Africa. However, as was pointed out in that context, the NCHE itself was not a Constituent Assembly for higher education governance. At best, it could *call on* the government and other stakeholders to enter into a collectively self-binding founding declaration of commitment to democratic governance in higher education. But it was beyond the powers of the NCHE to enact such a founding declaration of commitment by itself. The status and force of any such declaration of commitment would then have to depend on whether, and to what extent, the government and other stakeholders would take up this call for a collectively self-binding founding declaration of commitment. Unless this happened, and unless that declaration of a collectively self-binding commitment to 'co-operative governance' in higher education was given some force in law, there could also not be any effective recourse if certain parties did not stick to the terms of the agreement of 'co-operative governance' and/or the collectively self-binding agreement began to come apart.

In this perspective, the key consideration regarding the post-NCHE process does not only concern the positions taken by the DoE in its official determination of a policy framework for higher education governance; it must be equally concerned with the extent and ways in which other stakeholders responded to the NCHE's call for a shared and self-binding commitment to 'co-operative governance' in higher education. Instead of the shared declaration of commitment to 'co-operative governance' called for by the NCHE, what happened between 1996 and 2001 is that, on both sides and in different ways, the anticipated union of joining in the 'co-operative governance' of higher education was not consummated. The DoE, despite

some general declarations that it accepted and endorsed the NCHE's proposal for a 'co-operative governance' approach in higher education, in effect distanced itself from and/or significantly qualified key principles of that approach. Without spelling it out in so many words, the DoE effectively disavowed and discarded the NCHE's proposed 'co-operative governance' approach in higher education governance. Higher education institutions and other stakeholders, for their part, refrained from significantly engaging with this official process of policy-determination from the *Green Paper* and the *White Paper* to the NPHE, but also did not initiate independent initiatives or sectoral responses in support of the NCHE's proposal for 'co-operative governance'. Taken together, this amounted to an effective, though unacknowledged, disavowal of the collective self-binding commitment to 'co-operative governance' in higher education for which the NCHE had called.

This raises two sets of questions:

- First, if the presumed policy framework of 'co-operative governance', as called for by the NCHE, never actually was put into place, then how should the official policy framework underlying the implementation of the NPHE since 2001 be characterised more accurately?
- Second, if the collectively self-binding commitment to 'co-operative governance' in higher education, as called for by the NCHE, was never put into place, then what, if any, are the prospects for reviving the NCHE's vision of 'co-operative governance' and under what conditions would that be feasible?

We will briefly touch on each of these two sets of questions in the following sections.

4.3 Implementing the NPHE: The Trajectory of Consultative/ Coerced 'Steering' in Higher Education Governance

In 2001, the 5-year post-NCHE process culminated in the NPHE as the official policy framework for higher education. It is a notable feature of the NPHE that it did not include any explicit references to 'co-operative governance' as the NCHE's proposed approach to higher education governance. However, what the NPHE did do was to present itself as the closure of a consultative process that had started with the NCHE:

> The consultative process, which has lasted some six years, must rank as one of the most wide-ranging and all-encompassing that has taken place anywhere

> in the world on higher education. It began with the National Commission on Higher Education in 1995 and continued through the development of a Green Paper in 1996, the White Paper [in 1997], including a Draft White Paper, ... and the preparation of a Council on Higher Education's Report last year. It must be brought to a close (DoE 2001, section 1.6).

To underscore the nature and implications of this closure, the NPHE imperiously added that "the fundamental principles and framework outlined in the National Plan are not open for further consultation" (DoE 2001, section 1.6). Thus, it asserted the prerogatives of government control in the governance of higher education:

> When all the appropriate investigations and consultations have been completed, a Minister must decide, and must take responsibility for the consequences of the decision .... That time has now come (DoE 2001, section 3.5).

It could hardly be made any clearer that, with the NPHE, the DoE was leaving the NCHE's notions of 'co-operative governance' as the principle of state-sector relations behind, and was intent on taking direct charge of the implementation of its proposed higher education policy framework.

The objectives and principles of 'steering' were spelled out in the official text of the NPHE. In section 1.1, the NPHE is introduced as providing "an implementation framework and identifying the strategic interventions and levers necessary for the transformation of the higher education system" (DoE 2001, section 1.1). This is followed by a section on "steering mechanisms" for achieving the visions and goals of the NPHE by establishing:

> ... indicative targets for the size and shape of the higher education system, including overall growth and participation rates, institutional and programme mixes, and equity and efficiency goals (DoE 2001, section 1.5).

Evidently, government 'steering' of this kind could not primarily depend on voluntary co-operation by higher education institutions, but would have to involve some element of coercion. However, the adoption of this policy framework did not altogether rule out the need for consultation; the higher education sector would have to be consulted "on the details of implementation or on the outcomes of further investigations that are indicated" (DoE 2001, section 1.6). The DoE also recognised that an incremental

approach would have to be adopted to the development and implementation of key policy instruments, *inter alia* due to "the need to develop a consultative and interactive planning process through dialogue between the Ministry and higher education institutions to underpin the principle of co-operation and partnership" (DoE 2001, section 1.2). But this 'principle of co-operation and partnership' was a long way removed from the NCHE's vision: it did not refer to state-sector relations in terms of 'co-operative *governance*', but only to opportunities for consultation with the higher education sector in the development and implementation of key policy instruments within the given limits of a predetermined official policy framework. The vision proposed by the NPHE was at best one of '*consultative steering*'. But, this should not be confused with the 'co-operative governance' approach proposed by the NCHE.

The nature, scope and trajectory of 'consultative steering' since the promulgation of the NPHE in 2001 is a complex subject which cannot be dealt with in any detail here. The broad outlines of this approach have, however, been helpfully sketched in Chapter 3 of the 2008 HEIAAF Task Team Report. In addition to enacting legislative changes, government 'steering' involved three main 'levers':

> In practice, government has primarily steered the transformation and development of the higher education system since 1997 by means of three levers: planning, funding, and quality assurance (CHE 2008, 47).

Accordingly, the HEIAAF Report differentiated four dimensions of government 'steering':

- 'steering' by legislative changes;
- 'steering' by planning;
- 'steering' by funding; and
- 'steering' by quality assurance.

The extent to which government 'steering' involved consultation and/or 'coerced co-operation' of the higher education sector varied at different stages and also between the different dimensions. Significantly, the HEIAAF account and analysis shows that the manner in which, and extent to which, such consultation took place, had a major impact on the relative legitimacy of government 'steering' within the higher education sector and/or its rejection as illegitimate 'interference'.

We can briefly note the HEIAAF Task Team's account of the key elements of this process of 'consultative steering', as well as its comments and assessments in each case:

(i) 'Steering' by Legislative Changes:

The *Higher Education Act* was amended every year between 1998 and 2003. This included enacting powers for the Minister to intervene in governance crises of 'failing' institutions of higher education by appointing Assessors and Administrators. The Minister was also given sole authority to establish a particular higher education institution, after consultation with the CHE, while provisions were also made for mergers and incorporations (CHE 2008, 49-50).

The HEIAAF Report noted that, to begin with, the higher education sector had interpreted these legislative amendments for purposes of institutional crisis management by the Ministry as having negative implications for institutional autonomy, but over time such concerns appeared to have abated and "the HEIAAF submissions did not highlight them as particularly problematic" (CHE 2008, 49). Similarly, while at the outset higher education institutions had levelled accusations of micro-management against the DoE, "a few years on there seems to be wide acceptance that standard approval and reporting provisions support the consistent public accountability of [higher education] institutions" (CHE 2008, 49). The HEIAAF Report commented:

> From their reactions to the amendments, it appears that higher education institutions were troubled first, by government's apparent assumption that accountability is to be achieved by central directive in preference to any other means; and second, by the systemic application of 'correctives' to all institutions where many have not defaulted …. For the Task Team, the abating of contestation about the legislative amendments over time suggests that government has been more effective in explaining its motives after the fact, than in diligently pursuing transformation by co-operative means (CHE 2008, p.50).

The HEIAAF Task Team's own position on this score was somewhat ambivalent: on the one hand, it shared the higher education sector's concerns with the systemic implications of ad hoc interventions in order to salvage 'failing' or 'mismanaged' institutions. Indeed, it made this concern one of its final recommendations in relation to particular forms of steering:

> In relation to steering through legislative amendments: government should recognise that it may not always be appropriate to deal with mismanagement and governance difficulties in particular institutions through measures which target the whole higher education system as a 'problem case'. The key criterion for blanket stipulations should be system-wide gains in accountability (CHE 2008, 78).

On the other hand, its more specific findings and comments suggested that it considered the problem with state 'steering' through legislative amendments to have been primarily that of a lack of consultation, rather than relating to the systemic nature of state-sector relations.

This HEIAAF assessment left some key questions unanswered:

- to what extent can the 'abating of contestation about legislative amendments over time' be taken as evidence that 'government has been effective in explaining its motives after the fact'?;
- to what extent did this apply to the higher education institutions concerned, as well as to the sector more generally?; and
- what grounds are there to assume that further interventions of this kind will not elicit similar protests, or worse?

What is clear is that consultation of any kind played little or no part in these instances of 'steering', which could be better characterised as providing a legislative basis for government control and 'interference'.

(ii) 'Steering' by Planning:

Since 2000, this involved the partly overlapping processes of reconfiguring the higher education landscape through institutional mergers and incorporations, academic programme and qualification planning (the Programme Qualification Mix, 'PQM exercise'), and student enrolment planning (see CHE 2008, 50-51). As Symes observed, the process of institutional mergers and incorporations, in particular, "was ultimately a mandatory one …. As such, it effectively set aside institutional autonomy to achieve the greater good of a transformed 'fitness of purpose' of institutions to meet national policy goals, priorities and targets" (Symes 2005, 9-10).

The HEIAAF Report noted that the process of institutional mergers and incorporation was 'unquestionably' an enforced one that not only negated

institutional autonomy in principle, but in practice did so without proper consultation with the affected institutions:

> Ultimate decisions did not appear to flow from sustained system consultation, or from optimal consultation with individual (especially, affected) institutions …. The CHE's central recommendation … was rejected in favour of NPHE strategies for programme and infrastructural co-operation, and for institutional incorporations, mergers and the development of new institutional forms …. Steering of restructuring has been centrally driven and sometimes unduly politically influenced (CHE 2008, 51-52).

The HEIAAF Report actually went on to add the comment that the legislated process of institutional mergers and incorporation "departed, albeit temporarily, from the policy tenets of co-operative governance" (CHE 2008, 51). However, this must be considered either a massive understatement or a misunderstanding insofar as the DoE, at least since its adoption of the NPHE, was no longer committed to the principles of 'co-operative governance'. The question, if anything, must be whether the process of institutional mergers conformed to a notion of 'consultative steering'.

Despite the strong sectoral criticisms of enforced mergers and incorporations as infringements of institutional autonomy, the HEIAAF Report observed that this had been tempered by the fact that "the higher education sector broadly understood and supported the need for transformation of the higher education landscape" (CHE 2008, 52). Accordingly, the broad legitimacy of institutional mergers was accepted, if not the high-handed treatment of the merged institutions which had been seriously disrupted and, in various ways, disadvantaged.

Interestingly, the HEIAAF Report came to different conclusions with regard to a less prominent example of 'steering' by planning than that of institutional mergers and incorporations – that of programme and qualification planning, including the PQM exercise. Other observers also singled out the PQM exercise and similar instances of 'steering by planning' as especially problematic for the higher education sector:

> These developments provoked particularly strong reactions from elements within the sector. The PQM, for example, has been referred to as an 'inappropriate intervention' that represents the tipping over of state steering into state interference (Symes 2005, 9).

In the view of the HEIAAF Report, "the PQM provided a most unsatisfactory example of steering using the planning lever" (CHE 2008, 53). The underlying reason for this was that programme and qualification planning involved core academic activities at the heart of traditional concerns of universities with academic freedom and institutional autonomy:

> Programme and qualification planning was perceived as a different order of intervention which limited academic freedom, institutional autonomy and entrepreneurial response and, as such, was highly controversial. Certainly, the DoE's PQM exercise gave strong signals of intensified steerage of the system (CHE 2008, 52).

In this regard then, the HEIAAF Report concluded that "perceptions of unaccountable system intervention and development, bordering on interference and violation of academic freedom, are unsurprising" (CHE 2008, 53). However, this conclusion still pulled its punches: it should be noted that it was concerned with 'perceptions' by the higher education sector, while refraining from a categorical judgement; it was also unclear whether the objection concerned 'steering by planning' of core academic activities as such, or whether it was primarily concerned with the *unaccountable* nature of such systemic intervention.

The HEIAAF Report was more positive about the student enrolment planning process. In 2004, the DoE's initial proposals, especially the notion of 'enrolment caps', had sparked a negative sectoral reaction. Subsequently though, the Ministry accepted the CHE's advice for a differentiated enrolment planning approach, committing the DoE to discussions with individual higher education institutions. These engagements had been more positively received (CHE 2008, 53).

The overall comment of the HEIAAF Report was that, where this did not infringe on core academic activities, higher education institutions were prepared to go along with the DoE's 'steering by planning' approach, if with considerable qualifications:

> While institutions have, in the final analysis, been shy of declaring outright instances of government interference, and while they have acknowledged the need for strong forms of state regulation to address the large task of reconstruction, the overall tenor of their critique is that government's mode of implementation has been too centralised, oftentimes opaque, too technically and

> managerially oriented, and inadequately attuned to social, resource, regional, local and institutional contexts (CHE 2008, 53).

If this was, indeed, '*consultative* steering' by planning, then the higher education sector evidently did not take responsibility for having much of a role to play in that regard.

(iii) 'Steering' by Funding:

This centred on a new funding framework, announced in 2003 and introduced from 2004 to replace the old SAPSE (South African Post-Secondary Education) funding system, with funding henceforth serving as a key steering lever.

The HEIAAF Report noted that, while the former SAPSE funding formula, in particular the substantial block grant allocations, did not explicitly seek to steer the higher education system towards national priorities, the new funding framework's approach represented a significant break by regulating institutional choices:

> The Task Team understands the new funding framework to have intentionally moved institutional developmental trajectories further from the ambit of fully autonomous decision-making and more within the ambit of national imperatives as defined by the state (and the Constitution) …. For example, national norms and benchmarks now inform the funding of teaching and research outputs. Also, block grant allocations have decreased as a proportion of the total allocation to institutions in favour of increased proportions for earmarked funding (CHE 2008, 55).

Insofar as South African universities had always substantially depended on state funding, it is perhaps the *absence* of explicit 'state steering' under the former SAPSE funding formula that requires explanation; certainly, the HEIAAF Report did not raise any objections, in principle, to the move towards 'steering' under the new funding formula. Instead, it identified the lack of effective consultation as a major concern for the higher education sector:

> It is of great concern to the sector that there has been no effective consultation on government's prioritisation exercises that have resulted in the allocation of funds to the different components of the funding framework, and to new categories of earmarked funding (CHE 2008, 56).

The HEIAAF Report went so far as to characterise this as the beginnings of 'political interference':

> The Task Team notes growing trepidation on the part of some that such cases signal the beginning of direct interventions by the Minister in favour of particular institutions, without consultation with the sector. Thus, some allocations of institutional restructuring funds are seen to have been announced, rather than explained, by the DoE, leading to unease about possible political favour and even the possible condoning of mismanagement in some instances (CHE 2008, 56).

Intriguingly, the HEIAAF Report added a cryptic comment that 'political interference' of this kind raised concerns "about the extent to which government is exercising *its* democratic accountability" (CHE 2008, 56). This comment could be taken as suggesting a concern with the *constitutional* grounds of direct government interference of this kind. However, the Report did not further develop or explain this concern. Instead, it concluded:

> Unquestionably … where government allocates money for specific purposes – rather than a block grant – it must pro-actively explain why it does so and be willing to engage in dialogue with higher education institutions on its funding decisions (CHE 2008, 57).

In effect, this amounted to a call for '*consultative* steering' by funding. However, it is difficult to see what the significance of that might be in this context. Previously, the HEIAAF Report had noted that when the Ministry's "apparent power for unilateral decision-making was sharply contested by the sector … a concession was made by the Ministry that major changes to the Ministerial Statement would be subject to consultation with the sector and the CHE". The Report added a footnote to the effect that "the CHE was not consulted on this concession, nor informed that this would be the procedure [to be] followed" (CHE 2008, 48 – note 173).

(iv) 'Steering' by Quality Assurance:

Regulation of quality assurance was delegated to the HEQC, constituted within the CHE, as an independent statutory body.

The HEIAAF Report noted that there had been some concerns from higher education institutions that the HEQC's work could infringe on academic freedom,

or could endanger institutional autonomy. In principle, the Task Team shared this concern:

> Quality assurance as a regulatory form potentially comes closer to infringing upon processes at the heart of academic decision-making than either planning or funding, since it involves making judgements – and judgement calls – about what is academically acceptable (CHE 2008, 61).

The Report also referred to allegations that the HEQC had shifted from its early emphasis on capacity development to a tougher accountability regime, especially as its accreditation work and national reviews got underway. Even so, the Task Team considered that 'steering' by quality assurance, "if conducted within proper and agreed boundaries … can add value to the academic process" (CHE 2008, 61). The Report also found that this relatively positive assessment of 'steering' by quality assurance was shared by the higher education sector:

> HEQC steering appears to have been perceived by the sector as relatively more acceptable than some of its DoE equivalents (CHE 2008, 58).

Taken together, this amounted to something of a paradox: the HEQC's work on quality assurance touched on core academic activities, yet this tended to be more positively perceived by the higher education sector compared to other instances of 'steering', which were opposed as state 'interference'. The HEIAAF Task Team's explanation for this apparent anomaly is particularly illuminating. The Report attributed the more positive perception of 'steering' by quality assurance, *inter alia*, to the following factors:

> First, the CHE-HEQC, rather than the DoE, regulates quality assurance as an independent statutory body. Second, the HEQC has since its inception operated on the principles that higher education institutions retain primary ownership of quality, and that all policy frameworks are extensively consulted with the sector and its stakeholders (CHE 2008, 58).

Moreover, the more positive perception of the HEQC's regulation of quality assurance had beneficial consequences for state-sector relations:

> Many in the sector accept that the HEQC's work has begun to positively alter institutional awareness, behaviours and operations in relation to quality. They comment that audits have helped to foster a greater link between institutional planning, resource allocation, and quality assurance (CHE 2008, 58).

It appears that the involvement of the HEQC, as an independent statutory body, did not so much complicate the process of 'steering' by quality assurance; instead, it had resulted in relatively more co-operative state-sector interaction compared to other instances of more direct state 'steering'. The HEIAAF Report's own comments on this noted "the relatively low levels of contestation around quality assurance as a steering lever" (CHE 2008, 59). But, it seems to attribute this primarily to the particular style and approach adopted by the HEQC itself:

> Much appears due to the HEQC's largely consultative style and stated intentions to balance improvement and accountability roles, and build a culture of self-managed evaluation to support self-accrediting institutions (CHE 2008, 59).

More generally, though, this must raise questions relating to the NCHE's original rationale for the role of 'buffer bodies' in mediating the threat of 'political interference' in state-sector relations in higher education. What appears from the HEIAAF Report's survey of the different dimensions of state 'steering' is that in those cases (whether legislative action, planning, or funding) where this involved direct interaction between the DoE and higher education institutions, such 'steering' typically tended towards political 'interference', especially when prior consultation was lacking. However, in the instance of 'steering' by quality assurance, where this was mediated by the HEQC as a 'buffer body', this resulted in more co-operative interaction. On the face of it, this suggests support for the NCHE's original proposal of a 'professional' HEC, rather than the hybrid and emasculated CHE actually introduced instead.

(v) The Overall Trajectory of 'Consultative Steering':

Having differentiated the dimensions of 'steering' in relation to the various levers of legislative changes, planning, funding, and quality assurance, and having assessed the various complications and achievements of each of these in turn, the HEIAAF Report had some difficulty in coming to an overall characterisation and assessment of 'consultative steering' under the NPHE since 2001. Early on, the Report had

observed that there were significant differences in stakeholder perceptions of the function and objective of consultation in the official 'steering' process:

> Stakeholders apparently disagreed on the function of consultation in higher education governance. At the extremes, different parties might see it either as a procedural step on the way to independent decision-making by designated authorities, or as a substantive step giving content to shared decision-making or co-determination (CHE 2008, 23).

But this was not taken up and further developed, following the survey of the different dimensions of 'steering'. Instead of an analytical diagnosis identifying key trends in policy implementation and/or the underlying dynamics affecting these, the HEIAAF Report offered a rather haphazard and quite vague catch-all listing of various developments:

> Steering does not appear to have routinely become interference or to have regularly violated academic freedom and institutional autonomy. Yet, there have been undeniable shifts – subtle and not so subtle – in government's mode of steering. State demands on institutions have proliferated, often in a peremptory manner; there have been instances of government approaching interference, raising considerable alarm; and red flags as to future dangers have been raised …. The mergers are beginning to settle, although many challenges of academic identity and quality remain. Government has embarked on a more differentiated and nuanced approach to matters like enrolment planning, responding positively to criticisms and concerns of an early generic approach imposed in what appeared to be a unilateral fashion. The establishment of HESA as a single sectoral body has marked the advent of an improved working relationship between that body, the DoE, and the CHE (CHE 2008, 61-62).

Though this account was supposed to be concerned with the general issue of 'consolidating the regulatory environment' of higher education governance, it did not attempt to provide any systematic analysis of why 'steering' succeeded better in some instances (for example, that of quality assurance), even though these concerned core academic activities, while in other instances (for example, that of programme and qualification planning) it provoked charges of government 'interference'. It did not critically address the inherent limitations of '*consultative* steering', or the relevance of

'buffer bodies' in mediating state interference. Above all, it no longer even considered the relevance of 'co-operative governance' in terms of the NCHE's original vision, as distinct from the NPHE's approach of government 'steering'. Indeed, it would appear that the HEIAAF Task Team did not realise that, along with the NPHE, official policy had effectively renounced the assumptions of a 'co-operative governance' approach to higher education governance.

4.4 Facing Up to the Realities of an Unconsummated Union: The Conditions for Sustainable 'Co-operative Governance' in Higher Education

At this point it may be worthwhile to recapitulate the interim conclusions of our investigation regarding the basic status and significance of the notion of 'co-operative governance' in higher education. In section 2.3.3 above, we found that the NCHE's proposal for 'co-operative government' could best be considered as a *call* for a collectively self-binding declaration of commitment to democratic governance in higher education. However, the status and force of any such founding declaration of commitment to 'co-operative governance' in higher education had to depend on whether, and to what extent, that call would be taken up by government and other stakeholders. In section 4.2 above, we found that in its official policy determinations the DoE, despite some general declarations that it accepted and endorsed the NCHE's proposal for a 'co-operative governance' approach, in effect disavowed and discarded the Commission's proposed 'co-operative governance' approach to higher education governance. At the same time, higher education institutions and other stakeholders, for their part, refrained from significantly engaging with this official process of policy determination, while also not initiating independent initiatives or sectoral responses in support of the NCHE's proposal for 'co-operative governance'. Taken together, this amounted to an effective, though unacknowledged, disavowal of the collectively self-binding commitment to 'co-operative governance' in higher education for which the Commission had called. In practice, implementation of the NPHE, as summarised in section 4.3 above, took the form not of 'co-operative governance' but of different varieties of consultative/coerced 'steering'.

The upshot has been a persisting confusion in policy discourses and public discussion on the actual status and function of the 'co-operative governance' approach to higher education governance, as proposed by the NCHE. Time and again, it is claimed in official statements and/or assumed in policy discussions and analyses

that 'co-operative governance' somehow remained the normative framework for higher education governance. More often than not, though, this was not borne out by the specifics of actual policy articulation and implementation. The consequent confusions regarding the supposed, as against the actual, status and functions of 'co-operative governance' as a normative framework for the governance of higher education, has been well described in the 2008 HEIAAF Task Team's account of the submissions it received from various stakeholders in the higher education sector:

> The prevailing policy framework was adopted at a time when there was a particular air of consensus in SA higher education. Since then, unease has grown about co-operative governance as a concept, imperfectly understood and enacted …. This was exemplified by the HEIAAF submissions, which revealed – albeit 'between the lines' – interpretative variance and even confusion about co-operative governance. At system level, submissions by regulatory agencies (SAQA [the South African Qualifications Authority] … [and the] HEQC) referred to these agencies' commitment to consultation within the framework of allocated roles and responsibilities, but failed to acknowledge that other stakeholders questioned their efforts at times. At institutional level, submissions by higher education institutions were rarely the outcome of an internal process; [and] staff bodies and others were critical in their submissions of managements who failed to engage them in governance matters (CHE 2008, 22-23).

Altogether, this was a far cry from the NCHE's vision, testimony that the collectively self-binding commitment to 'co-operative governance' in higher education, called for by the Commission, was never actually put into place.

In retrospect, it would appear that the persisting confusions about the official status of 'co-operative governance', as compared to the actual implementation of higher education policies, may in large part have been due to the fact that the official *Green Paper* and *White Paper* did not reject or disavow it in so many words, but declared that the DoE accepted and supported the NCHE's proposed 'co-operative governance' approach. Combined with the enduring appeal of the notion of 'co-operative governance', linked as that was with the founding moment of a post-apartheid democracy, the official declarations of support for 'co-operative governance' continued to be taken at face value, even when they were increasingly not borne out by the details and thrust of official policy determinations and the NPHE. When the issue was specifically raised, investigators would time and again conclude, as already cited in

preceding sections, that the actual practice of state-sector relations in higher education did *not* conform with 'co-operative governance' as the supposed official policy framework. Thus, in 2002 the CHE Task Team on Governance in Higher Education concluded that "the concept of co-operative governance, while serving a key role in formulating a democratic higher education system, is now insufficient" (Hall, Symes and Luescher 2002, 107). In its subsequent policy advice to the Minister on the state of co-operative governance at public higher education institutions, the CHE stated that governance difficulties at institutional level were connected to lack of conceptual clarity across the system (CHE 2008, 23). In 2005, Symes (one of the co-authors of this CHE Report) spelled out the implications of that finding more categorically:

> Co-operative governance is a configuration of governance linked to the formal framework of the state in SA, and remains the formal policy for governance of South African higher education. However, co-operative governance is not the current reality of the state-sector relationship: the state appears to have modified it in practice (Symes 2005, 25).

And in 2008, the HEIAAF Task Team reported that there is "a cumulative sense amongst higher education institutions … that government's commitment to consultation has weakened after 1997, and that lack of consultation has, at times, approached unacceptable levels" (CHE 2008, 50).

Typically, these repeated findings of the defects or absence of 'co-operative governance' in practice led to calls for its clarification and/or reinstatement as the presumed normative framework for higher education governance. Thus, a main conclusion and recommendation of the 2002 CHE Task Team called for revisiting the notion of 'co-operative governance':

> The concept of co-operative governance, while serving a key role in formulating a democratic higher education system, is now insufficient. It should be supplemented by a clear statement of principles which define both the substantive elements of institutional autonomy and the role of the state in steering the higher education system as a whole, as well as the extent of the state's authority over the procedures for setting policy and funding the sector (Hall, Symes and Luescher 2002, 107).

The CHE, in its policy advice to the Ministry, recommended the promotion of debate on the vision and principles underlying the current policy and legislative framework

for higher education governance (Symes 2005, 16). In due course, this resulted in the CHE's high-profile HEIAAF Project (2005-2008). In the event, following an elaborate process of elicited submissions, regional and national workshops, commissioned research reports, and extensive deliberations, the HEIAAF Task Team concluded, once again, that what was required was even further clarification of this concept:

> *Conclusion 1:* Clarification of the concept and status of co-operative governance would promote effective co-operation between the higher education actors (CHE 2008, 71).

Otherwise, the HEIAAF Report's own interpretations of the key notion of 'co-operative governance' served rather to confirm the prevailing confusion of different 'minimalist' and 'maximalist' interpretations:

> The policy of co-operative governance: on a minimalist view, government may believe that it has consulted sufficiently with the sector to enable it to proceed with what it sees as its own sphere of decision-making. On a maximalist view, institutions may believe that government departs on occasion from the policy framework of higher education and interferes in areas of decision-making that are appropriately those of institutions (CHE 2008, 64).

As an answer to its self-imposed task of clarifying the significance and status of 'co-operative governance' as the supposed official policy framework, this pretty much amounted to a confession of failure.

The foregoing account of the post-NCHE trajectory of 'co-operative governance' suggests a different perspective on this prevailing confusion. If it is taken seriously that in the event the NCHE's call for a collectively self-binding founding commitment to 'co-operative governance' had *not* been put into place, but was in practice overtaken by the NPHE's framework for consultative and/or coerced 'steering', then the real question concerns the significance of the continuing dysfunctional rhetoric of 'co-operative governance'. This key question was already perceptively posed by the 2002 CHE Task Team on Governance in Higher Education:

> As a result of the way that the practice of governance has evolved … the concept of co-operative governance, as defined in the earlier 1990s, is now in danger of becoming a hindrance that confuses policy and inhibits the development

> of good practice. For many, co-operative governance has become a somewhat empty phrase that means little more than 'co-operation in governance', or even 'corporate governance' (Hall, Symes and Luescher 2002, 108).

In this perspective, the continuing rhetoric of 'co-operative governance' involves a double mistake: first, it confuses the actual policy framework of higher education governance that has been in place for a decade and more (that of consultative and/or coerced government 'steering') with a different normative framework, that of the NCHE's vision of 'co-operative governance' which had never actually been put into place. Second, in practice this confusion has become a hindrance to the correction of existing policy and the development of possible alternatives. What is needed, instead, is to face up to the reality that the shared foundational commitment to 'co-operative governance' of higher education, as called for by the NCHE, has remained an unconsummated union and, on that basis, to consider what the preconditions for its establishment might be.

4.5 Towards Identifying the Conditions for Sustainable 'Co-operative Governance' in Higher Education

Unfortunately, the 2008 HEIAAF Task Team Report is characterised by a number of misconceived constructions, conflating its own proposals for 'continuous engagement' with what it takes to be the significance of 'co-operative governance', as well as the trajectory of the official policy framework for consultative and/or coerced 'steering'. However, the Report did come to some conclusions worth taking seriously in relation to the prospects, if any, of reviving the notion of 'co-operative governance'. The basic question must be that of identifying the conditions for sustainable 'co-operative governance' of higher education in the South African context. A first step towards that would have to involve a survey of the abiding constraints on, and obstacles to, possible moves aimed at realising the NCHE's vision of 'co-operative governance'. In this regard, the concluding section of the HEIAAF Report includes some observations on current factors at play in state-sector relations in the governance of higher education worth citing at some length:

> There are consistent factors at play which do impact negatively on the regulatory environment and which could serve to undermine academic freedom … in the longer run. These include constrained capacity, all the way from limited

> state resources for on-going, in-depth consultation with institutions, through sometimes shaky available data for robust decisions, to fiscal and human resource constraints. There is poor co-ordination across government departments and inside higher education, leading to such anomalies as earmarked funding to develop pockets of higher education in the absence of a comprehensive human resource needs analysis; and a PQM in advance of an embedded quality assurance system. There has been general system-change overload that has placed severe burdens on institutions, and in relation to which a uniform regulatory insistence makes little sense (CHE 2008, 62-63).

Even if partial and unsystematic, this diagnosis of the pathologies currently affecting the regulatory environment of higher education must raise serious questions regarding the inherent limits to official policy implementation in these circumstances. The HEIAAF Report provides an equally bleak assessment of the likely prospects of the official policy approach addressing these issues and constraints more constructively:

> It is necessary to anticipate the likely unfolding of the higher education policy trajectory in the short and medium terms …. There is little sense of an approach of continuous engagement with institutions in the process of developing regulatory areas …. A preoccupation with indicators and targets is evident, without reference to the corresponding demands of capacity and differentiated policy for their implementation …. For the Task Team, it is important to recognise that these remain at present unresolved (CHE 2008, 63-64).

In short, going on this account it would be unrealistic to expect the implementation of the official policy framework in terms of government 'steering' to change in ways that would positively affect the conditions of sustainable 'co-operative governance'.

A significant part of the question must be what the higher education sector's own contribution towards the conditions for sustainable 'co-operative governance' could still be. But, as we have seen in section 4.2 above, the failure of consummating a shared founding commitment to 'co-operative governance' along the lines envisioned by the NCHE cannot be attributed to its effective disavowal at the level of official policy-making only. Higher education institutions and other stakeholders in the higher education sector also did not follow through on the NCHE's call for a shared founding commitment to 'co-operative governance'. So, to repeat: what could their

contribution towards the conditions for sustainable 'co-operative governance' still be? In this regard, assessments of current trends and future prospects have also been rather bleak. Thus, the 2002 CHE Task Team on Governance in Higher Education provided a sobering typology of institutional governance based on a sub-set of South African universities. It distinguished between (i) 'contested', (ii) 'management-focused', (iii) 'democratic', and (iv) 'democratic, well-managed' institutions. On closer scrutiny it appears that 'contested' institutions served as a euphemism for 'failing' institutions experiencing crises of governance, while 'management-focused' institutions referred to those characterised by 'managerialist' transformation, and 'democratic, well-managed' institutions applied to a minority of relatively marginal institutions. More specifically, the 2002 CHE Task Team Report was also highly critical of such core components of institutional governance as the Senate sector:

> … the Senate sector in SA higher education is currently a passive reflection of the status quo rather than an active champion of substantive autonomy. To counter this trend, it seems important to reassert those aspects of the 1997 White Paper and [Higher Education] Act that entrenched, for the first time, the constitutional right to academic freedom in higher education across the system, and a careful balance between the civic accountabilities of Councils and the academic responsibilities of Senates (Hall, Symes and Luescher 2002, 93).

Evidently, in the view of this Report, the higher education sector was not making adequate use of the governance provisions actually accorded to them by the 1998 *Higher Education Act.* Similarly, Symes reported:

> At the CHE Colloquium on *Ten Years of Democracy and Higher Education Change* in November 2004, there was limited optimism about the chances of significant success for self-regulation. This was because the sector has no history of regulating identified areas and unacceptable practices (Symes 2005, 21).

Likewise, the 2008 HEIAAF Report found that the higher education sector's contributions to transformation in higher education are inadequate (euphemistically termed, 'still evolving') and concluded that specific modes of co-operation and participation needed to be developed among higher education institutions, and between institutions, government, regulatory agencies, and other stakeholders:

> These should include flexible forms of engagement, as well as institutionalised channels, such as:
>
> - Representations by higher education institutions and stakeholders to the Parliamentary Portfolio Committee on Education …;
> - A system-wide higher education process and/or forum (or fora) to mobilise dialogue between actors; and
> - The establishment or enhancement of academic freedom committees, or similar structures, in higher education institutions (CHE 2008, 74).

Elsewhere, the HEIAAF Report proposed further variations or additions:

> - The development of appropriate system-wide representative structures for academic and other stakeholders to enable optimal consultation and engagement; and
> - Available capacity for optimal consultation and engagement between government, the sector, and stakeholders (CHE 2008, 66).

It cannot be said that these proposals amount to either a specific 'package' or a coherent diagnosis. Significantly, they do not touch on the relevance or possible role of HESA, which should surely be a main component in the kind of system-wide representative structures for stakeholders in the higher education sector envisaged here.

Likewise, the HEIAAF Report was also silent on the relevance of the CHE, either in its current format or along the lines of the dual 'buffer bodies' initially proposed by the NCHE. Some of its proposals, such as that for "a system-wide higher education process and/or forum (or fora) to mobilise dialogue between actors", seemed to hint at that, but refrained from referring more specifically to the status and functions of the bodies concerned. In this regard, the commissioned HEIAAF Research Report by Jonathan has been more helpful. In relation to a possible 'compact' – not unlike the shared commitment to 'co-operative governance' for which the NCHE called, involving functionally differentiated representative bodies from the higher education sector – Jonathan stated:

> The sectoral body HESA can and should operate straightforwardly as [an] expert interest group – the collective voice of the academy: were the CHE or an equivalent body not to exist, it could simply be ignored by government as

> representing stakeholder *vested* interests …. It, therefore, serves all parties to the collaborative compact – sector, statutory body, and government – to minimise friction and maximise dialogue in the interests not only of the public which they all serve through higher education, but also of the core values of the academy. The third, and key, state role player in that compact is, of course, the academy itself, through its institutions, its academics individually, and its stakeholder bodies (Jonathan 2006, 9-10).

Jonathan's proposals are premised on the underlying distinction between 'state' and 'government', more specifically that of the distinction between the *political* function of bodies representing particular vested interests and the *administrative* roles of officials or statutory bodies serving the public interest (see section 2.3.4.3 above). In terms of this distinction, she argues that:

> … given the mixed feeling that statutory bodies inevitably evoke in constituencies who interface with government through them (and given the temptation for governments sometimes to use them as an expert extension of the bureaucracy), it is important to insist that the core question of *academic freedom* applies as much to higher education's statutory body as it does to the academy. On this issue those parties have a commonality of interest, just as sector and statutory body, under 'normal conditions', have a common interest in safeguarding the *institutional autonomy* of higher education institutions in order to protect core academic values (but not privileges) (Jonathan 2006, 10).

Along these lines, it may be possible to conceive of a functionally differentiated sectoral configuration – for example, with HESA representing the vested interests of higher education institutions, next to the CHE as a primarily consultative and advisory forum; statutory bodies with official functions and powers like the HEC, originally proposed by the NCHE; national organisations representing the academic Senate sector, senior professoriate, and academic staff associations, along with a federation of institution-based academic freedom committees; representatives of higher education-based unions and student organisations; and institutional forums and other stakeholders – which might have the necessary legitimacy and capacity to enter into a 'compact' with government on the 'co-operative governance' of higher education. Evidently, though, we are a long way removed from the circumstances in which anything like this could be put into place.

4.6 Revisiting 'Co-operative Governance' as a Founding Constitutional Principle?

We can now return to the original issue of on what basis HESA, and the higher education sector more generally, might respond to such recent interventions by the Ministry of Higher Education as the legislative amendments to the *Higher Education Act* and the proposed new reporting regulations imposed on universities. Both of these developments have been perceived as serious threats to state-sector relations, and contrary not only to a supposed right to institutional autonomy but also to the principles of 'co-operative governance' as a normative framework of higher education policy. In section 1.1 above, it was argued that in South African circumstances, and even more so in the post-apartheid context, invocation of a right to institutional autonomy was misconceived and that it would be more appropriate to look to the founding notion of 'co-operative governance' as a possible basis for a sectoral response to perceived political interference. The key question to be investigated was: *what are the relevance, legitimacy and prospects for a foundational framework of 'co-operative governance' in the light of recent and current developments?* In reconstructing the genealogy of 'co-operative governance', we found that the origins of the foundational framework for higher education governance can be traced back to the call of the NCHE for a collectively self-binding declaration of commitment to an approach of 'co-operative governance' in higher education and in state-sector relations. But, we also found that, though not openly acknowledged as such, a shared commitment to 'co-operative governance was not actually put into place by the post-NCHE process of official determination of the NPHE as the new higher education policy framework. Instead of the 'co-operative governance' approach to higher education governance proposed by the NCHE, the official implementation of the NPHE took the form of consultative and/or coerced government 'steering'. Indeed, on critical examination it is difficult to discern how likely conditions for sustainable 'co-operative governance' in higher education under South African circumstances might be put into place. What, then, in the light of this account might be a possible basis for responding to even further political interference?

Arguably there are at least three different perspectives possible on the relevance of the above genealogy and trajectory of 'co-operative governance' for this key question:

(i) A Narrowly Focused Perspective on the Level of Official Policy Articulation, Development and Implementation:

In this perspective, the origins of the notion of 'co-operative governance' in the NCHE process has become a matter of 'historical' interest which can have little or no standing compared to current determinations of official policy. The NCHE's vision of a 'co-operative governance' approach in higher education governance has been superseded and left behind by the subsequent elaboration of the official higher education policy framework in terms of the NPHE and its implementation. At best, the NCHE process may be regarded as evidence of the DoE's willingness to allow an initial stage of inclusive consultation, but what must prevail are the government's democratic mandate and its official prerogative to determine official policy, including its responsibility for higher education governance. It may be noted that what is lost in this perspective is also the NCHE's analysis of a paradigm shift from 'government' to 'governance', as well as the concomitant distinction between 'government' and 'state'. In effect, in this perspective the post-NCHE trajectory of the notion of 'co-operative governance' amounted to a reversal of the attempted paradigm shift from 'government' to 'governance', and a reinstatement of *government* 'steering' rather than 'co-operative *governance*'. It also amounted to a relapse into the traditional conflation of 'government' and 'state'. But that has been the actual trajectory of official policy articulation, development and implementation in terms of which the notion of 'co-operative governance' can offer little or no basis for any legitimate critical challenge.

(ii) A Broader Contextual and Comparative Perspective on the Dynamics of Higher Education Governance:

Considered in the context of post-apartheid as well as comparable international developments in higher education governance, post-NCHE official policy-making appears as one factor within a more complex set of social, economic and political interactions. Within a general social science perspective, both the emergence of the notion of 'co-operative governance' in the transition to a post-apartheid democracy, as well as the post-NCHE process of government 'steering', appear as dependent variables to be explained in relation to other social and economic changes, including the global emergence of knowledge economies and market-related initiatives. Given our particular concern with the genealogy and relevance of the notion of 'co-operative governance', this broader contextual and comparative perspective has not been much in evidence in the foregoing account. A pertinent example of that

can be found, for example, in the chapter by Muller, Maassen and Cloete, "Modes of Governance and the Limits of Policy" (2006). In their perspective on the post-NCHE process, which places the DoE's articulation and implementation of the NPHE in the context of international comparative trends and market-led initiatives in higher education governance, they come to conclusions like the following:

> Little wonder then that there was, and remains, such confusion about the real direction of the modes of governance with respect to higher education …. We have characterised this direction … as a market-led governance approach with two distinct sub-types: a flexible/managerial sub-type with minor interventionist features, and a deregulatory/interventionist sub-type with substantial market features that may continue to pose threats to the weaker institutions …. It came about as a result of a broader structural set of forces shaping the field (Muller, Maassen and Cloete 2006, 306).

In this account, the self-understanding and stated objectives of government 'steering' are of less consequence than the formation and impact of higher education market forces and the emergence of market-led governance approaches. For present purposes, we need not go into the relative merits of this broader perspective for purposes of academic analysis and theoretical explanation. The relevant question is whether it might provide a basis for a legitimate critical challenge to perceived political interference by the government. And, on that score, it is difficult to see how that might be the case, except at an abstract level and in very indirect ways.

(iii) A 'Constitutional' Perspective:

From a constitutional perspective, a key question regarding the notion of 'co-operative governance' must be that of its constitutional provenance and standing: does 'co-operative governance' amount to a constitutional principle and, if so, what are the implications and consequences of that? The broad question of its constitutionality provides a relevant and independent perspective on the status and legitimacy of 'co-operative governance'. Neither the NCHE's notion of 'co-operative governance' in higher education governance, nor the post-NCHE process of government 'steering' should necessarily be taken at face value or in terms of their own self-understandings: in both instances, the question remains whether, or to what extent, these conform with constitutional requirements. As we have seen in the foregoing account, the 'constitutional connection' of the notion of

'co-operative governance' has occasionally featured in discussion, but has rarely been an explicit and major concern. In section 2.3.3 above, it was argued that the NCHE's proposed notion of 'co-operative governance' could best be understood as a founding declaration of commitment to the democratic governance of higher education in a post-apartheid South Africa, but that the status and force of such a founding declaration of commitment was by no means clear. In section 2.3.4.4 above, we saw that the NCHE identified the new Constitution as the relevant source for this founding declaration in two ways: by invoking the inclusive negotiated settlement which characterised South Africa's post-apartheid transition and issued in the new Constitution, and by referring to the specific constitutional principle of 'co-operative government' entrenched in the Constitution. In the view of the NCHE, then, its proposed approach of 'co-operative governance' was grounded in the Constitution itself, and expressed a constitutional principle that applied to other contexts of intergovernmental relations as well as to higher education. In section 3 above, we considered the notion of 'co-operative government' as a general constitutional principle applying to intergovernmental relations; and in section 3.2 above, we compared that with the significance and status of 'co-operative governance' in higher education governance and found that, as the NCHE Report had noted, that the constitutional principle of 'co-operative government' did apply to the higher education sector as well. Unfortunately, the NCHE Report did not spell out the more specific implications and consequences of the constitutional principle of 'co-operative government' for higher education governance. In section 3.3 above, we considered whether the terminological variance between 'co-operative *government*' and 'co-operative *governance*' were of any consequence in this context, and found that the significance and implications of 'constitutional government' as a constitutional principle, understood as a shift from hierarchical 'levels' to interactive 'spheres' of government, closely corresponded to the assumption of a paradigm shift from 'government' to 'governance' underlying the notion of 'co-operative governance'. On this basis we concluded that the general implications and consequences of the constitutional principle of 'co-operative government' did extend to the significance of 'co-operative governance' in higher education.

Few investigators and commentators have taken up the issue of 'co-operative governance' as a possible constitutional principle, and have done so only in passing when they discussed it at all. No doubt, the recognition of academic freedom as a basic right in article 16(1)(d) of the Constitution should be of major significance in

this regard, but unfortunately that has not yet been tested in the courts (see section 3.1 above). In general terms, though, few would disagree with Symes that:

> … the proper point of departure for structuring the relationship between state and sector … must be the *Constitution*, which accords institutions a full measure of academic freedom (Symes 2005, 17).

She also suggested some of the implications for a constitutional understanding of 'co-operative governance', including its application to the relationship between government departments and institutions of higher education as 'organs of state' in a passage already cited above:

> The state supervision system in SA was conceived as a system of 'co-operative governance', in which government would not be a single agent but would have a range of roles and obligations in a variety of co-ordinated arrangements. This choice was consistent with the South African *Constitution* which declares that all organs of state (whether these be government departments, or any institution exercising a public power or performing a public function) must co-operate with one another in mutual trust and good faith (Symes 2005, 6).

But she did not develop this suggestion further, or in more specific terms. A relevant and helpful discussion has been that of Jonathan in her HEIAAF-commissioned Research Report. She did not deal directly with the question of 'co-operative governance' as a constitutional principle, but couched that in terms of the basic distinction between *state* and *government*. She was especially concerned to warn against the persistent conflations of 'government' and 'state', which precluded a proper understanding of institutions of higher education as 'organs of state' when that tended to be confused with considering them as 'arms of government'. Constitutionally, government is only one 'organ of state' next to, and in interaction with, other 'organs of state'; institutions of higher education, too, were 'organs of state' to which the right of academic freedom applied and, as such, precisely *not* to be considered as 'arms of government':

> The role of the state, *constitutionally*, is to specify the function of organs of state, to enshrine their duty to co-operate for the public good …. [and] to safeguard their rights (for higher education these are negative rights of immunity

> underpinning academic freedom). *Institutionally*, therefore, the role players in the democratic oversight of higher education are threefold: government and its departmental bureaucracies, relevant statutory bodies, and the higher education sector itself (Jonathan 2006, 8).

Without referring to the notion of 'co-operative governance' as such, Jonathan spelled out some of the relevant implications of this constitutional perspective in rather suggestive terms:

> Co-operation between organs of state would thus imply dialogue between the higher education sector and government, both during the framing of relevant legislation and after its enactment … though final authority lies with the government-of-the-day on behalf of those who elected it. What co-operation does not imply is a passive or simply a reactive stance to legislation on the part of the higher education sector when that legislation affects it directly, nor an absence of critique on other measures in which it can legitimately claim expertise (Jonathan 2006, 7).

It would be instructive to make a systematic analysis and comparison between Jonathan's constitutional understanding of 'co-operative governance', and the official policy framework of consultative and/or coerced 'steering' (see section 4.3 above).

Significantly, the 2008 HEIAAF Task Team Report considered the 'constitutional route' as one of three potential 'routes' towards a revitalised understanding and exercise of a co-operative 'state-sector' relationship in the governance of higher education:

> A first 'constitutional route' is based on public law and theoretical analyses, treating the SA Constitution as the necessary starting point for analysing higher education governance. As [the] supreme law, the Constitution is seen … to create a framework within which (higher) education is to be promoted, and key provisions (academic freedom, institutional autonomy, and rights to education) protected (CHE 2008, 23-24).

This should have provided an important opportunity to develop and explore a 'constitutional' perspective on 'co-operative governance' as a possible constitutional

principle. Unfortunately, as we have noted in various places in the course of the foregoing account, the HEIAAF Report's treatment of this 'constitutional route', and of the various key issues relevant to it, proved to be quite unsatisfactory. Thus, having noted the absence of any relevant tests in the courts, the Task Team blithely proceeded to pronounce that it had difficulty accepting that:

> … the constitutional notion of 'co-operative government' – insofar as government and universities are concerned – is identical or intrinsically connected with 'co-operative governance' (CHE 2008, 24).

And, it did so without providing any comparative account or analysis of the respective meanings of these two terms. Amongst other reasons for objecting to an intrinsic connection between the notions of 'co-operative government' and 'co-operative governance', the HEIAAF Report claimed that "an interpretation that deems universities organs of state, potentially blurs the boundary between 'constitutional' and 'institutional' state" (without explaining what the nature or significance of that boundary was), and that it "seemed inconsistent with [the Task Team's] interpretation of higher education's accountability to society as a third party" (CHE 2008, 25). The HEIAAF Report also did not explain how "higher education's accountability to society as a third party" was relevant to a *constitutional* perspective on 'co-operative governance'.

On the key issue whether 'co-operative governance' should be considered as a constitutional principle, the HEIAAF Report rejected this interpretation in no uncertain terms. The Task Team stressed that it:

> … took co-operative governance, as a policy framework, to be *a policy choice* but *not a constitutional imperative* …. Co-operation is not deemed an obligatory framework of intergovernmental relations between organs of state … as constitutionally defined (CHE 2008, 27 – italics added).

But it did so without explicating what was involved in the distinction between 'policy choice' and 'constitutional imperative', or what it would mean to take 'co-operative governance' as a 'policy choice', especially since it continued to state that "in a democratic society, the elected government is mandated to make policy and allocate resources" (CHE 2008, 27). Conclusion 5 of the HEIAAF Report likewise stated that:

> … policy-makers should carefully distinguish between *constitutional imperatives* and *policy choices* when making and implementing policy (CHE 2008, 72 – italics added).

This conclusion would be intelligible if the HEIAAF Report considered 'co-operative governance' as a constitutional imperative in relation to other more specific policy choices of various kinds. But, since the Task Team was concerned to deny that 'co-operative governance' should be considered a constitutional imperative, it is difficult to know what to make of this conclusion. In short, the HEIAAF Report's treatment of the 'constitutional route' to an understanding of 'co-operative governance' may, for our purposes, best be disregarded.

5 Conclusion

The key question remains whether 'co-operative governance' amounts to a constitutional principle applying to the governance of higher education, in general, and to state-sector relations, in particular. The significance of this question relates to the need for an appropriate and independent basis for possible objections by the higher education sector to recurrent and on-going government interference in the governance of higher education. Some propositions for consideration in this regard:

- An authoritative answer to the issue of 'co-operative governance' as a constitutional principle applicable to the governance of higher education will require the determination of an appropriate test case, also involving clarification of the constitutional right to academic freedom, by the Constitutional Court.
- The NCHE's notion of 'co-operative governance', understood as a possible constitutional principle in conjunction with that of 'co-operative government', provides a relevant historical starting point and frame of reference but does not have independent legal or political standing.
- The NCHE's arguments and proposals for functionally differentiated 'buffer bodies' mediating state-sector relations in higher education, in conjunction with the right to academic freedom being applicable to higher education institutions

as 'organs of state', suggest appropriate lines for developing the application of 'co-operative governance' as a constitutional principle.

- The obstacles to the prospects of moving towards authoritative recognition of 'co-operative governance' as a constitutional principle along these lines include not only the Ministry's official commitment to an alternative approach of consultative and/or coerced 'steering', but also the more general failure on the part of the higher education sector to put key conditions for sustainable 'co-operative governance' into place, as well as the lack of a clear and coherently articulated vision of what that might entail.
- The prospects for a functionally differentiated sectoral reconfiguration which might have the necessary legitimacy and capacity to enter into a 'compact' with government, based on recognising 'co-operative governance' of higher education as a constitutional principle, constitutes a classic 'chicken-and-egg' dilemma: as representative of the vested interests of higher education institutions, HESA, for example, would need to launch initiatives in conjunction with yet-to-be-constituted statutory 'buffer bodies', as well as still-nascent system-wide bodies and organisations representing the academic sector and other stakeholders.
- The immediate question is whether developments such as the 2012 higher education legislative amendments and/or the proposed new reporting regulations for universities provide opportunities:
  (i) for possible legal and constitutional challenges, raising the issue of 'co-operative governance' as a constitutional principle in conjunction with the right to academic freedom; and
  (ii) to initiate more focused responses by relevant organisations and bodies across the higher education sector in support of this issue.

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ABOUT THE BOOK

This discussion document is the result of a literature review commissioned by the Board of Directors of Higher Education South Africa (HESA) in 2013. The primary objective was to develop a document which could assist in stimulating debate and inform and shape HESA's recommendations to the government, as well as develop a 'co-operative governance' framework which might help to restore the primacy of the foundational principles of academic freedom, institutional autonomy and accountability of public higher education institutions (HEIs).

The project was prompted by the 2012 amendments to the Higher Education and Training Act, which significantly extended the powers of the Minister to intervene in the governance of universities. HESA viewed these developments as a 'momentous shift' in the governance assumptions on which the relationship between HEIs and the government is based.

HESA therefore identified the need for a more systematic and inclusive deliberation on 'co-operative governance' that could contribute towards shaping a single voice for universities on this important policy issue. HEIs are therefore encouraged to familiarise themselves and engage with this document, with a view to arrive, over time, at some understanding of the complexity of the issues involved.

ABOUT HESA

HESA represents the 23 public higher education institutions in South Africa. Led by the Vice-Chancellors of these universities, HESA acts to support the higher education sector by advancing and promoting the interests of South African universities, and developing policy positions on matters of higher education.

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