THE LEGAL NATURE OF A UNIVERSITY AND THE STUDENT-UNIVERSITY RELATIONSHIP

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I. INTRODUCTION

This paper deals with the various theories which have developed over the years to describe the legal nature of the student-university relationship. Such a discussion inevitably involves a consideration of the peculiar legal nature of the university itself. In particular the question of whether universities fall within the realm of private or public law may govern the remedies available to the student. And as so often happens, the nature of the available remedies can dictate the nature of the relationship itself.

In earlier days schools were considered to stand in loco parentis to their pupils. In matters of discipline schools were said to be exercising powers delegated to them by the parents of the children. The degree of paternalism to be found in some universities and their rule books suggests that a similar understanding of the student-university relationship might not have been impossible at that time.

More recently, debate has centered on whether the relationship is a purely contractual one or whether the student enjoys a status which he, by virtue of the public nature of universities, can protect by using public law as opposed to private law remedies. This issue is necessarily intertwined with the question of the legal nature of the university and the peculiar dichotomy of its public-private character. That debate may now assume increased importance. Given the public nature of universities, the advent of the Charter of Rights and Freedoms¹ may fundamentally alter the student-university relationship. Students may argue that a university is essentially a public body in order to claim constitutional rights enforceable against it.

II. THE LEGAL NATURE OF THE UNIVERSITY

Universities are legal corporations owing their existence to charter or statute. In Canada, as in other Commonwealth countries, it is normally the latter. Some provinces have one statute governing the incorporation of all universities within the province² while, in others, each

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2 See, e.g., University Act, R.S.B.C. 1979, c. 419; The Universities Act, R.S.A. 1970, c. 378.
individual university is incorporated by a special act. The statutes vary. Some merely establish a basic institutional framework, allocating broad and general powers among the various university bodies; others are more or less comprehensive attempts to regulate all aspects of university life.

As statutory corporations, these universities can do only that which is expressly, or by necessary implication, authorized by their founding statute. Any act not authorized is *ultra vires* the powers conferred upon them and thereby void.

In the United Kingdom universities have traditionally been incorporated by Royal Charter issued by virtue of the Royal Prerogative. Of the major Canadian universities, McGill was so incorporated and is therefore a chartered, not a statutory, corporation. Queen's University at Kingston is in a somewhat peculiar position. It was originally incorporated by Royal Charter. Subsequent confirmation, amendment and reconstruction has been effected by federal legislation. This legislation only repeals the original charter insofar as it is "contradictory to or inconsistent with this Act..." Thus, where the university exercises powers derived from statute, it would seem to be a statutory corporation. Where it exercises those derived from the original charter, however, it may be necessary to treat the university as a chartered corporation.

Universities incorporated by charter have all the powers of a natural person and are not confined to those actions affirmatively authorized by that charter. In addition, it seems that even acts which are expressly prohibited by their charter are not *ultra vires* and void. In *The Case of*

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3 See, e.g., The University of Toronto Act, 1947, S.O. 1947, c. 112; The University of Saskatchewan Act, R.S.S. 1978, c. U-6; An Act Regulating Dalhousie University, S.N.S. 1863, c. 23.

4 See, e.g., An Act Regulating Dalhousie University, S.N.S. 1863, c. 23. There can be considerable difference between universities within the same province, as a comparison between this statute and Saint Mary's University Act, S.N.S. 1970, c. 147 demonstrates.

5 See, e.g., The University of Toronto Act, 1947, S.O. 1947, c. 112. Typically, these statutes set out the institutional framework in considerable detail; the various university bodies are granted specific powers and functions.

6 There is a small group of universities which are statutory corporations, e.g., the Universities of Oxford and Cambridge (as opposed to the individual colleges which are chartered corporations), Oxford and Cambridge Act, U.K. 1571, c. 29; the Scottish Universities of St. Andrews, Glasgow, Aberdeen and Edinburgh, Universities (Scotland) Acts 1858 to 1966; and the University of Newcastle-Upon-Tyne, Universities of Durham and Newcastle-Upon-Tyne Act, 1963. See D.J. Christie, *The Power to Award Degrees*, [1976] Pub. L. 358.

7 Issued by King George IV at Westminster in 1821 and confirmed and amended by a Charter of Queen Victoria issued at Westminster in 1852.

8 Issued by Queen Victoria at Westminster in 1841.


10 S.C. 1912, c. 138, s. 25; see also S.C. 1882, c. 123, s. 10.

11 See Report of the Committee on Higher Education, App. IV, paras. 10 and 11 (Lord Robbins Chairman) for a general discussion on the legal questions surrounding the creation of a university.
Sutton's Hospital, it was held that a restriction in a charter was merely "an ordinance testifying the King's desire, but it is but a precept, and doth not bind in law". More recently, Swinfen Eady J. confirmed the following view:

\[\text{Not only can the chartered company bind itself by acts as to which no power is affirmatively given by the charter, but even if the charter by express negative words forbid any particular act, the corporation can nevertheless at common law do the act, and if it does it, is bound thereby, and the result is only that ground is given for a proceeding by scire facias in the name of the Crown, repealing the Charter.}\]

However, a member may obtain an injunction to restrain any act possibly leading to the revocation of a charter. This in practice amounts to a restriction on the power of the corporation to act in defiance of its charter.

While the legal status of a university is relatively certain, the legal nature of the student-university relationship is far less so. In particular it is uncertain whether scrutiny of university affairs belongs in the realm of private law or public law. Professor Fridman best captures the curious public-private nature of university activities. As he points out, universities are legal corporations capable of entering into contractual relationships with faculty and students. As such, it might be possible to confine disputes arising from such relationships to the law of contract, modified to suit the particular climate of universities. Conversely, instead of viewing universities as purely private institutions, one can regard them as performing a public function, having been instituted by the state either through legislative act or prerogative charter. As such they are essentially public bodies.

It has in fact been held in St. David's College, Lampeter v. Ministry of Education that incorporation by the "sovereign power" (which presumably today would include statute) is an essential attribute of a university and that the power to grant degrees flows from the royal prerogative. These statements, suggesting as they do the essential involvement of the state in the creation of universities, have been strongly challenged. Incorporation of universities has been argued to amount to recognition of the academic value of the institution rather than to the

\[\text{12 10 Co. Rep. 1a, 23a, 77 E.R. 937, 960 (K.B. 1612).}\]
\[\text{13 Id. at 30b, 77 E.R. at 970.}\]
\[\text{14 British South Africa Co. v. De Beers Consolidated Mines Ltd., [1910] 1 Ch. 354, at 376.}\]
\[\text{16 Judicial Intervention into University Affairs, 21 Chitty's L.J. 181 (1973).}\]
\[\text{17 [1951] 1 All E.R. 559 (Ch.).}\]
\[\text{18 See REPORT OF THE COMMITTEE ON HIGHER EDUCATION, supra note 11, paras. 1-16.}\]
source of a legitimate power to confer such honours. On either view, it is clear that the founding of universities by private groups in the last century and early part of this century did involve some state action either as recognition of the academic quality of the institution or as a means for providing a legal basis for the awarding of degrees. As the state has assumed responsibility for higher education, it has deliberately created new universities either by statute or charter. The state also provides a very high degree of funding for educational institutions. All this adds weight to the view that universities are public bodies performing public functions. Both their legal status and the curious public-private nature of their activities are relevant in considering the nature of the student-university relationship.

A. In Loco Parentis

One of the earliest theories thought to govern the school-pupil relationship and educational establishments was the doctrine of in loco parentis; parents were taken to have delegated their parental rights to the school authorities. This was often used as a defence where a school teacher inflicted corporal punishment on a child and was subsequently charged with assault. However in some cases it was also used as a justification for the imposition of other disciplinary measures. In Hutt v. Governors of Haileybury College a fifteen-year-old pupil was expelled from school for allegedly committing theft. Field J. emphasized that all aspects of school discipline could be grounded in the delegation of parental authority. This theory has been criticized as being artificial in the school context since education is now compulsory and parents have no choice but to send their children to school. Further, the need for discipline can override parental stipulation, a fact running counter to the theory of implied delegation. This need, rather than any metaphysical concept of delegated parental authority, has therefore been argued to justify the use of reasonable disciplinary measures.

Whatever the fate of the doctrine at the school level, it is unlikely to provide an adequate description of present day university-student

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19 D.J. Christie, supra note 6. Some provinces have recently introduced legislation designed to prevent the granting of degrees by institutions not authorised by the province, suggesting that there is, in fact, nothing inherently unlawful in such institutions awarding degrees. See, e.g., Bill 3, 53rd Leg. N.S., 2d sess., 1982-83.

20 See, e.g., Ryan v. Fildes, [1938] 3 All E.R. 517 (K.B.). Canadian examples include Campeau v. The King, 103 C.C.C. 35 (Que. K.B. 1951). An interesting example is R. v. Trynchy, 73 W.W.R. 165 (Y.T. 1970) where a school bus driver was held to stand in loco parentis; see also the Criminal Code, R.S.C. 1970, c. C-34, s. 43.


relations. Until recently there seemed to be no British or Canadian case raising the issue, although it did arise in American litigation at the turn of the century in a university context. The concept has been criticized as reflecting a paternalistic attitude, unrepresentative of life in modern universities. Students are individuals with whom university authorities have dealings rather than children to be looked after. In addition the theory can apply only to those students who are still below the age of majority; in Britain and in six provinces of Canada it is now eighteen while in the remainder of the Canadian provinces, it is nineteen. Thus most university students do not fall within the ambit of the doctrine, and some other rationale is necessary to render them subject to university regulations. The absurdity of having some students governed by one legal regime while the rest are governed by another hardly needs to be mentioned.

A recent Nova Scotian decision rejected the *in loco parentis* doctrine. In *Sutcliffe v. Governors of Acadia University*, the university sought to recover unpaid residence fees arguing that the student had contracted to pay them. Rather ingeniously, Sutcliffe argued that the university stood *in loco parentis* and that the relevant presumptions were those applicable in a domestic rather than commercial context. Consequently it was to be presumed that there was no intent to create a legal relationship. Mr. Justice Cooper rejected the submission, pointing out that Sutcliffe was above the age of majority and that the *in loco parentis* doctrine was "entirely unrealistic" for universities anyway.

Given the inadequacy of this doctrine which is more in keeping with the nineteenth than the twentieth century, other explanations of the student-university relationship need to be canvassed.

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23 There are overtones of it in the judgment of Pennycuick V.C. in *Glynn v. Keele Univ.*, [1971] 2 All E.R. 89, [1971] 1 W.L.R. 487 (Ch. 1970) where he talks of the unique relationship of tutor and pupil and the responsibility borne by the school or university for the upbringing of the pupil.

24 See *Gott v. Berea College*, 161 S.W. 204 (Ky. 1913); see also Van Alstyne, *The Tentative Emergence of Student Power in the United States*, 17 *AMER. J. COMP. L.* 403, at 403-408 (1969).


27 Support for the abandonment of this doctrine can be found in a number of university committee reports. At Oxford, the report by Hart, *Committee on Relations with Junior Members*, University Gazette, Supplement No. VII (OUP 1969); and at Cambridge, Devlin, *Report of the Sit-In February 1972 and Its Consequences*, Vol. C111, Cambridge University Reporter Special, No. 12, 14 Feb. 1972. Both reports rejected the theory as implausible. Similarly, the *Report of Presidential Committee on Rights and Responsibility of Members of York University: Freedom and Responsibility in the University* (1970) stated, at 8, "[T]he *in loco parentis* relationship of the University to the student no longer has any validity."
B. Contractual Relationship

An alternative view of the student-university relationship would be to regard it as contractual. The student, on registration or payment of fees, enters into a contract with the university whereby he agrees to be bound by its statutes and regulations. However, whether contractual principles explain all aspects of this complex relationship is still debatable. The student may also possess a status in respect of which public law principles and prerogative remedies are more appropriate.

In the last century the courts seemed to reject the contractual view. In *Thomson v. University of London*, a dispute arose over the interpretation of regulations governing LL.D. examinations. Thomson argued that the original interpretation formed part of a contract between himself and the university which he could enforce by an injunction. Kindersley V.C. rejected the contention first on the ground that the issue was an internal matter within the jurisdiction of the Visitor, an officer of the university who has exclusive jurisdiction over its internal affairs. Second he felt that the relationship was not a legal contract and to describe it as such was a misnomer.

Cases in this century have accepted the idea that there is a contract between the university and the students. The courts have viewed it as the source of rights and obligations for the parties. In *D'Mello v. Loughborough College of Technology*, the Court held there was a contract of which a college prospectus outlining the syllabus for a course formed a part. Consequently, if the course failed to correspond to the syllabus, there might be an actionable breach of contract. However, O'Connor J. held that it was for the college to decide how to teach the course. As long as the course was taught, there could be no legitimate complaint even if the emphasis differed from that which the student expected.

Similarly, in *Sammy v. Birbeck College*, a disappointed student claimed, *inter alia*, damages for breach of contract after he failed an examination. The Court held that there was a contract between student and college by which the college was bound to provide proper tuition. By an implied term, it also warranted that it had adequate professional staff and facilities for this purpose. Again the Court found no evidence that these obligations had been broken.

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28 33 L.J. Ch. 625 (1864).
31 The Times Law Reports (H.C. 3 Nov. 1964). The latest example of the contractual theory arose in Casson v. University of Aston in Birmingham, [1983] 1 All E.R. 88 (L.C. 1982) (a decision of the Visitor). A student claimed that the failure of the university to provide certain courses for which the student had been accepted was a breach of contract. This claim has not yet been considered as the question of whether the ordinary courts or the University Visitor had jurisdiction had to be settled.
It seems that contractual principles offer a potential avenue for redress when a university fails to live up to its commitments. Here damages seem the most appropriate remedy as a student is seeking monetary compensation for the university’s conduct rather than challenging the validity of its decisions. In the latter situation public law principles might be more advantageous from the student’s point of view.

Contract also provides a mechanism for subjecting students to university regulations and discipline. In Ceylon University v. Fernando, where a student was accused of cheating during an examination, Lord Jenkins suggested that a student “must be taken to have agreed, when he became a member of the university, to be bound by the statutes of the university. . .” Lord Devlin in his report on disturbances at Cambridge, stated, “Contract is the foundation of most domestic or internal systems of discipline. . . . The power to discipline should be derived from the acceptance of it, by the student in the contract of matriculation.”

Contractual principles can also provide a means of tempering the disciplinary authority of the university. The courts can insist that there is an implied term in the contract obliging the university to observe the principles of natural justice and the procedures set out in the regulations before subjecting a student to disciplinary measures. In so doing, the courts are in effect using the private law mechanism of implying terms to import public law concepts of procedural review into a contractual or private law relationship. The same basic concept of procedural fairness is applied in the statutory and the domestic or contractual context, in the former as an implied term of the statute and in the latter as an implied term of the contract.

A line of cases concerning trade unions and professional bodies confirms that these bodies draw their disciplinary jurisdiction from the contract of membership. Recent cases confirm the readiness of courts to insist on observance of natural justice as an implied term of the contract, particularly where a person’s ability to work is dependent on retaining membership in the union. In Edwards v. Soc’y of Graphical and Allied Trades, for example, the Court held that a union could not expel a member without first giving him a hearing. Any rule purporting to do so would be contrary to public policy and void. Analogies with the

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university enforcing regulations or exercising disciplinary authority over students by way of contract are easily drawn.

The courts in the United Kingdom have certainly been prepared to insist on natural justice within the university. There is, however, very little discussion of the basis for judicial intervention. In *Herring v. Templeman*, the courts did consider the issue. The case involved a dismissal of a student from a teacher-training college for academic rather than disciplinary reasons. The school was maintained by a trust fund. In the lower courts the student's case was argued on the basis that his membership in the school entitled him to enforce the provisions of the trust deed and insist on observance of natural justice. The Court of Appeal stated that this claim was unfounded; perhaps because the school was not incorporated but rather was maintained by a trust and there was no association of which the student could be a member. The Court was, however prepared to proceed on the assumption that on accepting Herring as a student, the governing body entered into a contract with him by virtue of which he could insist on observance of the terms of the trust and of natural justice. As the Court held that there had been no breach of natural justice, it struck out the statement of claim. Technically therefore it never had to decide if there was a contract of the sort alleged. Even so, it seems clear that contractual principles could in appropriate circumstances be used as a mechanism for reviewing the procedures of university authorities.

Canadian authorities support the view that the relationship is at least partly contractual, and have used the contract theory as a source of rights and duties for both the student and the university. In *Sutcliffe v. Governors of Acadia University*, the university sought to recover unpaid residence fees. The calendar stipulated that a student would be liable to pay fees for the whole academic year even if he withdrew. Mr. Justice Cooper stated that "there was clearly a contract... between the appellant and the university and it is this contract which govern[es] the relationship between the parties". He felt that the university could bring an action in contract to recover unpaid fees.

Mr. Justice Cooper also suggested that the student, by registering, "accepted the offer made to him through the medium of the calendar". For an article advocating the use of contractual principles as a device for ensuring due process in private universities in the United States, where it may be difficult to use constitutional principles in the absence of state action, see Beach, *Fundamental Fairness In Search of a Legal Rationale in Private College Student Discipline and Expulsions*, 2 J.C.U.L. 65 (1974-75). For a recent evaluation, see Jennings, *Breach of Contract Suits by Students Against Post Secondary Education Institutions: Can They Succeed?*, 7 J.C.U.L. 191 (1980-81).
In *Pecover v. Bowker*[^42], a student sought *mandamus* to enforce his "legal right" to be admitted to law school. He contended that, having satisfied the minimum academic requirements outlined in the calendar, he was entitled to be admitted. Mr. Justice Johnson pointed out that this could only be so if the calendar constituted an offer to the student. His Lordship objected to this construction. He felt that the university had the right under its founding statute to make regulations concerning admissions. This must be the preferable view as otherwise the university could be compelled to admit students irrespective of its ability to provide adequate tuition and facilities.[^43]

Some universities state clearly that satisfaction of minimum requirements does not confer a right of admission.[^44] It is better to view the student as making the offer and the university, the acceptance, by enrolling the student. The calendar could still provide the basis for the contractual relationship; either it could be incorporated by reference or the offer could be treated as an offer of enrolment subject to the rules set out in the calendar.

A somewhat novel application of the contract theory occurred in *Akhtar v. Dalhousie University*,[^45] where a student claimed damages for injuries incurred on university premises. The Court held that there was a contract between the student and the university (the occupier) containing an implied warranty that the premises were as safe as reasonable care could make them.

The majority of other Canadian cases, particularly those dealing with dismissal from courses and expulsion, have involved challenges on the grounds of the university's non-compliance with procedural fairness. These have been discussed by the courts in terms of the availability of the prerogative writs and will be considered later. Even here hints of contract sometimes appear, at least as an explanation of the source of university authority.

*Re Polten*,[^46] for example, involved allegations of procedural unfairness in the application of rules governing the approval of graduate theses. Mr. Justice Weatherston pointed out that even though "these rules have no statutory basis, Polten must be taken to have agreed, when he entered the school, to be bound by the procedural rules. . ."[^47] In *Sutcliffe*, Cooper J.A. mentioned that the calendar contained provisions relating to "dismissal, discipline, regulations respecting examinations,

[^42]: 20 W.W.R. 561, 8 D.L.R. (2d) 20 (1957 Alta. S.C.); see also *Re University of Sydney, Ex parte Forster*, [1963] N.S.W.L.R. 723, at 728.

[^43]: An even stranger situation would exist if, as the English authorities discussed above suggest, there is also an implied term by which the university warrants its ability to provide such supervision.

[^44]: See, e.g., *Saint Mary's University, Halifax, Academic Calendar* 14 (1982-83); *Mount Saint Vincent University, Halifax, Academic Calendar* 18 (1983-84).


[^47]: *Id.* at 754, 59 D.L.R. (3d) at 202.
rereading of examination papers and so on”. By registering, the student had agreed to be bound by these provisions.

Cases involving allegations that the university or student has failed to meet commitments may best be dealt with by contractual principles relating to monetary compensation. On the other hand, challenges to the validity of decisions based on the university’s failure to observe procedural fairness are better handled as a matter of public law. Yet, it is sometimes difficult to categorize a case. Doane v. Mount Saint Vincent University, seems to stand on the borderline of contract and public law. Doane sought to compel the awarding of her diploma through specific performance. The calendar had stipulated that a grade of fifty percent or better was a pass. The instructor had made it clear in the first class that there were two parts to the whole course and that a student must obtain fifty percent in each half to pass. Doane received an overall fifty percent but failed to get fifty percent in one section and so was refused a degree. Mr. Justice Morrison clearly felt that a court could intervene by way of the prerogative writs where the university acted in bad faith, fraud or was in breach of natural justice. He was prepared to allow a contractual remedy as well, but felt that there had been no breach of contract as the means used to convey the evaluation method were fair and adequate.

It is interesting to speculate whether specific performance, or mandamus for that matter, would be appropriate if the university had failed to explain the different course evaluations. That would amount to compelling the award of a degree on the basis of the university’s misrepresentation rather than on satisfaction of its academic requirements. Perhaps it would be better to compensate the student by awarding damages assessed on the expected commercial value of a degree together with the cost of tuition and residence.

An interesting point not considered in the judgment is that the method of course evaluation, which differed from that outlined in the calendar, was not communicated to Doane until after she registered. It might be argued that this amounted to a variation of contract requiring the consent of the student and consideration. This may explain Morrison J.’s preference for treating universities as public bodies subject to prerogative writs. On this view, a university could be seen as a self-governing entity free to alter its rules without the need to satisfy the requirements of contract law. Doubtless the decision could be brought within the ambit of contract; this would require the use of the ubiquitous “implied term”, carefully fashioned to give the university freedom to alter its rules without the need for consent and consideration. The artificiality of treating university government in purely contractual terms hardly needs to be mentioned.

48 Supra note 26, at 101.

49 24 N.S.R. (2d) 298, 74 D.L.R. (3d) 297 (S.C. 1977). Presumably the frequency of litigation reflects the high concentration of universities in Nova Scotia — there are five in Halifax alone — rather than a litigious spirit on the part of the population.
A number of points should be made about the suitability of treating the whole relationship as contractual. First, the student has no real choice about accepting the rules; he either registers and is bound by them or he seeks education at a university where the rules are more favourable. In addition, it is likely that the calendar, forming the basis of the contract, will expressly state that the student is to be bound by "regulations already made or to be made". If it does not, such a term will need to be implied if the university is to be able to change existing rules or introduce new ones and thereby bind a student, regardless of his subsequent agreement or consideration. While this power can be expressed in traditional contractual terms, the legal fiction does seem to be wearing a little thin. It is far more realistic to see the university as a community ordering its own internal affairs. Normally academic staff and student representatives participate in formulating the rules. The various university organs are better viewed as legislating for the university rather than as formulating a set of contractual proposals to be put to each student for acceptance.

At the same time contractual remedies may not always be the most useful from the student's point of view, particularly when, for example, he is challenging a decision to expel him. One contractual remedy available to a student expelled in disregard of natural justice is the "declaration". In a purely contractual setting, however, all this remedy does is to "declare" that the student has been dismissed in breach of contract. It cannot nullify the decision. The student is dependent on the goodwill of the university to readmit him and follow the proper procedures. Similarly, damages hardly compensate for the lost opportunity to pursue an education. Admittedly the student can apply elsewhere but his chances of admission may be prejudiced. A student could seek specific performance, insisting on reinstatement and observance of the proper procedures, but a court will not usually grant the remedy where it forces the parties to maintain a personal relationship. The student really wants a remedy that will nullify the decision and restore the status quo. In such circumstances, the prerogative writs would be more appropriate. Perhaps the relationship of student to university could be viewed as a hybrid relationship, partly dealt with by contractual principles and partly by public law and prerogative writ.

A final point to note is that a purely contractual approach (assuming the contract is formed when the university accepts the student) gives an applicant no legal basis for seeking judicial review of a decision to reject his application. Occasionally, a university may ask for a fee with the application form. This could provide consideration for a separate contract relating to the application in which, for example, a term might be implied obliging the university to consider the application "fairly". In the absence of such a payment, it would be very difficult to spell out a contract by which the courts could insist that the university consider the

50 See Dalhousie University, Academic Calendar ix (1982-83).
51 Id. at xii. Saint Marys University, Halifax, supra note 44, at 14.
application properly. The university would be able to act as arbitrarily or unreasonably as it wished so long as it did not violate any anti-discrimination legislation. For these reasons it may well be advantageous to bring the relationship within the ambit of the prerogative writs and place it on a footing other than contractual.

C. Public Law and Prerogative Writs

There have been attempts to bring judicial control of university affairs within the realm of public law. These usually involve challenges to the validity of university decisions based on allegations of non-compliance with procedural fairness, a public law principle. Discussion has centred on the availability of the prerogative writs, particularly certiorari, to quash the decision of a university disciplinary tribunal. It has been remarked that “the exact limits of the ancient remedy by way of certiorari have never been, and ought not to be, specifically defined. They have varied from time to time being extended to meet changing conditions”.

What is clear is that the prerogative writs are essentially public in nature and will not lie to quash decisions of private or domestic tribunals whose authority is derived solely from contract or agreement. It is less clear whether the remedy is restricted to tribunals established by statute and exercising statutory powers. There are a number of statements to this effect. In R. v. National Joint Council for the Craft of Dental Technicians, Ex parte Neate, Lord Goddard C.J. observed that “the bodies to which in modern times the remedies of these prerogative writs have been applied have all been statutory bodies on whom Parliament has conferred statutory powers and duties...”. Consequently the remedy would not lie against an arbitration body set up by agreement between the parties. Again in the context of arbitrators, the Supreme Court in Port Arthur Shipbuilding Co. v. Arthurs stated that the writs would not lie against a non-statutory tribunal. Therefore the Court could only quash an arbitration decision if there was a statutory duty obliging the parties to take their dispute to arbitration, in which case the arbitrator would be a statutory tribunal. In these cases, however, the tribunal was created by, and drew its disciplinary authority from, the agreement of the parties. Universities fall mid-way between bodies established by purely private agreements and statutory tribunals. The university is created by statute (or prerogative) but acquires authority only over those students who enter into a contract of membership with it. The mechanism for discipline may be statutory, but the right to subject students to that discipline is acquired by virtue of agreement.

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33 [1953] 1 Q.B. 704, at 707-08.
In order to subject universities to the prerogative writs, there are a number of possibilities. First, the relationship could be treated as purely private but with an attempt made to find a statutory provision akin to those found in the labour arbitration context, obliging universities to set up tribunals and exercise disciplinary powers. Second, it could be recognized that existing authorities are not exhaustive. There may be a mid-way position between purely private and completely statutory tribunals. Although universities acquire their jurisdiction over students by contract, they are created by statute and so should be amenable to certiorari. In order to bring chartered universities within the scope of certiorari, the whole ambit of the prerogative writs would have to be re-examined and the need for a body to be treated, in some sense, as a statutory tribunal removed.

D. University Bodies as Statutory Tribunals

In Canada there are a series of cases which have held university tribunals to be statutory bodies. In these cases, the statute not only sets up the university, but also establishes a committee designated to hear complaints or do particular acts. The courts in these circumstances have been prepared to issue the prerogative writs.

In King v. University of Saskatchewan, the Supreme Court pointed out that paragraph 76(c) of The University Act imposed a duty on the council to “deal with and, subject to an appeal to the senate, decide upon all applications and memorials by students”. The Court concluded that this amounted to a statutory duty, compliance with which could be enforced by the ordinary courts. However, the Supreme Court left open the question whether the prerogative writs would lie, finding it unnecessary to answer the question as it felt no breach of natural justice had occurred. Mr. Justice Spence did, however, refer to universities as “private or academic bodies”. On the one hand then, there is the suggestion that these are domestic bodies, and on the other, that they are subject to statutory duties.

The matter was fully discussed in Re Polten. Here again the founding statute expressly imposed a duty on Faculty Council to “deal with and decide upon all applications and memorials by students. . .”.

Mr. Justice Weatherston considered in depth the argument that a university acquires its disciplinary authority by contract and so should be subject only to contractual remedies and the argument that universities perform “public” functions and so should be controlled by public law remedies. He concluded that, with respect to students seeking to prove a denial of natural justice, the statute had specifically imposed a duty on the Senate to hear appeals. The university performed a public function in that it

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56 R.S.S. 1953, c. 167.
57 Supra note 46.
58 The University of Toronto Act, 1947, S.O. 1947, c. 112, para. 70(1)(e).
was responsible for the higher education of citizens. The combination of a specific statutory duty and the public nature of universities led him to hold that the prerogative writs would lie against the Senate in this situation.

Mr. Justice Weatherston felt obliged to equate university tribunals with statutory tribunals for two reasons. First, he felt that *certiorari* would not lie to non-statutory tribunals and second, the Divisional Court could only grant injunctions and declarations in cases involving exercises of statutory power. Therefore, if the student’s rights rested solely in contract, he would have no jurisdiction to issue an injunction or declaration.

A similar decision was reached in *Re Schabas*, this time involving a disciplinary body (the Caput). This tribunal was established by a statute which also set out the scope and substance of its disciplinary powers. The Court seemed to have no difficulty in treating this as a statutory tribunal to which *certiorari* would lie, and there was no real discussion of the issue. More recently, in *Re McInnes*, the Court assumed that *certiorari* would lie to quash a decision of a university academic appeals board if there was no evidence reasonably capable of supporting the board’s decision.

The recent Supreme Court decision of *Re Harelkin* seems to confirm that where a statute specifically imposes a duty on a university body to hear complaints, *certiorari* might issue in appropriate circumstances to quash decisions of that body. The relevant statute obliged the council to hear and decide applications and gave students a right of appeal to the senate. Harelkin was not given a hearing by the council and sought to have the decision quashed. It was argued that the Court should exercise its discretion and refuse to issue the remedy as the student had an alternative remedy, namely his appeal to the senate. Mr. Justice Dickson for the minority, but with the majority agreeing on this point, felt *certiorari* did lie. As he pointed out, “Where statutory duties are imposed upon university committees and tribunals, those duties are public duties and the ordinary Courts will enforce, and control compliance with, the statute.”

Mr. Justice Beetz, for the majority, decided that on a balance of convenience, the Court should use its discretion to refuse *certiorari* as

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59 The Judicial Review Procedure Act, 1971, S.O. 1971, c. 48, sub. 3(1).
60 There is also the possibility that The Statutory Powers Procedure Act, 1971, S.O. 1971, c. 47 may apply where a university in exercising a statutory power of decision is required by law to hold a hearing before a decision is made. See comments of Weatherston J. in *Re Polten*, *supra* note 46, at 765, 59 D.L.R. (3d) at 213, where he suggests that the Governing Council which was required to “hear and determine” appeals might be required to comply with the statute.
62 The University of Toronto Act, 1947, S.O. 1947, c. 112, s. 72 and ss. 79-82.
65 *Id.* at 601, 96 D.L.R. (3d) at 21.
the student's right of appeal was, in his view, an adequate alternative remedy. The basis for his judgment was that *certiorari* should not, rather than could not, issue. So presumably he would agree with the minority view on the separate issue of its availability. However, an important factor influencing His Lordship's decision was the *domestic* nature of university tribunals. It had been argued that as the statute had imposed a duty, the court should not refuse to enforce it. Beetz J. stated:

> [The fact of statutory incorporation] does not alter the traditional nature of such an institution as a community of scholars and students enjoying substantial internal autonomy. While a university incorporated by a statute and subsidized by public funds may in a sense be regarded as a public service . . . its immediate and direct responsibility extends primarily to its present members and, in practice, its governing bodies function as domestic tribunals when they act in a *quasi*-judicial capacity.  

If all this were true, would it not be an argument for denying the availability of *certiorari* altogether? It seems the drift of His Lordship's reasoning is that a university in these circumstances is *de jure* public and amenable to *certiorari* but *de facto* private and domestic. This is the reverse of the usual position that the university is *de jure* private, acquiring jurisdiction only by virtue of contract but *de facto* public because of its activities, and can sometimes, most notably where it is statutorily created and subject to statutory duties to do certain things, be made public *de jure*. Such statements would cause problems in other contexts where university committees are not under statutory duties, or are chartered bodies, and it would be more difficult to treat them as statutory bodies. Then it may be necessary to modify the remedy of *certiorari* and link it more with the public nature of a university's activities. But here the majority of the Supreme Court seems to be saying that universities are really private. These and similar statements are perhaps best regarded as considerations relevant only to Beetz J.'s novel concept of a balance of convenience in the issuing of *certiorari* and not transferable to other discussions of the nature of universities and their susceptibility to public law remedies.

The above cases involve the imposition of statutory duties on statutorily designated bodies performing what can be regarded as public functions. These bodies can be more easily treated as akin to statutory tribunals. Even though their jurisdiction over students is derived from contract, the manner of its exercise is specifically regulated by statute, as in labour arbitration where a board is set up by private agreement but a statute stipulates that the parties must make provision therein for arbitration.

A more difficult situation arises where the statute does not impose particular duties on the specific bodies which it creates but rather gives general powers to regulate discipline or academic matters to the board or senate.  

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66 *Id.* at 594-95, 96 D.L.R. (3d) at 56.
67 *See*, e.g., Mount Saint Vincent University Act, S.N.S. 1966, c. 124, s. 17.
deal with matters. The problem is whether this tribunal can be regarded as "statutory". The tribunal itself is not established by the provisions of the statute but rather under the general statutory powers of the parent body. A student will not be insisting on an observance of a particular statutory provision, but rather on the observance of a regulation which provides for a hearing. In such circumstances can the tribunals be regarded as exercising statutory powers or are they merely following internal regulations which have legal effect if at all by their incorporation into the contract of membership? There is no conclusive answer. Cases concerning committees with power to award tenure to professors provide an analogy but the courts in these cases have arrived at different conclusions.

In *Re Elliot*,68 Mr. Justice Lieberman held that a tenure committee was a statutory tribunal even though it was not created by statute but rather by regulations recommended by the General Faculty Council and adopted by the Board of Governors. As these “parent” bodies were created by statute and the statute referred to tenure (although, only in the most general terms and certainly with no provision for any particular body to hear appeals), Lieberman J. felt that the committee was sufficiently "statutory" for *certiorari* to lie.

More recently the courts in *Re Paine*69 held that a decision of a tenure committee was reviewable by way of the prerogative writs. The statute did not create the Tenure Committee; rather it was established by the Governing Council which did have a specific statutory power to consider appointments.70 The lower court felt that the decision of the Committee was really that of the Council or President and as such involved a specific statutory power controllable by the prerogative writs.71 The Court of Appeal accepted this argument but stressed that the right to be considered for tenure was a term of the contract of employment. The Court stressed that the “domestic” or private nature of a university was not altered because of statutory incorporation. *Paine* does not, then, support the view that committees established under a general statutory power to regulate internal university affairs are reviewable by the prerogative writs. Rather, the judgment suggests that a committee must be exercising a specific statutory power if it is to be treated as a statutory tribunal to which the prerogative remedies may issue.

The necessity for a specific statutory provision in order to make a tribunal “statutory” is also supported by Cavanagh J. in another case: *Vanek v. Governors of University of Alberta*.72 His view was subsequently upheld in the Court of Appeal.73 It was pointed out that the committee and the regulations on tenure were reached as a result of

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70 The University of Toronto Act, 1971, S.O. 1971, c. 56, para. 2(14)(b).
negotiation between the general Faculty Council and the Academic Staff Association and were incorporated into the contract of employment. The statute did not create the Tenure Committee nor did it make resort to the Committee mandatory. Consequently it could not be regarded as statutory.\footnote{For a discussion of Elliot and Vanek, see, e.g., Fridman, \textit{supra} note 16; Mullan, \textit{The Modern Law of Tenure}, in \textit{The University and the Law} 102 (H. Janisch ed. 1975); D. Mullan and I. Christie, \textit{Canadian Academic Tenure and Employment: An Uncertain Future?}, 7 \textit{Dalhousie L.J.} 72; Fridman, \textit{The Nature of a Professional Contract}, in \textit{Universities and the Law} 7 (P. Thomas ed. 1975). Vanek was subsequently followed in McWhirter v. Governors of Univ. of Alberta, 7 A.R. 376, at 387-88, 80 D.L.R. (3d) 609, at 616-17 (S.C. 1977).}

Similar arguments could be made about student disciplinary committees or academic review boards which have their origins in university regulations, not in the founding statute. In Polten's case,\footnote{Supra note 46.} Weatherston J. pointed out that rules governing the assessment of graduate theses were not statutory but had their basis in contract. Such committees can be viewed "not as bodies prescribed by statute as a matter of public policy, but rather as a matter of choice in the exercise of a discretion granted by the statute, relating to affairs internal to the university".\footnote{Re Vanek, \textit{supra} note 73, at 600 (Clement J.A.).} This suggests that a student has to rely on contractual remedies where disciplinary committees are set up by the university under general powers to delegate functions or provide for matters of discipline. However, there are important differences between academic regulations or student disciplinary matters and tenure matters for professors, and it is possible to distinguish the two sets of circumstances.

First, in the tenure cases, the rules were a product of agreement between representatives of the staff and the universities by which matters concerning tenure were to be settled. These cases are easily likened to arbitration cases where a body to settle disputes is created by private agreement; in order to bring this body within the rubric of "statutory tribunal", a specific statutory duty compelling it to arbitrate needs to be found. A university regulating student affairs is less like a negotiation process and more like a contractual one: the student contracts with the university thereby submitting to the rules and regulations "legislated" by its authorities. In such circumstances, the tribunals may be made "statutory" simply by pointing to the founding statute which gives the power to regulate and by treating regulations made thereunder as having equal statutory force or sufficient "statutory" connection to allow \textit{certiorari} to issue.\footnote{In another context, the majority of the Supreme Court held that rules, the making of which was directly authorized by the empowering Act, were not "law" for the purposes of the Federal Court Act, R.S.C. 1970, c. 10 (2nd Supp.), s. 28 (which required an administrative decision required by law to be exercised on a quasi-judicial basis before it can be reviewed in the Appeal Division). Martineau v. Matsqui Inst. Inmate Disciplinary Bd., [1978] 1 S.C.R. 118, 74 D.L.R. (3d) 1 (1977). \textit{See} Janisch, \textit{What is}
Where *certiorari* is available, it does offer a student certain advantages. Decisions not taken in accordance with the statute or the regulations, or where natural justice has not been observed, will be *ultra vires*. The decision can be quashed and the student automatically reinstated. He can then be dismissed only if the proper procedures are followed. Regulations which fail to guarantee procedural fairness could also be invalidated on the grounds that they do not comply with the terms of the parent statute (which impliedly guarantees procedural fairness in the exercise of decision-making authority). While a court should treat the internal procedures of a university with deference, as the creators will be more familiar with the institutional structure, it is nonetheless wise to have a mechanism for striking down those regulations which blatantly contravene procedural fairness. The same result could, it is admitted, be reached if the regulations were not viewed as equivalent to subordinate legislation but rather drew their legal force by virtue of their incorporation into the student's contract of membership. Regulations violating the requirements of fairness could be declared void on the grounds that they run counter to public policy.\(^7\)

Another advantage of treating the university as exercising statutory powers comes at the admission stage. In exercising the discretionary power to accept or reject applicants, the university must exercise its discretion fairly and properly consider each application.\(^7\) The applicant would then have a legal peg on which to hang claims of arbitrary, discriminatory or unfair treatment. This matter was briefly considered in *Pecover v. Bowker*\(^8\) where the Court rejected a student's claim that as he had satisfied the minimum entrance requirements, he had a right to be admitted. Mr. Justice Johnson felt that the university had power under the University Act\(^8\) to make such rules on admission as it deemed proper, but felt it was unnecessary to decide whether the Court would review the reasonableness of such rules. He did insist, however, that the correct body — the Board of Governors not the Dean — promulgate the rules (or properly delegate, by resolution, the power to do so to the Dean). To that extent he was prepared to control the exercise of power under the statute. It is suggested that he could have, if the need had arisen, treated the rules as subordinate legislation invalid insofar as they contravened the terms of the statute, an implied term of which was that universities exercise their discretion fairly and properly.

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E. Chartered Universities

A university incorporated by Royal Charter is clearly not a statutory body. Such a university does not exercise statutory power, nor can the rules made pursuant to the Charter be equated with subordinate legislation. If certiorari is to lie against the tribunals of a chartered university, the remedy must first be severed from the requirement that it lies only against statutory tribunals. There are suggestions that certiorari is breaking loose from its traditional moorings. *R. v. Criminal Injuries Compensation Board, Ex parte Lain*\(^{82}\) concerned a scheme for awarding compensation to victims of violence. The Board and the regulations governing its operation were set up under prerogative powers, not statutory authority. Certiorari was sought to quash a decision of the Board on the grounds that it had made an error of law by misconstruing the rules governing the scheme. The Court held that certiorari lay not only to statutory tribunals but to any essentially public body: "[T]he ambit of certiorari can be said to cover every case in which a body of persons of a public as opposed to a purely private or domestic character has to determine matters affecting subjects...."\(^{83}\) This suggests that certiorari might lie to bodies which are public by virtue of owing their existence to the prerogative as well as public by virtue of being statutory. It opens up the possibility of certiorari lying against universities which derive their existence from the royal prerogative and can be regarded as performing essentially “public” functions.

In one British case, *R. v. Aston University Senate, Ex parte Roffey*,\(^{84}\) the Court assumed that certiorari was an appropriate remedy but declined to issue it for discretionary reasons. However in Quebec, in a case involving McGill University which is also a chartered corporation, the Court refused to grant the writ of evocation, the equivalent of certiorari, against a university committee established “pursuant to the law and statutes under which McGill University [is] incorporated”\(^{85}\).

Professor Wade has strongly criticised the *Aston University* case.\(^{86}\) He argues that a charter confers only the powers of a natural person upon a university. Therefore it has no authority to determine the rights of anyone. Its regulations can acquire legal force only insofar as they are incorporated into a contract between the university and the student. Consequently, as the university acquires jurisdiction over

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\(^{82}\) Supra note 52.

\(^{83}\) *Id.* at 882, [1967] 2 All E.R. 770, at 778 (Lord Parker C.J.).


students solely by contractual agreement, only contractual remedies are applicable.\textsuperscript{87}

Professor Wade draws support for his view of the relationship as a purely contractual one from \textit{Herring v. Templeman}\textsuperscript{88} which based the relationship firmly in contract. There the college was not an incorporated body but was set up by a trust deed.

Professor Garner\textsuperscript{89} believes that the prerogative writs are available. He feels the universities are sufficiently public for \textit{certiorari} to lie in principle. He then argues that a student acquires a "status" on entering university so that the relationship is not purely contractual. He explains \textit{Herring v. Templeman} as a case where there was no incorporated body of which the student could be a member and therefore, there was no question of a student having a status.

A number of points can be made about these rival arguments. While Professor Wade may, as a matter of legal principle, be correct in arguing that a chartered university has only the power of a natural person, this ignores the factual aspects of the situation. A university can legitimately be viewed as a public body created by legislative or executive act to provide higher education. At the present time, education is primarily a responsibility of the state, as demonstrated by the degree of public funding that universities receive. There is no reason why they cannot be regarded as akin to governmental departments or agencies as far as certain activities are concerned. To equate them with such bodies for the purpose of judicial supervision is unlikely to threaten their autonomy.

In practice, universities "legislate" codes of behaviour and procedure for students; it is not done on a contractual basis. However, to talk of a student having a "status" is to fail to paint the whole picture. The university-student relationship is a hybrid process. Some aspects of the relationship, such as the payment of tuition fees, for example, are more akin to contract matters while others, most notably when courts compel the observance of procedural fairness, involve an insistence on the recognition of basically public law principles. Where a public body performs functions involving public law principles it is at least arguable that they should be amenable to public law remedies.

In addition, by concentrating on the "status" of students, Professor Garner threatens to exclude applicants from claiming judicial review. Status flows only from membership and applicants do not have membership. Therefore it is better to talk about judicial review of public bodies performing public activities. \textit{Herring v. Templeman}\textsuperscript{90} can be explained as a case involving a private institution since the college in

\textsuperscript{87} The situation can be contrasted with statutory universities which, while they have jurisdiction only over those with whom they enter into a contractual relationship, can thereafter point to a statute as a source of their rule-making powers. Chartered universities cannot similarly point to the charter as a source of legal power, only as a source of legal capacity to enter into relations with other legal persons.

\textsuperscript{88} \textit{Supra} note 36.

\textsuperscript{89} \textit{Supra} note 38.

\textsuperscript{90} \textit{Supra} note 36.
The Legal Nature of a University

question was set up by a trust deed, not statute or charter. Even then the college had to be maintained in accordance with the Education Acts. It was required by statutory instrument\(^9\) to be run under articles of government approved by the education minister. This might provide a basis for arguing that there was sufficient state involvement to make this college "public". Given that these colleges perform the same functions as those established by statute or charter, it might be desirable to have \textit{certiorari} uniformly available. The case can still be distinguished, though, on the basis that that college was a private establishment subjected to limited state regulations rather than an emanation of the state. This again amounts to linking \textit{certiorari} with the origins of a body rather than its functions.

A second logical difficulty might also stand in the way of \textit{certiorari}. Normally it operates to quash a decision on the grounds that there is no legal authority for the making of the decision. Thus in the context of a statute, a person can do only what is authorized by the statute. A decision taken without observing natural justice is contrary to an implied term of the statute and, as such, is unauthorized, \textit{ultra vires} its statutory powers and void. This reasoning will not work in the context of a chartered university as acts done in express defiance of the charter are not \textit{ultra vires}.\(^9\) The charter does not confer limited legal authority on an incorporated body. On the contrary, it confers legal capacity to act as a natural person. If the courts assume power to quash decisions taken by the university in breach of natural justice they must, in doing so, assume the power to quash acts of public bodies on the ground that they have failed to observe principles of public law.\(^9\) There is no reason why they should not do this, but it should be recognized for what it is: a naked assertion of power to invalidate acts rather than a clever use of the theories of \textit{ultra vires}. In effect, it would be a common law "constitutional due process".

At this stage it is useful to consider the position of applicants. In the context of a chartered university, it is obvious that there is no question of the university exercising statutory powers to regulate admission, so no implied term that the power be exercised "fairly" can be used as a basis for giving jurisdiction to the courts.\(^9\) At the same time there is at that stage no contractual relationship providing a basis for the court's jurisdiction. So far the discussion has centred on replacing contractual remedies with prerogative ones in instances where the court clearly has jurisdiction; in the present situation the courts, on traditional theories,

\(^{91}\) S.I. 1967/792, reg. 12.

\(^{92}\) See text accompanying note 11 supra.

\(^{93}\) Does this mean this category of acts would be voidable as opposed to void?

\(^{94}\) The courts also have the power to quash decisions on the ground that there is an error of law on the face of the record, which is regarded as an exception to the normal theory of \textit{ultra vires}. This power apparently derives from the inherent supervisory power of the courts in matters of law. R. v. Northumberland Compensation Appeal Tribunal, \textit{Ex parte} Shaw, [1952] 1 K.B. 338, [1952] 1 All E.R. 122.
have none. There have been two recent cases⁹⁵ where it was suggested that a court could ensure that a purely domestic body which had to consider applications for licences do so fairly, without bias, and not arbitrarily or capriciously, even though there was no contractual relationship involved. These cases were concerned with the ability of a person to earn his livelihood where a licencing authority exercised a monopoly over licensing. Lord Denning, M.R. talked of the "right to work"⁹⁶ but Megarry V.C. pointed out there was no such "right"; rather it was the right to be treated without arbitrariness.⁹⁷

This reasoning has been applied in a student context in Central Council for Education and Training in Social Work v. Edwards.⁹⁸ There a polytechnic refused an applicant for a particular course. The limited account of the case suggests that Slade J. regarded the admissions procedure as a purely domestic matter and not as an exercise of statutory power. Nevertheless, in view of the facts that the polytechnic was publicly funded, the applicant needed the degree in question for promotion in his employment and the admissions committee had issued copies of the selection procedures, he held that the court had jurisdiction. He then granted a declaration that the rejection was improper and the application should be properly considered. This is stronger than the average student case as the diploma was specifically linked to his employment prospects. Given the importance of degrees in the job market a court might indeed assume jurisdiction to review an ordinary application which was clearly improperly rejected. These cases all point to a lessening concern over doctrinal matters and an increasing one with ensuring that bodies which exercise powers having a grave impact on individuals, exercise them according to what is fair in the circumstances.

III CONSTITUTIONAL POSITION

The possibility of equating universities with public bodies acting as an arm or agent of the government raises the prospect of Canadian universities being subject to the Charter of Rights.⁹⁹ Section 32 of the Constitution Act, 1982 states that the Charter applies to the "legislature and government of each province...". Dealing first with the university’s founding statute, this, as an Act of the provincial legislature, must surely be within the terms of section 32 and so subject to the Charter. Therefore if it contains any specific mention of, or sets out procedures for a hearing, these might have to comply with section 7 which, in effect, amounts to a guarantee of due process. Therefore if a student avails

⁹⁶ In Nagle v. Feilden, id. at 646, 1 All E.R. at 694.
⁹⁷ In McLnnes v. Onslow Fane, supra note 95, at 1528, [1978] 3 All E.R. at 217.
⁹⁸ Times, 5 May 1978 (Ch.D.).
himself of a statutory right to a hearing, he may also have a constitutional right to have it conducted in accordance with due process.

Where the statute is not specific but grants general powers to discipline or regulate academic matters and the university passes regulations in that respect, these regulations might be subjected to the Charter. Assuming the regulations are treated as subordinate legislation they cannot contradict the provisions of the parent statute. As the latter is limited by the restrictions of the Charter and cannot deny due process, the regulations must also be so restricted. In this instance the regulations are invalid because they contradict the parent act and are therefore *ultra vires* according to a traditional administrative theory and not because the Charter applies directly to the regulations. Alternatively if the regulations are viewed as subordinate legislation, they may fall directly within the terms of section 32, and will need to conform with the requirements of the Charter.

The regulations may on the other hand be viewed as internal rules acquiring legal force only by virtue of incorporation into the student's contract of membership with the university. In such circumstances, the question is whether a university is sufficiently "public" to be equated to "government" for the purposes of the Charter. The statutory mode of creation and the degree of public funding and governmental involvement in questions of higher education may enable courts to equate university action with governmental action and so subject universities to the Charter. It would certainly be odd if a university's founding statute could not deny due process when its internal rules could.

The application of the Charter within the university context could have a dramatic effect. Claims for procedural fairness in the conduct of hearings which might result in the withdrawal of the student from the university could be based on the section 7 guarantee of "fundamental justice". Disciplinary codes which prohibit off-campus demonstrations on the grounds that this might bring the university into disrepute might violate the rights of freedom of association or assembly guaranteed in section 2. A statute mandating a university to "give special emphasis to the Christian tradition" might violate a student's freedom of religion guaranteed in section 2.

The Charter offers greater remedial flexibility than do the existing theories. A contract theory only awards damages and these may be inappropriate if a student wants a university decision invalidated. The public law theory cannot give damages in situations where some com-

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101 In the United States it has been held that a sufficient nexus exists between a university and government where the university is supported by public funds (e.g., taxes) for the university's acts to be treated as state action and subject to the constitution. Dixon v. Alabama State Bd. of Educ., 294 F. 2d 150 (5th Cir. 1961).

102 See Saint Mary's University Act, 1970, S.N.S. 1970, c. 147, para. 5(b).
pensation seems desirable, as in the Doane case, but where to compel the award of a university degree might not. Subsection 24(1) of the Charter allows the courts to award the remedy "appropriate and just in the circumstances". This flexibility could allow the courts to capture more accurately the peculiar hybrid nature of the student-university relationship.

IV. CONCLUSION

The university-student relationship is a complex, hybrid one which, it seems, is better regulated partly by contract and partly under the rubric of public law. In certain areas of the relationship, especially those involved with the payment of fees or with students misled by the university as to the academic requirements of a degree, contractual remedies in the form of damages seem most suitable. Contract can also be viewed both as a source of university authority and as the basis of the student's claim to natural justice (by means of the much overworked "implied term"). Even where a university seeks expressly to exclude natural justice, this can be prevented by holding the term to be "contrary to public policy".

In other areas of the relationship, the contractual analysis may not be the most appropriate one, especially in light of the remedies offered to the student. Where, for example, a student wants reinstatement and the observance of proper procedures before expulsion, monetary compensation is not satisfactory. Moreover the courts may be reluctant to order specific performance of a contract involving personal relationships. The contract theory can do nothing for applicants who are treated arbitrarily or discriminatorily since they have no contract until they are admitted.

It may be more appropriate in many instances to view universities as public bodies regulating their own affairs and subject to judicial scrutiny. A university is more realistically seen as a self-governing entity setting academic standards or "legislating" codes of conduct and procedure for its members. Frequently, public law remedies are more advantageous. For example, a finding that an expulsion or suspension was ordered without regard to proper procedures would render the decision void. The status quo would then be restored. The university is always free, if it wishes, to begin the decision-making process again.

Where a university is statutory in origin, it should not be too difficult to bring it within the realm of public law, particularly where specific statutory duties imposed upon the university are in issue. Where a university is a chartered corporation, the courts should ignore any logical difficulties about the availability of public law remedies. Rather they should treat universities as sufficiently public to attract judicial

103 Supra note 49 and text.
scrutiny. In cases involving insistence on the observance of essentially public law principles such as procedural fairness, they should issue the prerogative writs. Only a subtle combination of private and public law principles and remedies can fully reflect the complexity of the student-university relationship.

This remedial flexibility may best be achieved by the application of the Charter to universities, which seems capable of reflecting the hybrid nature of the relationship. The Charter could also ensure that other fundamental rights such as freedom of association are not violated. The combination of public funding, creation by legislative or executive act and the public interest in higher education, suggest that the Charter should apply to universities.