The Business of Higher Institutional Education

Integrating Academic Freedom, Pedagogical Approaches and Costitutionalism

Michele van Eck &
Wesahl Domingo (Eds)


UNIVERSITY
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Editors

Michele van Eck (managing editor): Associate professor and Head of the Department of Private Law at the University of Johannesburg. Admitted attorney of the High Court of South Africa (non-practicing).

Wesahl Domingo: Professor and Executive Dean of the Faculty of Law at the University of Johannesburg. Commissioner of the South African Law Reform Commission and President of the South African Law Deans' Association.

Authors

Amanda Boniface: Associate professor in the Department of Private Law at the Faculty of Law of the University of Johannesburg. Admitted advocate of the High Court of South Africa (non-practicing).

Cayle Lupton: Senior lecturer in the Department of Procedural Law at the Faculty of Law of the University of Johannesburg. Director of the Centre for Banking Law at the University of Johannesburg.

Franaaz Khan: Associate professor in the Department of Private Law at the Faculty of Law at the University of Johannesburg. Admitted attorney of the High Court of South Africa (non-practicing).

Gift Manyatera: Executive Dean in the Faculty of Law, Midlands State University and a registered legal practitioner.

Jentley Lenong: Lecturer in the Department of Mercantile Law at the Faculty of Law at the University of Johannesburg. Academic in the United Nations Office on Drugs and Crime (UNODC) – Education for Justice (E4J) network focusing on international cybercrime.

Leoni van der Merwe: Lecturer in the Department of Practical Business Law at the Faculty of Law at the University of Johannesburg (*this is the case until 2023*).

Louis Koen: Lecturer in the Department of Public Law at the University of Johannesburg.

Michele van Eck: Associate professor and Head of the Department of Private Law at the University of Johannesburg. Admitted attorney of the High Court of South Africa (non-practicing).

Samantha Huneberg: Associate professor in the Department of Mercantile Law at the University of Johannesburg.

Swikani Ncube: Associate professor and Head of the Department of Practical Business Law at the University of Johannesburg.

Member of the Southern Development Community Parliamentary Forum (SADC-PF), Democracy, Governance and Human Rights (DGHR) Committee Technical Working Group (DGHR – TWG), and associate editor of the Comparative and International Law Journal of Southern Africa (CILSA).

Tapiwa G Kasuso: Lecturer in the Department of Private Law, Faculty of Law, Midlands State University and a registered legal practitioner.

Theophilus Edwin Coleman Senior postdoctoral research fellow and lecturer for Practical Business Law at the Faculty of Law at the University of Johannesburg until 2023. Senior Research Associate at the Research Centre for Private International Law in Emerging Countries (RCPILEC).

Foreword

In its pursuit of advancing legal discourse in the scholarship of teaching and learning, in 2022 the Faculty of Law identified an area of teaching and learning that has had very little academic attention, being the corporatisation of higher institutional education structures (specifically universities). The changing nature of universities and the greater drive for financial profitability has had both a negative and positive impact on the functioning of universities, but also on pedagogical approaches to teaching and learning, as well as students generally. It is against this background that the Faculty of Law embarked on this book project to start this important conversation as to how the corporatisation of universities and the drive for profitability may impact the functioning of such higher educational institutions (HEIs), the teaching and learning, as well as the student cohort generally.

With the new trends in the business of HEIs and the new models in approaches to higher institutional education, which have been brought by the global economic and financial pressures which have triggered changes in the operation of many HEIs, these institutions find themselves struggling to balance their core function of providing quality education with the funding of such quality education and research. These changes have brought in approaches to interrogate the business models of HEIs which mandate them to balance achieving financial viability and sustainability while maintaining and upholding their academic integrity, academic freedom, and innovative pedagogical approaches within the constitutional prism in South Africa.

HEIs are under pressure to raise sufficient revenue to support their research needs and to update their equipment and resources in the classrooms to ensure that the lecture rooms are equipped with the latest technology, which is critical in delivering innovative pedagogy to the students. Universities are also faced with the challenge of delivering their teaching and learning pedagogy online after Covid-19. For HEIs to remain relevant and competitive, they must take up this challenge within the financial

constraints and subsidy cuts that they are faced with. HEIs are under pressure to increase student enrolments, increase student throughput, increase tuition fees, and commercialise research to attract funding to keep up with these recent changes.

This approach has, therefore, sparked the debate on the potential impact of the corporatisation of HEIs and how the urge for profitability may impact on the delivery of pedagogy in teaching and learning. Historically, HEIs are places known for the creation of knowledge and for training the next generation of professionals and leaders in different fields. If this *modus operandi* is changed due to the direction that these institutions are now taking, this impacts on the constitutive frameworks and governance structures of the HEIs. These issues lead to the necessity of this research, which focuses on the legal discourse and academic debate on the corporatisation of HEI structures and how this impacts teaching and learning. The first and foremost role of institutions of higher education, mainly universities, is to undertake research to solve the socio-economic and socio-political challenges of the society, as well as to train young people to think critically about how to contribute towards solving these societal ills and challenges. If HEIs shift and lose this main focus, becoming business enterprises with the main objective of simply making a profit, they would have failed the society.

To try to close this gap in the legal discourse, the authors of the different chapters critically reflect on the current debates of the corporatisation of HEIs and the possible benefits, tensions, and integration of academic freedom, pedagogical approaches, and their interaction with principles of constitutionalism in teaching and learning within the South African context.

This book reflects the efforts and invaluable expertise of many of our colleagues in the Faculty of Law and other institutions, who found time in their academic schedules to engage in research on this important topic on corporatisation of HEIs which will prove a worthy addition to our literature on HEIs and their role in teaching and learning. This book provides insights into the different topics that categorise the broad themes that are covered, which are: the business and commerciality of HEIs,

the impact and influences on academic freedom, and the impact on students and that of teaching and learning. The present work brings in a consolidated publication various scientific findings resulting from investigative initiatives and research through which scholars do not shy away from engaging in topical issues which are not easy to tackle, such as the epidemic of corruption in the corporatisation of HEIs in South Africa as well as academic freedom and its interaction with academics' right to criticise their employer (to mention a few), while at the same time they spark fertile debates with a unique, value-added approach of coming up with some alternative practical solutions to the issues.

The present book could not have been readily available on time without the technical and scholarly skills, valuable time, and scrutiny of the peer reviewers and editorial team. The Faculty of Law expresses its utmost appreciation to the team and their dedication to this project.

I hope that this book will be of great benefit to various stakeholders in both public and private higher education institutions, scholars, researchers, students, lecturers, and policymakers.

Puseletso Letete
Vice Dean for Teaching and Learning
Professor of Tax Law
Faculty of Law
University of Johannesburg
May 2024

Introduction

Editors' Introductory Overview

Michele van Eck[1]
Faculty of Law,
University of Johannesburg

Wesahl Domingo[2]
Faculty of Law,
University of Johannesburg

Higher educational institutions (HEIs) are underpinned by the principle of academic freedom in both pedagogical approaches of teaching and learning and that of research. South Africa (and many other countries) recognises the principle of academic freedom as forming part of the freedom of expression under section 16 of the Constitution of the Republic of South Africa, 1996. However, global economic and financial pressures and technological developments have precipitated changes in the operation of many HEIs. Some of these changes include, for example, the commercialisation of research and intellectual property of HEIs, a drive for profit margins, greater research outputs, and an increase of student throughput within the HEI structures. Therein, the commerciality and business of running HEIs have facilitated – and, in some instances, strained – traditionally held academic dynamics such as academic freedom, constitutionalism, and pedagogical approaches in teaching, learning, and research. The purpose of this co-edited book is to explore the contemporary dynamics of the corporatisation of HEIs and the possible benefits, tensions, and integration of academic freedom, pedagogical

1 Bcom (Law), LLB, LLM, LLD, B.Th., B.Th (Hons). Associate professor and Head of the Private Law Department at the University of Johannesburg.
2 BSoSc, LLB, LLM, SJD. Professor of Law and Executive Dean of the Faculty of Law University of Johannesburg.

approaches, and principles of constitutionalism in order to further the discourse of teaching and learning and the future of HEIs within the South African context.

Against this background, several academics from different legal disciplines have contributed chapters in this book wherein the commerciality and business of HEIs have been analysed and, in some respects, have challenged both in relation to the operation and the teaching and learning dynamics of HEIs. The academic discourse is presented in three broad categories of discussion (or parts).

The first part considers the business and commerciality of HEIs and how this may impact the operation of HEIs. This is presented in four chapters. The first chapter, *The epidemic of corruption on the corporatisation of higher institutional education in South Africa*, sets out the dangers of greed and money by establishing the risks of corruption within HEIs as such institutions become more focused towards profitability and commerciality. The structure and functioning of HEIs are also impacted, specifically how modern insurance requirements are structured in the chapter titled *The impact on procurement of adequate insurance in the ever-changing risk landscape of higher education institution*. Herein, there is a focus placed on the way liability and risk (also modern phenomena in HEIs) are closely linked to mitigating such risks through appropriate insurance, which comes at a cost for the HEI. The third chapter, titled *Higher education institutions and construction contracts: the demand guarantee as a means of security*, delves into the practicalities of infrastructure within HEIs (which is directly linked to the ability to provide teaching and learning services to students) and is focused on the process of entering into and securing demand guarantees. The fourth chapter in this part, *The nature of the South African university-student contract*, considers the contractual basis on which universities and students engage. As contracts are commercial in nature, this chapter highlights that the university-student contract is not only commercial but has many other dynamics and is, therefore, not completely compatible with a pure commercial and business-centric outlook of HEIs.

The second part is about how the business and the commerciality of HEIs may directly (or indirectly) impact academic freedom. This is presented in three chapters, wherein the friction between an academic's duty towards their employer (being the HEI) and an academic's right to academic freedom in a South African context is established in the chapter titled *Academic freedom and academics' right to criticise their employer*, to illustrate that there are more duties placed on an academic employee than that of a so-called ordinary employee. This, in turn, illustrates that HEIs cannot be considered as purely commercial in nature, but rather are more than simple employers. The second chapter in this part, titled *Ghana's proposed Anti-LGBTQ+ Bill and its implication on academic freedom in institutions of higher learning*, highlights that the new anti-LGBTQ+ legislation introduced in Ghana has a direct bearing on academic freedom, which inhibits the traditional function of academics. The final chapter in this section, *Some perspectives on the impact of disciplinary procedures on academic freedom in state universities in Zimbabwe*, illustrates how legislation regulating HEIs in Zimbabwe has an impact on academic freedom, especially considering new disciplinary measures imposed on HEIs in Zimbabwe. This section highlights how specific legislative instruments that intend to assist in the functioning of HEIs and society may impact academic freedom and the functioning of HEIs.

The third and final part of the book considers how the business and commerciality of HEIs may impact on teaching and learning and pedagogical approaches within HEIs. This is presented in three chapters. In the chapter *The stone left unturned: an assessment of the impact of marketisation on the higher education experience of students with disabilities*, specific focus is placed on students living with disabilities and the function of HEIs in dismantling the barriers for those students living with disabilities. The second chapter in this part, *Infusing decoloniality into the pedagogy of international law at African tertiary institutions*, focuses on decolonisation of international law and how the process of decolonisation is impacted by the functioning of HEIs. Finally, the impact that Covid-19 had on first-year law students at the University of Johannesburg is considered in the context of the

structure of HEIs on teaching and learning in the chapter titled *Pedagogical approaches and lived experience of teaching and learning a first-year law subject during the Covid-19 lockdown in South Africa*. This then illustrates that HEIs have a greater function than simply making profits and being commercially viable. Rather, HEIs have a social function, which trumps that of its business and commercial endeavours. The chapter suggests that perhaps, rather than focusing on the profit margin, HEIs should refocus on their greater social responsibility.

In summary, this book provides an overview of the complexities of transforming HEIs into hubs of commerce and illustrates that HEIs cannot simply be regarded as business enterprises. Rather, HEIs have a social dynamic that is far greater than simply making a profit. HEIs have a unique and integrated function within the fabric of society and, therefore, require more careful consideration of the various dynamics influencing the structures and stakeholders of HEIs.

Part 1:

The Business and Commerciality of HEIs

Chapter 1

The Epidemic Of Corruption in the Corporatisation of Higher Institutional Education in South Africa

Franaaz Khan[1]
Faculty of Law,
University of Johannesburg

Abstract

For many years, higher education was regarded as a privilege where marginalised and poor individuals of society could not afford the luxury of education. In some ways, the structure of higher educational institutions (HEIs) such as universities was seen as a threat to power and there was no substantial international assistance to develop HEIs. Universities have, in particular, been recognised for their role in developing the human capital necessary for technological advancements, including that of accelerated growth. Since the 1970s, there has been a global increase in higher education enrolment. However, access to higher education remains low in sub-Saharan Africa compared to other regions, with enrolment rates having been reported as only being 1.4% in 1970 and 8.9% in 2014. The substantial increase in enrolment rates worldwide highlights the importance of ensuring proper regulation of the higher education sector. However, corruption within such academic institutions has a negative effect on achieving the goals for higher education in countries like South Africa. Herein, the abuse of power for private gain often rears its ugly head from time to time. When individuals –

1 LLB, LLM, PhD. Associate Professor in the Department of Private Law, University of Johannesburg.

including students, faculty, administrators, and board members – engage HEIs structures for the purpose of exploiting its resources, the essence of the HEI is compromised. Furthermore, when individuals with criminal affiliations hold positions in councils or become integral parts of university administration and management, HEIs are at risk of mirroring the corruption often associated with state-owned enterprises. Added to this, many HEIs are currently traversing to corporatism or more commonly known as corporatisation. Corporatisation comes with its own challenges and academics have explored the effects of HEIs corporatising such as institutions becoming subsidiaries for business enterprises instead of making them a so-called "Bureau of Knowledge Production"[2]. This argument is further compounded by the complexities of corruption. The various forms of corruption and fraud in HEIs are wide and include, for example, fraudulent admissions and degrees being awarded. This list is certainly not exhaustive, however, for the purposes of this chapter, a selected number of types of corruption that are typical within an HEI setting will be discussed. The chapter will examine the effects of the corporatisation of HEIs and the implications of corruption to the structures and operation of an HEI. In doing so, this chapter examines the current legislative and national institutional policies in South Africa which address corruption, with a specific focus on the positive institutional approaches undertaken by the University of Johannesburg regarding corruption. In doing so, the effects of corruption on an international scale at HEIs are highlighted and recommendations are provided that will aid in combatting corruption at HEIs.

1. Introduction

In January 2023, a significant incident unfolded at the University of Fort Hare, where Professor Sakhela Buhlungu, the vice-chancellor at the time, narrowly escaped an attempted assassination. The motivation behind this violent act was reportedly linked to Professor Buhlungu's active role in

2 Imenda "The idea of a South African university and implications for knowledge production" 2005 *SAJHE 19 Special Issue 2005* 1405-1418.

investigating corruption within the university.[3] The University of Fort Hare holds historical significance as the *alma mater* of Nelson Mandela, adding gravity to the situation. The attempt on Professor Buhlungu's life underscores the severe consequences that can arise when individuals within HEIs take on the task of exposing and addressing corruption.[4]

Corruption at HEIs, specifically universities, can have far-reaching effects, such as compromising the integrity of academic institutions and eroding public trust. When university officials engage in corrupt practices, it not only tarnishes the reputation of the institution but also undermines the fundamental principles of education.[5] Resources intended for academic development and student welfare may be misappropriated, hindering the overall quality of education provided. Moreover, corruption can foster an atmosphere of fear and intimidation, as evidenced by the attempt on Professor Buhlungu's life. Such incidents not only endanger the lives of individuals committed to upholding ethical standards, but also create a chilling effect that deters others from challenging corruption within the academic community.[6] The attempted assassination of Professor Sakhela Buhlungu at the University of Fort Hare serves as a stark reminder of the dangers associated with investigating and confronting corruption within HEIs. The repercussions extend beyond the immediate threat to individuals' lives, impacting the institution's reputation, academic quality, and the broader trust placed in the educational system.

3 Govender "Fort Hare Vice-Chancellor's bodyguard shot dead in suspected 'assassination attempt'" 2023 https://www.timeslive.co.za/news/south-africa/2023-01-07-fort-hare-vice-chancellors-bodyguard-shot-dead-in-suspected-assassination-attempt/ (21-02-2024).

4 *Ibid.*

5 Jack "Corruption fight goes on, says V-C after 'assassination attempt'" 2023 https://www.timeshighereducation.com/news/corruption-fight-goes-says-v-c-after-assassination-attempt (21-02-2024).

6 Hlati "Outrage over hit attempt on Fort Hare Vice-Chancellor" 2023 https://www.iol.co.za/capetimes/news/outrage-over-hit-attempt-on-fort-hare-vice-chancellor-8a5c5b6a-f951-4732-80ed-912756287f0e (21-02-2024).

Corruption has detrimental effects for HEIs and the broader community.[7] The effect of corruption ruins the reputation of HEIs, and has the indirect consequence of preventing access of student applicants and wastes HEIs' money and resources.[8] Added to this, when unqualified and incapable graduates enter the market, it poses a risk to the safety and wellbeing of the public at large.[9] Corrupt and fraudulent practices within HEIs effectively erode the integrity within society. Research undertaken during 2017 involving 7 000 young adults (between the ages of 18-35) in East Africa revealed that 60% "admired" individuals who became rich overnight with minimum or no effort, and half of the participants were of the view that it did not matter how a person acquired such money.[10] An astounding 35% believed that corruption should not be viewed as an ill in society.[11]

Corruption in the higher education sector is not an isolated incident and it affects countries globally.[12] HEIs co-exist within political, social, and economic platforms, and play a major role in shaping the society in which they exist, which ultimately aids in social progression.[13] Education is the antidote that aids in eliminating communal problems and provides social cohesion. HEIs are foundational in cascading knowledge to both individuals and society, and they also facilitate academic

7 Denisova-Schmidt "The challenges of academic integrity in higher education: Current trends and prospects" 2017 *Chestnut Hill, MA: The Boston College Center for International Higher Education (CIHE)* 2.

8 Altbach "The question of corruption in academe" 2004 *International Higher Education* 7-8.

9 Pérez-Peña "Best, brightest and rejected: Elite colleges turn away up to 95%" 2014 *New York Times* 2 https://www.nytimes.com/2014/04/09/us/led-by-stanfords-5-top-colleges-acceptance-rates-hit-new-lows.html (16-05-2024).

10 *Ibid*.

11 *Ibid*.

12 Marklein "Quality assurance cannot solve corruption on its own" 2016 *University World News* 30 https://www.universityworldnews.com/post.php?story=20160130005848512 (16-05-2024); Egharevba and Atkinson "The role of corruption and unethical behaviour in precluding the placement of industry sponsored clinical trials in sub-Saharan Africa: Stakeholder views" 2016 *Contemporary Clinical Trials Communications* 102-110.

13 O'Malley "Global: Detecting application fraud" 2010 *University World News* https://www.universityworldnews.com/post.php?story=20100326124132375 (16-05-2024).

freedom and institutional independence, which enhance scientific consideration and creation of new knowledge.[14] When corruption rears its ugly head in HEIs, it poses a risk to the very foundations of societal structures.

2. The corporatisation of higher education and corruption

In order to understand the challenges and context surrounding the rise in equitable access to higher education in South Africa post-1994, it is essential to delve into the historical backdrop of the country's education system, particularly the intricacies of Bantustan tertiary education.[15]

Before the dismantling of apartheid in 1994, South Africa was characterised by institutionalised racial segregation, where the majority of the population – specifically black individuals – were systematically excluded from quality education and various opportunities. Bantustans, also known as homelands, were designated territories for different ethnic groups, creating a fragmented and unequal educational landscape.[16] In the context of higher education, access to education was severely restricted for black individuals. Certain HEIs were designated for specific racial groups, with many HEIs catering exclusively to white students. Barriers to access were further compounded by the Bantustan system, where HEIs within these territories were often underfunded and lacked resources, perpetuating educational inequalities.[17]

To access an HEI outside their designated Bantustans, black students faced significant hurdles. Permission from the government, often in the form of ministerial exceptions, was required. These exceptions were granted on a case-by-case basis and were limited, reinforcing the systemic discrimination

14 Chapman and Lindner "Degrees of integrity: The threat of corruption in higher education" 2014 *Studies in Higher Education* 247-268.

15 Luescher "South African higher education reviewed: Two decades of democracy" 2016 *Council on Higher Education (CHE)* 18.

16 *Ibid.*

17 *Ibid.*

embedded in the education system.[18] The term "people of colour" was used to encompass individuals from diverse racial backgrounds, including black, Indian, and mixed-race populations, who were historically marginalised under apartheid.[19] Post-1994, with the advent of democracy, there were concerted efforts to address these historical injustices and promote equitable access to education for all.

However, as the narrative suggests, the increased enrolment of people of colour in HEIs also posed financial challenges for the government. The demand for resources, scholarships, and infrastructure to accommodate a more diverse student population strained the already limited financial capacity of the government, necessitating a delicate balance between fostering inclusivity and managing fiscal constraints.[20] This has led to HEIs having to redesign their identities according to the demands of corporate culture. This has also led to fee increases and the outsourcing of services. Dlamini postulates that the corporate structure is business- and market-driven.[21] The consequences range from the younger generation being unable to access tertiary education to challenges in academic freedom, institutional independence, and corruption.[22] Borg highlights the concern that, within corporate settings, the principles of shared governance are being undermined or distorted, and the concept of accountability may be narrowed down to a financial or accounting-centric perspective, potentially neglecting broader ethical and social dimensions.[23] Dlamini further contends that with corporatisation growing rapidly in higher education, HEIs may be perceived as businesses instead of institutions that generate knowledge.[24] He

18 *Ibid*.
19 *Ibid*.
20 Dlamini "Corporatisation of universities deepens inequalities by ignoring social injustices and restricting access to higher education" 2018 *South African Journal of Higher Education* 54-65.
21 Dlamini (n 19) 56; Badat "The challenges of transformation in higher education and training institutions in South Africa" 2010 *Development Bank of Southern Africa* 8.
22 Dlamini (n 19) 57. See also Chapman and Lindner (n 12).
23 Borg *Gramsci and Education* (2002) 87; Dlamini (n 18) 58.
24 Dlamini (n 19) 60. See also Blass "The rise and rise of the corporate university" 2005 *Journal of European Industrial Training* 58-74.

highlights that universities should be wary of profit-making.[25] Lerner points out that when there has been a corporatisation of HEIs, the process is characterised by two related processes. On the one hand is the erosion of tenure and its impact on HEI governance, and on the other, the development of the so-called "star system", whose effects are a two-tiered labour market in which staff of a limited number of faculties will advance rapidly in their careers and remuneration, while staff of contingent or adjunct faculties – who is low-paid and hired on a semester-by-semester basis – will not advance in their careers as desired.[26] In addition, according to Waite, HEIs co-exist with the wider public and society. They are influenced by the laws and policies that govern them.[27] Unfortunately, societal tensions and anxieties are at times portrayed by these institutions, and they feel the ill effects of corporatisation and, in some instances, corruption.[28] Added to this, Waite further contends that the establishment of market values corrupts learning.[29]

Several scholars, as discussed above, oppose the idea of corporatisation of HEIs. Compounded with the consequences of corporatisation are the ills of corruption that somehow intrude upon the aims of education as well. At this juncture, the different forms of corruption that may occur at HEIs are discussed, and this may cement the arguments against the corporatisation of HEIs.

25 Dlamini (n 19) 61. See also Giroux "Neoliberalism, corporate culture, and the promise of higher education: The university as a democratic public sphere" 2002 *Harvard Educational Review* 425-464.

26 Lerner "Corporatizing Higher Education" 2008 *The History Teacher* 219-227.

27 Waite "Corporatism and its corruption of democracy and education" 2010 *Journal of Education and Humanities: Theory and Practice* 81-106; Zernike "Students are covering a bigger share of the costs of their college education" 2009 *The New York Times* A15.

28 Waite (n 26) 85.

29 Waite (n 26) 90.

3. The different forms of corruption that exist at universities

3.1 University councils

A fundamental issue at the core of the problem of corruption stems from a deficiency in governance and managerial capabilities, coupled with a compromise in academic integrity.[30] Jansen particularly highlights university councils as a pivotal source of the predicament. These high-level decision-making bodies encounter various challenges.[31] Not only do many university councils fail to provide adequate support to university management, but they also contribute to internal divisions within the institutions. In some instances, they even engage in the misappropriation of university resources.[32] Jansen points out a significant flaw in numerous university councils being an increasing politicisation as well as the appointment of many council members who lack the background typical of established universities and often come from a business or professional sphere.[33] Instead, universities are seen as business opportunities, which introduces activities ranging from attending endless meetings for financial allowances to engaging in business transactions with a university. Moreover, Jansen notes a concerning trend among ministerial appointees, and there is a growing concern that many of these individuals appear to align with the ruling African National Congress (ANC) party's "cadre deployment" initiative.[34] This highlights the concern that politically aligned figures are strategically placed on university councils by the Minister of Higher Education and Training to fulfil a political agenda. This involvement may include aligning with specific student or union groups and influencing appointments, thereby compromising the university council's independence and effectiveness.

30 Jansen *Corrupted: A Study of Chronic Dysfunction in South African Universities* (2023) 66-69.
31 Jansen (n 29) 115-117.
32 Jansen (n 29) 115-119.
33 *Ibid*.
34 Jansen (n 29) 167.

3.2 Political manipulation

Governments and political parties affiliate themselves with the daily activities of HEIs as graduates and HEIs provide structure to the political and social environments in developing countries.[35] In this respect, corporatisation enables HEIs to expand into political networks.[36] This has its advantages and disadvantages. One such advantage would be the establishment of a new institution that may have lower tertiary fees and this may cause tension in other institutions that base their revenue on the quality of service that they deliver. Public universities in South Africa are state owned, but there has been an increase in private tertiary education institutions. These privately-owned institutions may have different accreditation and minimum requirements from their public counterparts.[37] The credibility of some institutions becomes questionable.[38] The politicisation of HEIs further creates a trend of appointing politicians as office-holders and heads of HEIs. An example would be the newly appointed chancellor of University of Johannesburg Dr Phumzile Mlambo Ngcuka, who was a member of parliament in 1994 and also held various ministerial positions. In addition, political corruption at HEIs may also involve the granting of unearned credentials.[39]

3.3 Corruption in accreditation

Accreditation provides an assurance to students, parents, employers, and society that the HEI meets certain quality standards in education. Accredited HEIs are recognised for providing high-quality education and producing graduates who are well prepared for their careers. Graduates from accredited HEIs are often more competitive in the job market and are more

35 See Mathrani *et al* "Interpreting academic integrity transgressions among learning communities" 2021 *International Journal Education Integrity* 2.
36 *Ibid*.
37 Kokutse "Corruption among factors affecting HE quality process" 2018 *University World News* 1.
38 *Ibid.*
39 France-Presse "Grace Mugabe's PhD investigated by Zimbabwe's anticorruption watchdog" 2018 *The Guardian* https://www.theguardian.com/world/2018/jan/09/grace-mugabe-phd-investigated-zimbabwe-anti-corruption-watchdog (16-05-2024).

likely to be recognised by employers.[40] Undergraduate degrees provide the basis for a proficient licence which places pressure for accreditation, and often leads to corruption and extortion.[41] One of the pitfalls is that HEIs may not have the resources and infrastructure to receive accreditation. This leads to a lower professional standard and a gap between the knowledge and skills of graduates.[42] Moreover, academic staff may be pressured into lowering the threshold for pass marks, as lower pass rates would result in damage to reputation and financial loss for the HEI.

3.4 Corruption in student admissions

Fraud in respect of HEI admissions is a worldwide problem. The credibility of the selection process for admissions at HEIs is brought into disrepute by fraud and corruption.[43] Bribery and its ills can provide a pass mark for an exam or a test, and it can even guarantee a place for a student who does not qualify for HEI entrance. The Global Report on Education on Corruption revealed that, in some instances, students paid officials in order to gain admission into HEIs.[44] Paying officials to gain access to an HEI has become common practice globally.[45] Students feel peer pressure to pay a bribe as other students are also engaging in similar conduct, which exacerbates the sense of not wanting to be left behind.[46] This line of thinking can bring the good standing and reputation of an HEI into disrepute.[47] By way of example, in 2021, the University of KwaZulu-Natal (UKZN) disclosed that it spent over R73.5 million on an initiative named Operation Clever, which investigated irregularities at its Nelson R Mandela School of

40 See Chapman and Lindner (n 13) 247-268
41 Heyneman "Education and corruption" 2004 *International Journal of Educational Development* 637–648.
42 See Mohamedbhai "Higher education: A hotbed of corruption?" 2015 https://www.insidehighered.com/blogs/world-view/higher-education-hotbed-corruption (16-05-2024).
43 See Shaw "Impacts of globalisation on the academic profession: Emerging corruption risks in higher education" in Sweeney, Despota, and Lindner (eds) "Global Corruption Report: Education" 2013 194-201.
44 Shaw (n 42) 194.
45 Shaw (n 42) 198.
46 *Ibid.*
47 Shaw (n42) 200.

Medicine.[48] This disclosure followed a court order mandating the release of specific details about the probe. Operation Clever was initiated to examine allegations of irregular student admissions, the sale of exam papers, tampering with academic records, mark alterations, and irregularities related to student accommodation, among other accusations.[49]

3.5 Corruption in the appointment of staff and promotion process

In certain instances, appointments to positions of leadership – for example, heads of department, heads of schools, vice deans, and deans – might be awarded due to favours. These types of appointments and promotions of such staff members at HEIs adversely affects the value of teaching, learning and, research. When heads of departments at Italian tertiary departments were awarded qualifications based on favours exchanged in both the private and professional domain – instead of it being based on accolades – it caused concern.[50] In this respect, a positive step that HEIs can undertake to counter corruption is to adhere to ethical recruitment practices to promote fairness, transparency, and equal opportunity.[51] These practices can include publishing job vacancies, advertising job openings through various channels, and implementing selection criteria relevant to the advertised

48 McCain "R73.5m spent on 'Operation Clever' probe into medical school admissions, UKZN reveals" 2021 https://www.news24.com/news24/southafrica/news/r735m-spent-on-operation-clever-probe-into-medical-school-admissions-ukzn-reveals-20210208 (21-02-2024).

49 *Ibid.*

50 Edwards "Dozens of Italian university professors arrested over corruption claims" 2016 *The Local* https://www.thelocal.it/20170926/university-teachers-under-house-arrest-over-corruption-after-being-unmasked-by-an-english-academic (16-05-2024).

51 UJ "University of Johannesburg: Code of Ethics and Business Conduct" 2007 https://www.uj.ac.za/wp-content/uploads/2021/10/code-of-academic-and-research-ethics-approved-2021.pdf (16-05-2024). See also the World Bank "World Bank: Preventing corruption in the recruitment and promotion of public officials" n.d. https://www.worldbank.org/content/dam/documents/sanctions/other-documents/osd/User%20Friendly%20Version%20of%20the%20Anti-Corruption%20Guidelines.pdf (16-05-2024).

position. Also, HEIs can conduct comprehensive background checks on all candidates to ensure that they meet the necessary qualifications and do not have any criminal records or previous history of unethical behaviour. Many HEIs conduct these background checks and such practices have proven to be effective in ensuring fairness in candidate appointments.[52]

3.6 University financial mismanagement and procurement fraud

There has been alarming concern that HEIs' funds are vulnerable as management may use such funds for incentives for fraudsters.[53] Reorganised functions and risk management processes at times result in administrators being unaware that fraud occurs right within their own departments.[54] Moreover, many HEIs find themselves in situations of acquiring funds to ensure the maintenance of educational standards. The growth in the higher education sector has also resulted in the construction of new buildings at HEIs,[55] which opens the door to the potential for corruption, fraud, and mismanagement of funds.

The mismanagement of HEIs, misappropriated funds, and collusion with service providers inevitably lead to substandard work.[56] Take, for instance Makere University in Uganda, which fell victim to substandard work when a newly erected wall collapsed during rainy weather.[57] Moreso corruption in procurement and tender processes can have a significant negative impact on HEIs, leading to substandard goods and services, inflated prices, and a lack of accountability. It can also undermine public trust in an

52 UJ is an example where background checks are made on potential employees. "The University of Johannesburg privacy notice" n.d. https://www.uj.ac.za/wp-content/uploads/2022/05/uj-privacy-notice.pdf (21-02-2024)
53 Mohamedbhai (n 41).
54 *Ibid.*
55 *Ibid.*
56 *Ibid.*
57 Karugaba and Olupot "Parliament wants Makerere boss to explain collapsed perimeter wall" 2009 *New Vision* https://www.newvision.co.ug/new_vision/news/1221457/parliament-makerere-boss-explain-collapsed-perimeter-wall (16-05-2024).

HEI and erode confidence in the fairness and transparency of the procurement process.

3.7 Sextortion

The term sextortion denotes the abuse of power to acquire a sexual favour or some advantage.[58] In this regard, sex is the type of benefit (instead of money for the bribe), which may also be used in corrupt practices. Female staff and students are commonly the victims of sexual harassment at HEIs[59] and, although an alarmingly occurrence, it is unfortunately rarely acknowledged as a problem or a concern.[60] From the 1990s, studies and reports have suggested that sextortion is on the rise – with, for example, a third of female students in the United States facing sexual harassment each year.[61] Power relations play a critical factor in respect of sexual harassment. These relations create the platform for exploitation in gender roles, such as a relationship developing between a lecturer and a student or a similar relationship occurring in an employer-employee relationship.[62] The Global Report on Corruption asserted that HEIs can serve as environments conducive to sexual harassment.[63] Unfortunately, the lack of knowledge regarding rules and procedures at HEIs are stumbling blocks for victims seeking remedies.[64]

58 International Association of Women Judges (IAWJ) *Stopping the Abuse of Power through Sexual Exploitation. Naming, Shaming and Ending Sextortion. A Tool Kit* (2012).

59 Adams *et al* "Sexual harassment: The 'silent killer' of female students at the University of Ayoba in South Africa" 2013 *SAJHE* 1149-1163.

60 Dziech and Hawkins *Sexual harassment in higher education: Reflections and new perspectives* (2018) 25.

61 "Combatting sextortion: A comparative study of laws to prosecute corruption involving sexual exploitation" 2015 *Thomas Reuters Foundation* https://www.trust.org/contentAsset/raw-data/588013e6-2f99-4d54-8dd8-9a65ae2e0802/file (16-05-2024). See also Kalof *et al* "The influence of race and gender on student self-reports of sexual harassment by college professors" 2001 *Gender & Society* 282-302.

62 Thomas Reuters Foundation (n 59); Kalof (n59) 282-302.

63 Shaw (n 42) 103.

64 See Marks and Nelson "Sexual harassment on campus: Effects of professor gender on perception of sexually harassing behavior" 1993 *Sex Roles* 207-217.

3.8 Academic dishonesty

There are several factors that contribute to academic dishonesty and these can include, for example, plagiarism, fraud in exams, and organisations that provide illegitimate academic qualifications (often referred to as degree mills). Academic dishonesty has become a lucrative business. In 2016 so-called "contact cheating" drew over 20 000 students who purchased assignments.[65] Another form of academic dishonesty that creates grave consequences is the fabrication of research data. The lack of transparency in, for example, clinical trials creates potentially dangerous consequences where unsafe drugs can be approved for medical use.[66] Fraud in exams is also common and creates challenges especially where technological advancements may facilitate such fraudulent actions.[67] In 2017, officials at a university in Uganda were criminally charged for engaging in forging student grades.[68] In the same year, a man in India was charged with the sale of 2 000 forged degrees.[69] Academic dishonesty in these various forms threatens not only HEIs but also the proper functioning of society in general.

The various forms of corruption at HEIs erode the very essence of education and its objectives. The law does, to a certain degree, serve as a deterrent and policies within HEIs may assist in curbing corruption. The legislative and institutional

65 See Lancaster "How to stop cheating in universities" 2017 *The Conversation* https://theconversation.com/how-to-stop-cheating-in-universities-85407 (15-06-2024).

66 See Regmi "Ethical and legal issues in publication and dissemination of scholarly knowledge: A summary of the published evidence" 2011 *Journal of Academic Ethics* 71-81.

67 Conway *et al Cheating: Digital learning activities and challenges. In Handbook of research on academic misconduct in higher education* (2017) 112-130.

68 Ligami "Up to 88 Makerere staff face degree forgery prosecution" 2017 *University World News* 1 https://www.universityworldnews.com/post.php?story=20170915135929598 (16-05-2024).

69 Gohwar "Degree certificate racket thrives in Bengaluru" 2017 *The Hindu* 1 http://www.thehindu.com/news/cities/bangalore/degree-certificate-racket-thrives-in-bengaluru/article19127959.ece?utm_content=buffer69bc3&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer (16-05-2024).

approaches regarding corruption in South Africa is discussed in the paragraphs that follow.

3.9 International examples

International corruption incidents include competition, fame, and bad reputation which placed exceptional pressures on HEIs.[70] It was evident that the individuals and institutions who lacked managerial control were susceptible to corruption. A higher education system that fails is one where it is impossible for graduates to be free from some form of corruption.[71] Take, for instance, when Bosnia conducted a study that revealed that 50% of its students viewed corruption as the most critical issue that surrounds higher education, while the remainder of students indicated that cheating was nothing out of the ordinary.[72] In 2016, the Kenyan government resolved to eliminate the country's national examination board after its leaders were found guilty of cheating on the entrance exams.[73] Examination questions were on sale via WhatsApp.[74] Academic fraud has spread though internationalisation. The United States reports that international student enrolments at institutions of higher education worldwide increased drastically from 1.1 million in 1985 to 4.3 million in 2011.[75] In 2016, it was estimated 30% of United States universities were said to have used agents for undergraduate admissions, and most of the agents helped international students fabricate parts of their applications.[76] Internationally, fraud within HEIs has been

70 Shaw (n 41) 101; Shore "How corrupt are universities? Audit culture, fraud prevention, and the big four accountancy firms" 2018 *Current Anthropology* S92-S104.
71 Shaw (n 41) 102.
72 Shaw (n 41) 191-192.
73 Havergal "Kenyan exam board bosses arrested over university entry 'fraud'" 2016 *Times Higher Education* 33 https://www.timeshighereducation.com/content/chris-havergal-0?page=33 (16-05-2024).
74 *Ibid*.
75 Parr "Rising university corruption linked to falling public investment" 2013 *Times Higher Education* https://www.timeshighereducation.com/news/rising-university-corruption-linked-to-falling-public-investment/2007868.article (21-02-2024).
76 American Council on Education "Mapping internationalization on U.S. campuses" 2012 *American Council on Education* 1 26-27.

documented as a substantial business, amounting to a staggering $1.5-$2.5 billion.[77]

4. Existing laws, structures, and policies that address corruption

4.1 South African legislative framework

The Constitution of the Republic of South Africa and other legislative machinery recognises that corruption erodes society's rights.[78] Take, for instance, section 217 of the Constitution, which expects all sectors of the government to engage with contracts in a transparent and fair manner.[79] Added to this, the Competition Act of 1998 requires the establishment of the Competition Commission and Tribunal,[80] with the core function of investigating prohibited uncompetitive activities.[81] The Prevention and Combatting of Corrupt Activities Act of 2004 (PCCA) was promulgated with the intent of dealing with and eradicating corruption. The PCCA regards corruption as a crime,[82] and utilises measures from an investigative to a preventative stance in an attempt to eliminate corruption. The offences listed in the PCCA range from the abuse of power for gain to that of personal gratification in an unlawful and fraudulent manner[83] If the person agrees to accept gratification to use their power in an unjustified manner, they too will be guilty of corruption under the PCCA.[84] In addition to identifying corruption as a crime,

77 Parr (n 73).
78 The Constitution of the Republic of South Africa, 1996.
79 Corruption Watch "Corruption and the law in South Africa: a reference guide" 2015 7 https://www.corruptionwatch.org.za/wp-content/uploads/2015/06/Corruption-Watch-Corruption-and-the-law-in-SA.pdf (16-05-2024) (Hereafter "Corruption and the Law").
80 The Competition Act 89 of 1998.
81 Corruption and the Law (n 77) 8.
82 The Prevention and Combatting of Corrupt Activities Act 12 of 2004 (hereafter "the PCCA").
83 Corruption and the Law (n 77) 9.
84 s 1 of the PCCA. The term "gratification" includes, amongst other things, gifts, donations, fees, loans, the avoidance of loss, any status, honour, service and right or privilege.

the PCCA also provides and imposes fines and punishments,[85] which can include imprisonment for up to five years.[86] Finally, the Protected Disclosures Act of 2000 (PDA) allows for workers to unveil details about illegal or other unusual behaviour in the work environment.[87] The PDA provides for protection against any employment disclosure, and it extends to both the public and private spheres.[88]

4.2 South African institutional structures

The National Prosecuting Authority (NPA) initiates criminal processes for the state. The prosecuting authority has a range of units that deal with specific commercial crimes, which includes an asset forfeiture division as well as a witness protection division.[89] Moreover, the Public Protector is tasked with dealing with any unusual and untoward conduct in state affairs or in the public sphere of government.[90] The Directorate for Priority Crime Investigation is a division within the South African Police Services that deals with organised crime, serious corruption, and serious commercial crime.[91] These are just some of the national institutions in South Africa amongst others where one of their functions is to fight corruption. In addition to these national governmental institutions, HEIs may have their own structures to combat corruption. An example of this may be found in the University of Johannesburg's Fraud Prevention Policy.[92]

In November 2021, the Risk and Assurance Unit at the University of Johannesburg adopted the fraud prevention policy. The policy envisages a zero-tolerance stance to all types of fraud and corruption amongst its workers, students, and vested

85 s 26 of the PCCA, dealing with penalties.
86 *Ibid.*
87 The Protected Disclosures Act 26 of 2000.
88 Corruption and the Law (n 77) 12.
89 Corruption and the Law (n 77) 21.
90 *Ibid.*
91 *Ibid.*
92 University of Johannesburg "Fraud Prevention Policy" 2021 https://www.uj.ac.za/wp-content/uploads/2021/12/fraud-prevention-policy-approved-nov-2021.pdf (16-05-2024) (Hereafter "Fraud Prevention").

stakeholders.[93] In this, the University of Johannesburg seeks to comply with the Constitution and all laws in the country,[94] and the policy is also reflective of the PCCA.[95] Article 6 of the policy offers safety to whistleblowers when they voluntarily share information that deals with fraud, dishonesty, and corruption.[96] The policy goes further, in terms of article 7, to hold the University's council answerable for fraud risk management.[97] The accountability is assigned to the council's Audit and Risk Committee, which function is based on the information received by the Management Executive Committee. In addition, the policy requires auditors (both internal and external) to be involved and review the findings.[98] The policy seeks to foster the highest standards of ethical and professional conduct within the University of Johannesburg,[99] and strives to acquire the maximum levels of business integrity through firm corporate governance, accountability, and transparency. The initiative taken by the University of Johannesburg is a commendable one and certainly not an isolated instance, as other HEIs have similar policies. Whether such policies prove effective will be seen in a matter of time.

4.3 International instruments

In 2005, the United Nations Convention Against Corruption (UNCAC) was formulated, a convention to which South Africa ascribes. UNCAC prescribes steps to be taken to eliminate and minimise corruption, and it fosters collaboration between all countries in combatting corruption.[100] Moreover, UNCAC encourages all states to participate in the prevention and elimination of corruption, as well as providing protection to those who report corruption.[101] South African obligation in terms of this convention finds its voice in its domestic legislation (as

93 Fraud Prevention (n 90) 4-5.
94 Fraud Prevention (n 90) 5-6.
95 Fraud Prevention (n 90) 6-7.
96 Fraud Prevention (n 90) 8-9.
97 Fraud Prevention (n 90) 9-10.
98 Fraud Prevention (n 90) 10.
99 Fraud Prevention (n 90) 5-6.
100 Corruption and the Law (n 77) 2-3.
101 *Ibid.*

discussed earlier in this chapter). Added to this, the African Union Convention on Preventing and Combating Corruption provides similar principles to that of UNCAC, requiring signatories to establish, maintain, and strengthen independent, national, and anti-corruption authorities or agencies.[102]

5. Recommendations and conclusion

Despite the various arguments opposing the corporatisation of HEIs, the overwhelming drive for it outweighs its opposition for the simple reason that corporatisation is now fast becoming a global trend. It is not presumptuous to assume that South Africa will invariably follow suit in its entirety soon. However, if corporatisation is the route of HEIs in South Africa, then proper the mechanisms and strategies need to be put in place to curb and eradicate the ills of corruption, mismanagement of funds, and fraud. After all, HEIs have become politically driven and an important component for endorsing and applying institutional improvements. Furthermore, redistributing power among various individuals will enhance the process of change within HEIs. In this regard, there is a need for HEIs to improve governance that will address corruption, the mismanagement of funds, and fraud. At the centre of this debate is establishing accountability within HEI structures, and thereby necessarily to support and enhance legislative and institutional structures and policies (as seen in the example of the University of Johannesburg's internal policies to address corruption).

In addition, there needs to be a drive for domestic interventions to combat corruption at tertiary level. The South African government has a key role to play in combatting corruption, as it must enact and enforce adequate regulations and standards. In the same token, government must allow for academic freedom and not interfere in the matters of HEIs. Ongoing enactments regarding corruption in respect of the HEI policies and the transparency of distribution of public funding

102 art 5.3 of the African Union Convention Against Corruption 2003 https://www.refworld.org/legal/agreements/au/2003/en/63979 (16-05-2024).

is of grave importance. Government plays a significant role in guaranteeing that the law is preserved and upheld, and a strong message must be sent to individuals connected to academic dishonesty, fraud, mismanagement of funds, and corruption – specifically in the form of grave criminal consequences attached to such conduct. Besides ensuring government accountability, professional regulatory bodies (like medical councils and legal associations, which mandate licences for practice) play a role in mitigating corruption within HEIs. These entities serve as gatekeepers for their respective professions and hold registers of accredited professionals, and these registers should remove such transgressors if they engage in inappropriate conduct. Professionals, like doctors and lawyers, also have to ascribe by codes of conduct for the profession. Similar approaches could be adopted in HEIs.

If South African HEIs are embarking on the road of corporatisation, then focus must be placed on how to combat corruption, mismanagement of funds, and fraud. This chapter highlighted some of the risks, and also provided recommendations that could assist South African HEIs in this journey of corporatisation.

Chapter 2

The Impact on Procurement of Adequate Insurance in the Ever-Changing Risk Landscape of Higher Education Institutions

Samantha Huneberg[1]
Faculty of Law,
University of Johannesburg

Abstract

In modern times, risk exposure for both natural and juristic persons is continuously evolving and is influenced by numerous factors. Risk, in this context, signifies the possibility of harm. Insurance serves an integral purpose in society and fulfils a significant social function. The idea of risk spreading is dominant to insurance and generally entails that the insurer agrees to accept the risk to which the insured is exposed, and the insured in return pays or agrees to pay a premium. The role of insurance in higher education institutions (HEIs) plays a critical role in protecting institutions and parties involved when loss or damage is experienced either by the institution itself, by its employees, or by students. As such, the risk landscape of HEIs in South Africa is evolving and changing at a rapid rate. Recently, risks such as cybersecurity have become more prevalent; the impact of the Covid-19 pandemic has also sparked various changes within the institutions, and there are constant perils like defamation, sexual harassment, and general instances of damage or loss. There is also the increased risk of weather-related risks due to climate change. Therefore, all these risks are creating novel challenges

1 BCom Law, LLB, LLM, LLD. Associate professor in the Department of Mercantile Law, University of Johannesburg.

within HEIs. HEIs procure various types of insurance to protect themselves, their employees, and students from the possibility of loss or harm that may be experienced. Importantly, liability insurance plays an integral role and is a part of insurance that deals with the negative elements of the insured's patrimony. Therefore, any liabilities that the insured may incur towards third parties is encompassed under liability insurance. Liability insurance is constantly developing – this is due to growing consumerism as well as a litigious society. Specific liability policies relevant to HEIs include, for example, professional indemnity insurance, public liability insurance, and – more recently – cybersecurity insurance. These types of policies play a crucial role in safeguarding HEIs against risk. Parametric insurance may also become a more popular type of policy procured by HEIs in areas that may be exposed to natural disasters. This chapter seeks to ascertain the relevance and importance of HEIs procuring adequate insurance cover and, specifically, the aim is to determine the evolving risks faced by HEIs and how best to go about insuring these specific risks. The importance of liability insurance will be discussed with specific reference to the unique risks faced by HEIs as well as the importance of cybersecurity insurance and parametric insurance.

1. Introduction

In modern times, risk exposure for both natural and juristic persons is continuously evolving and is influenced by numerous factors. Risk, in this context, signifies the possibility of harm.[2] Insurance serves an integral purpose in society and fulfils a significant societal function.[3] The concept of risk dispersal is essential to insurance and necessitates that the insurer undertakes to accept the risk to which the insured is exposed, and in return, the insured pays or agrees to pay a premium.[4] Reinecke

2 Reinecke, van Niekerk and Nienaber *South African Insurance Law* (2013) 1.
3 Millard *Modern Insurance Law in South Africa* (2013) 1.
4 Reinecke *et al* (n 1) 3.

et al state that the whole purpose of insurance is for the insured to be "relieved" of the risk of a loss or the impairment of an interest.[5]

The role of insurance in the space of higher education institutions (HEIs) plays a critical role in protecting the various institutions and parties involved when loss or damage is experienced either by the institution itself, by its employees, or by students.[6] The risk landscape of HEIs in South Africa is evolving and changing rapidly. In the last few years, risks such as cybersecurity have become more prevalent; the impact of the Covid-19 pandemic has also sparked various changes within the institutions, and there are constant perils like defamation, sexual harassment, and general instances of damage or loss. There is also the increased risk of weather-related risks due to climate change. All these risks are creating novel challenges in the higher education space which require the necessary addressing of such risks by HEIs in order to know what type of insurance to procure and, likewise, by the insurers, in that they may need to consider new types of insurance offerings.

HEIs procure various types of non-life insurance to protect themselves, their employees, and students from the possibility of loss or harm that may be experienced.[7] Importantly, liability

5 Reinecke *et al* (n 1) 234.

6 Examples of some of the common types of loss higher education institutions face include damage to property, reputational damages, possible defamation and harassment cases and losses associated therewith, possibilities of students being assaulted on campus, etc.

7 Common types of policies procured by HEIs would be property policies, liability policies, accident and health policies, travel policies, and motor policies. Worth mentioning is that HEIs also face significant risks to property posed by events such as riots and protests by staff and students (as well as non-students that participate in these protests). Protests at universities are not new and have existed for decades. See Fomunyam "Student protest and the culture of violence at African universities: an inherited ideological trait" 2017 *Yesterday and Today* 38 38-63. Also, students take to protests to demonstrate their voices in political as well as other non-political issues. This chapter will not consider the risks posed by riots and protests on HEI campuses. This chapter seeks to look at how HEIs are set to deal with new/novel risks that they face. In South Africa, the state-owned South African Special Risk Insurance Association (Sasria) covers loss and damage to property which emanates from riots and protests. Sasria cover is voluntary

insurance plays an integral role and is that part of insurance which deals with the negative components of the insured's patrimony.[8] Therefore, any liabilities that the insured may incur towards third parties is encompassed under liability insurance.[9] Liability insurance is constantly developing; this is due to growing consumerism as well as a litigious society. Specific liability policies relevant to HEIs include professional indemnity insurance, public liability insurance, and – more recently – cybersecurity insurance; these types of policies play a crucial role in safeguarding higher education institutions. Property insurance is also another policy that HEIs would procure. Property insurance in the form of parametric insurance cover may also become a more popular type of policy procured by HEIs in areas that may be exposed to natural disasters.[10]

This chapter seeks to ascertain the relevance and importance of HEIs procuring adequate insurance cover and, specifically, the aim is to determine the evolving risks faced by these institutions and how best to go about insuring these specific, and somewhat novel, risks. This will entail an analysis of the element of risk in insurance as one of the *essentialia* of a contract of insurance as well as considering the importance of liability and property insurance with specific reference to the unique and

insurance cover and is provided through an insurer (also known as an agent) and policyholders pay a premium for such cover. Sasria does cover student protests, but it is for the policyholder to opt into this coverage in order to reap the benefits of it. Sasria only provides cover to property and does not cover liability. Once again, worth mentioning is that insurance coverage and premiums are based on risks presented by the policyholder, and insurers will offer coverage and premium determinations based on the risks at hand. HEIs face the risk of riots and protests which may cause damage to property, which is something insurers will take into account when providing cover to HEIs. Due to the events of riots that took place in South Africa in 2021, the body has faced major setbacks and has had to increase its premiums significantly. Insurers may then also increase their premiums for property insurance to cover the potential of pitfalls by Sasria.

8 Reinecke *et al* (n 1) 10.

9 Jacobs "Liability insurance in a nutshell: simplified complexities or complex simplicities" 2009 *SA Merc LJ* 202-207.

10 Parametric insurance is insurance based on a triggering event and not on the actual damage or loss suffered.

impending risks faced by HEIs in the 21st century,[11] including the importance of specific insurance products like cybersecurity and parametric insurance considering the evolving risk landscape.

2. Understanding the concept of risk in the higher education arena

2.1 Conceptualising risk

The term "risk" descends from the early Italian word "*riscare*" which means "to dare" or "danger to be avoided".[12] Kuschke defines risk as "the possibility of the occurrence of an uncertain event leading to an undesirable consequence, such as damage or harm, whether patrimonial or not, to which the insured himself [or herself], his [or her] property or even his [or her] interests are exposed".[13] The notion of risk is recognised as one of the *essentialia* of an insurance contract, andrelates to the possibility of the existence of an uncertain event which will then ultimately lead to an undesirable consequence for the insured.[14] Risk is usually described with referral to the particular dangers to which insurable interests are exposed.[15] These specific possibilities will either give rise to the risk materialising or not. Therefore, in insurance it is required that the risk actually materialises.[16] Additionally, there must also be a causal nexus between the risk which has been insured against and the actual loss experienced by the insured.[17] This is, therefore, viewed as a purely factual issue and, in insurance, reference is made to the proximate cause test

11 The term *essentialia* refers to those clauses which are integral for the classification of a contract as belonging to a particular class or category of contract. See Schulze *et al General Principles of Commercial Law* 9th ed 105.
12 The Italian etymology of this word comes from "risco", essentially meaning danger.
13 Millard (n 2) 85.
14 Reinecke *et al* (n 1) 234. See also *Lake v Reinsurance Corporation Ltd* 1967 (3) SA 124 (W) 127.
15 Reinecke *et al* (n 1) 234. See also *Prudential Insurance Co v Inland Revenue Commissioners* [1904] 2 KB 258 662.
16 Reinecke *et al* (n 1) 238. *See* also *Eagle Star Insurance Co Ltd v Willey* 1956 (1) SA 330 (A).
17 Reinecke *et al* (n 1) 247-248.

to determine such link.[18] The possibility of the risk occurring is founded on the likelihood of the undesired event happening.[19]

In terms of the applicable insurance legislation, the Short-term Insurance Act[20] (STIA) defines risk as "a possibility that a particular event may occur during the period for which a short-term policy is operative".[21] Millard explains that understanding the concept of risk in insurance and the appropriate cover needed is necessary since it informs every aspect of insurance.[22]

Understanding the concept of risk leads to the importance of knowing how best to manage the various risks one faces on a daily basis. Ultimately, the idea of risk management guides both natural and juristic persons alike over a vast range of decision-making in modern society. Risk management involves a process of being able to identify a threat in advance and taking measures to mitigate those threats. Generally, private individuals and organisations utilise insurance as a key aspect of risk management processes and mitigation of financial loss as they can be impacted by several factors like theft, natural disaster, or accidents.[23] Particularly in insurance, risk management allows one to transfer the risk to the insurer and thereby takes the burden of the possibility of loss or damage off oneself and transfers it onto the insurer (in return for the compensation of a premium by the policyholder).[24] The transferring of risk to the insurer is fundamental to the concept of insurance and the insurance policy itself.

In the context of HEIs, the entity will obtain insurance cover to protect itself against the risk of an uncertain and undesirable event occurring.[25] Upon taking out the appropriate cover, and then

18 Reinecke *et al* (n 1) 249.
19 "Probabilities in statistics are the mathematical odds that an event will occur. … The probability ratio expresses the likelihood that the event will take place. This ratio is significant to insurance providers." See Reinecke *et al* (n 1) 239.
20 the Short-term Insurance Act 62 of 1998 (hereafter "the STIA").
21 See the definition of risk under s 1 of the STIA.
22 Millard (n 2) 86.
23 Naveena Ulavan "The Role of Insurance in Risk Management for Businesses" 2023 https://naveenaulavan.com/the-role-of-insurance-in-risk-management-for-businesses/ (26-08-2024).
24 Millard (n 2) 86.
25 *Ibid.*

should the risk materialise following a "particular event",[26] the insurer will compensate the HEI for such loss; in other words, the insurer will make good the loss.[27]

It is trite that the possibilities of damage or prejudice to which both natural and juristic persons are exposed to are infinite, therefore in terms of the insurance policy, the scope thereof may be limited contractually.[28] The policy will, therefore, be specific as to which risks are transferred to the insurer. In this context, "all risk cover" refers purely to risks. This means that certainties are not included therein and that in a policy including this clause, the risks do not have to be specified.[29] Millard reiterates the importance of the fact that both the insurer and the insured must agree on the nature and scope of the risk that will be transferred from the insured to the insurer.[30]

The various risks faced by HEIs are cumbersome and, therefore, procuring adequate insurance cover is fundamental to the financial position and viability of the institution in terms of safeguarding itself against the vast range of possible damages and losses it may sustain should the risks materialise. Up until recently, HEIs have understood the general risks they face and have, therefore, acquired the requisite insurance cover. However, in the last few years HEIs have faced new and unknown risks. The Covid-19 pandemic in 2020 has brought about new issues around remote learning risks (including cybersecurity risks), and the recent floods occurring in the Kwa-Zulu Natal province have also highlighted the imminent dangers of climate change on general infrastructure. As cybersecurity issues rise and the impending risks associated with climate change faced by HEIs intensify, it is crucial that these institutions understand these novel risks and obtain adequate insurance cover to appropriately deal with them. Understanding these risks in the higher education sector is

26 The STIA explicitly states "particular event", which indicates that those events insured against may be specified or limited. The Act does not state "uncertain event". However, it is submitted that the core of insurance is to insure against specified uncertain events.
27 Millard (n 2) 86.
28 *Ibid.*
29 *Ibid.*
30 *Ibid.*

fundamental in underwriting as well as procuring the correct and suitable policies for HEIs.

2.2 The specific risks faced by HEIs

2.2.1 Cybersecurity risks

Cybersecurity is the "practice of protecting systems, networks and programs from digital attacks".[31] When cyberattacks occur, they are generally aimed at acquiring, altering, or damaging sensitive information, extorting money from customers, or disrupting standard business practices.[32] The risk of cybersecurity incidents has become a prevalent issue in the 21st century. Since almost all forms of transactions concluded are electronic and in an online space, it requires users to have an online presence. This means that most of people's daily conduct is concluded electronically and on the internet. This brings us to the use of the cyber world in the current era. Natural as well as juristic persons conduct themselves and their activities in an online environment, therefore, the threat of people's information as well as businesses being hacked is a reality and concern.[33] People and businesses alike try to protect their information and transactional activities in the online world. They have passwords, encryption, and firewalls in place to protect against attacks. Hackers and hacking incidents are ubiquitous in nature and, therefore, information and activities on the internet are capable of being acquired by others in an unlawful manner. The possibilities of loss are, therefore, linked to this information being accessed. In the sphere of HEIs, the use of online platforms and activities is crucial to the institution and learning environment. Whether we are referring to the information of all staff and students held by an HEI, or online databases utilised, or

31 Kaspersky "What is Cyber Security" n.d. https://www.kaspersky.co.za/resource-center/definitions/what-is-cyber-security (27-10-2022).

32 Hoory, Aditham and Livingston "What is a cyberattack? Definition, Types and Prevention" Forbes Advisor 2024. https://www.forbes.com/advisor/business/what-is-cyber-attack/ (26-08-2024).

33 In recent years, South Africa has seen severe cyberattacks and the leaking of critical personal data. Examples include the Dischem data breach in 2022 as well as the 2020 Experian data breach and the 2022 TransUnion data breach.

even the teaching and learning activities conducted online, these are all possible targets to hackers wanting to obtain and control such information.

Following the Covid-19 pandemic, HEIs conducted all teaching, learning, and assessment activities online. The prevalence of these activities in a virtual space meant new risks posed to the institution as well as to students and staff. With an increase in virtual assessments, programmes, teaching, and learning, this meant there were new and higher possibilities of cyberattacks. Therefore, as HEIs digitise themselves further, the exposure to cybersecurity breaches increases. In the last few years, cybersecurity breaches have increased and become a somewhat common occurrence. From government institutions being hacked, to private companies being compromised, the issue is a serious concern for individuals and businesses alike.[34]

The term cyberattack refers to aiming to disable, disrupt, destroy, or control computer systems and information held therein.[35] There is no doubt that HEIs are at risk of such attacks; they hold valuable information and are, therefore, seen as possible target. However, HEIs are aware of this and therefore do all they can to protect themselves against such possible attacks and breaches. HEIs also procure and hold adequate cybersecurity insurance in order to protect themselves against such possibilities. However, with the growing use of online platforms, HEIs must be proactive in this regard and ensure that adequate protection mechanisms and insurance are in place for such increased risks.

Within HEIs, information technology (IT) specialists and departments play an important role in ensuring the best protection mechanism are in place.[36] These specialists within the HEIs will need be one step ahead of the cyber criminals and ensure that systems are as safe as they can possibly be. This may mean

34 See Hoory, Aditham and Livingston (n 31).

35 Pratt "Definition of Cyber-attack" 2023 https://www.techtarget.com/searchsecurity/definition/cyber-attack#:~:text=A%20cyber%20attack%20is%20any,data%20held%20within%20these%20systems (22-10-2022).

36 HEIs have IT specialists within the organisation that keep up to date with all the prevailing cyber threats.

rethinking existing security and cloud solutions. HEIs will have to work closely with the IT specialists to ensure that their systems are not outdated. HEIs require large sums of money to ensure that the best security measures are in place, and spending the money is a necessity. Insurance in this regard is one of the best tools that an HEI can procure to protect itself against possible losses due to such attacks. The concept of cybersecurity insurance policies will be elaborated on further in paragraph 3.3.1 (below).

Cybersecurity risks are just one of the rather "new" issues facing HEIs due to the increased use of online activities by these institutions, but another relatively novel risk that has come to the fore is that presented by climate change and increased weather-related events that may cause significant damage to HEIs and their property. This will now be considered below.

2.2.2 *Climate change risks*

The South African Climate Change Bill published in the 2021 defines climate change as "a change of climate that is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and that is in addition to natural climate variability observed over comparable time periods".[37] The word climate refers to specific weather conditions on earth averaged at a particular point. Characteristically, when one speaks of the climate, it is articulated with reference to expected temperatures, wind conditions and possible rainfall, all based on historical observations. This is either the average climate or climate inconsistency that persists over an extended period.[38] In order to establish whether climate change has occurred or not requires a measure after decades of careful observations and analysis of weather conditions.[39]

There are several contributing factors towards climate change. Many of these contributors are influenced by human

37 *GG* No. 45299 of 11 October 2021.
38 Riedy "Climate Change" 2016 *The Blackwell Encyclopedia of Sociology* 1-3.
39 British Geological Survey "Climate Change: Discovering Geology" n.d. https://www.bgs.ac.uk/discovering-geology/climate-change/ (12-08-2022).

activities. Governments around the world, as well as other stakeholders, have acknowledged that the threat climate change poses to human, environmental, and economic systems is imminent and dire.[40] In South Africa, the government has published the South African Climate Change Bill recognising and acknowledging that there is a need to develop an effective response to climate change and an extensive and lengthy evolution to a "low-carbon and climate-resistant economy and society in the context of sustainable development".[41] The aim of the Bill is to provide for a harmonised and united response to climate change for South Africa, which specifically provides for the effective administration of climate change impacts, making a just and fair involvement to the worldwide effort to alleviate the absorptions of greenhouse gases, as well as giving effect to the country's international responsibilities and obligations in relation to climate change, and protecting and maintaining the planet for the advantage of present as well as future generations of the human race.[42] The Bill is yet to be promulgated; however, it is anticipated that it will be passed into law soon due to the mounting pressure government faces in this regard. This will be the first legal framework by the South African government in response to climate change.[43]

Climate change impacts various aspects of life as the normal processes that cause rain, snow, storms, and hail are now dependent on various factors including human activities, political decisions, and, recently, technological advancement.[44] The

40 International Association of Insurance Supervisors (IAIS) "Issues paper on climate change risks to the insurance sector" 2018 https://www.unepfi.org/psi/wp-content/uploads/2018/08/IAIS_SIF_-Issues-Paper-on-Climate-Change-Risks-to-the-Insurance-Sector.pdf (10-10-2022).

41 Climate Change Bill. An explanatory summary of the Bill and prior notice of its introduction were published in *GG* No. 45299 of 11 October 2021.

42 *Ibid*.

43 Joubert, Rushton and Kododia "Key Aspects of South Africa's much-anticipated Climate Change Bill" 2022 https://www.polity.org.za/article/key-aspects-of-south-africas-much-anticipated-climate-change-bill-2022-06-14 (22-10-2022).

44 British Geological Survey "Impacts of Climate change" n.d. https://www.bgs.ac.uk/discovering-geology/climate-change/impacts-of-climate-change/ (22-10-2022).

International Association for Insurance Supervisors (IAIS) has put forward an issues paper dealing with climate change and has identified that climate change has an impact on environmental systems and a negative impact on natural capital stock on which the society and economy rely.[45] This has increased the risk of extreme weather events around the world and has been seen over the years by extreme events such as heatwaves (leading to communicable diseases), drought, rainfall, wildfires, storms, and flooding.

In the beginning of 2022, the South African province of KwaZulu-Natal experienced severe floods and these floods are a major cause for concern. This highlighted the severity of climate change as well the dire impact that these weather conditions can have on communities and the economy at large. There is a need for an urgent response to climate change in South Africa and worldwide. Scientists specialising in climate issues anticipate that the floods may be attributed to human-induced climate change as they are consistent with forecasts of extreme weather events brought on by climate change. The extreme flooding in the province resulted in severe damage to homes, properties, infrastructure and the like and furthermore, saw more than 300 people's lives claimed by the devastating events.[46]

The increased risks due to climate change are imminent and this is an ominous threat that will lead to further and severe losses in the future. HEIs face serious threats in this regard. An institution's infrastructure is vital to its continued existence and, therefore, requires suitable cover and protection. If HEIs should become the victim of a severe weather-related incident, they risk losing more than just the value of the lost or damaged property. It also means that operations within the institution may need to come to an end, which will then have a direct impact on the income they receive, and this may lead to further losses for them. If an HEI needs to stop teaching and learning activities

45 See IAIS (n 39).

46 Omarjee "With climate change causing severe weather, KZN floods may just be the beginning" 2022 https://www.news24.com/fin24/companies/analysis-with-climate-change-causing-severe-weather-kzn-floods-may-just-be-the-beginning-20220415 (23-08-2022).

due to collapsed or lost infrastructure, then this may also result in income losses. An HEI's infrastructure serves an integral purpose for staff and students alike and, therefore, mitigating and managing these risks is essential for the continued existence of the institution.

2.3 Evolution of risks

It is evident that HEIs are facing increased exposure to various types of novel risks. Cybersecurity risks are on the rise and HEIs face increased pressure to ensure that they have the correct measures in place to protect data and information held by the institution in the online space. This will require a robust response from HEIs to ensure that they procure adequate insurance coverage relating to cybersecurity risks. This requires an analysis of liability insurance as a specific type of insurance and will be discussed in section 3.1 (below).

The prevalence of remote learning during the Covid-19 pandemic increased cyber exposures for basically all HEIs. As HEIs continue to employ a hybrid mode of teaching, it appears that online learning is not disappearing any time soon. This is just one area that increases the need for cyber insurance. Cyber insurance allows HEIs to insure their complex, virtual networks and further ensure that they are properly secure to reduce the risk of attacks and breaches.

Also, part of the evolving risk landscape faced by HEIs is the issue of climate change and the increased risks which climate change will bring to the institutions. As climate change is exacerbated by current tendencies in the world, the risks that HEIs will face in this regard will intensify. HEIs will face increased possibilities of property damage due to the likelihood of floods, droughts, fires, and other climate-related events. This means that HEIs in specific areas will have to account for the specific types of weather-related risks they may face and procure adequate cover in this regard. Parametric insurance will be considered in more detail in section 3.3.2 (below).

3. How should HEIs go about insuring these risks?

3.1 The role of liability insurance in HEIs

As far as the objective of liability insurance is concerned, this refers to the interest of the insured in not incurring liability towards a third party.[47] Liability insurance undertakes a considerable financial role in the distribution of risk and most notably in the burden of civil liability.[48] The importance of liability insurance can be accredited to the hasty increase of rights awareness amongst consumers and policyholders alike, developments in consumer-centric legislation,[49] and an expanding litigious society.[50] A liability policy characteristically provides cover to an insured against their legal liability for third-party damages. It is necessary to understand that ordinary loss or damage suffered by the third party is not enough. The insured party must be legally and rightfully liable for the third party's loss or damage and the third party must be capable of recovering damages from the insured prior to the latter's liability insurer incurring any liability in terms of the policy issued.[51]

In terms of Table 2 of the Insurance Act,[52] the liability class is distinguished and detailed therein. Within the various liability sub-classes, public liability is listed therein.[53] The liability class within the Insurance Act describes the subclass as covering liability to another person.[54] Therefore, when it comes to the

47 Reinecke *et al* (n 1) 539; See also *Boshoff v South British Insurance Co Ltd* 1951 (3) SA 481 (T).
48 Reinecke *et al* (n 1) 538; See also *Cape Town Municipality v Allianz Insurance Co Ltd* 1990 (1) SA 311 (C).
49 In insurance, take note of the Policyholder Protection Rules.
50 Jacobs "Legal protection insurance **in the context of** liability insurance: Possible solutions in English law?" 2011 *SA Merc LJ* 464.
51 Millard (n 2) 45. See also *Watson NO v Shaw NO* 2008 (1) SA 350 (C).
52 Insurance Act 18 of 2017. This details the classes and subclasses of insurance business for non-life insurance.
53 Table 2 of sch 2 of the Insurance Act 18 of 2017. See also Yiannakis "Does the current drone legislation in South Africa and the United Kingdom assist insurers and their underwriters to assess and address the liability risks associated therewith? A comparative study" 2019 Master's Dissertation, University of Johannesburg.
54 table 2 of sch 2 of the Insurance Act 18 of 2017.

insuring of HEIs' liabilities, this is where one finds application within the legislation. Reinecke *et al* describe liability insurance as that which is concerned with the negative elements which come into being as part of the insured's patrimony.[55] Insured parties will procure such insurance to protect themselves against economically debilitating consequences of sustaining legal liability towards others.[56]

3.2 The role of property insurance in HEI

The notion of property insurance generally considers the positive elements or assets of the insured's patrimony or estate, and it is concerned specifically with those attributes.[57] It is also known as first-party insurance, as the insured procures such insurance to protect its assets against possible loss or damage. Therefore, the insured is concerned with their positive aspects of their patrimony.[58] In terms of the Insurance Act, Table 2 refers to the class of property insurance and divides it into two subclasses – personal lines and commercial lines – and defines it as covering "damage to or loss resulting from the possession, use or ownership of property".

In the case of HEIs, they procure such short-term (or non-life) insurance policies to protect their various assets against possible loss or damage that they may be subjected to. This type of insurance plays a significant role in protecting the actual assets held by the HEIs, including buildings, vehicles, equipment, etc. Therefore, in terms of climate change risks faced by HEIs and the increase of weather-related events, there is an increased risk of property damage due to events such as floods, fires, and other severe weather systems.

55 Reinecke *et al* (n 1) 10.
56 Reinecke *et al* (n 1) 540.
57 Reinecke *et al* (n 1) 10.
58 Reinecke *et al* (n 1) 538.

3.3 The appropriate cover for HEIs in terms of the novel risks

3.3.1 Cybersecurity insurance policies

The risk of cyberattacks has introduced cyber insurance as a specific type of insurance product offered by various insurers and is therefore considered a financial product by insurance companies.[59] The FAIS Act[60] defines a financial product as a long-term or a short-term insurance contract or policy, referred to in the Long-term Insurance Act[61] and the Short-term Insurance Act.[62] Section 2 of the Financial Sector Regulation Act[63] also uses similar wording to the FAIS Act.[64] Cyber insurance is now a specific type of liability insurance policy offered by many commercial insurers.

The rise of cyberattacks and breaches necessitates HEIs in procuring cyber insurance policies. Since HEIs store third-party data, they need to ensure that this information is protected. Advantages of HEIs procuring cyber insurance include that the institution will be able bounce back from any interruption or financial loss incurred as a result from a cyberattack or breach. It also assists in the practical side of getting IT experts to restore the systems, recreate data, and prevent as well as foresee new possible threats. Procuring adequate cyber insurance policies ensures that HEIs are not held liable for accidental loss of data or

59 For example, see the United Kingdom Company Chubb that specifically offers cyber insurance products for various entities. This can be seen as part of their product offering: https://www.chubb.com/za-en/businesses/cyber-insurance.html (26-08-2024); AIG "Comprehensive cyber insurance to protect clients from one of the most volatile risks facing businesses today" n.d. https://www.aig.co.za/business/our-products/financial-lines/cyber (14-08-2022); Specifically, in South Africa Santam offers cyber insurance as part of liability cover for businesses – see https://www.santam.co.za/insurance/for-my-business/liability-insurance/ (26-08-2024).

60 the Financial Advisory and Intermediary Services (FAIS) Act 37 of 2002.

61 the Long-term Insurance Act 52 of 1998.

62 the Short-term Insurance Act 53 of 1998.

63 the Financial Sector Regulation Act 9 of 2017.

64 The Act defines a financial product as a short-term policy as defined in s 1(1) of the Short-term Insurance Act or a non-life insurance policy as defined in s 1 of the Insurance Act.

any accidental damage caused by computer-driven property, as well as ensuring that the institutions do not suffer a loss, damage, or liability caused by algorithmic errors and malfunctions.[65]

3.3.2 Parametric insurance policies

Parametric insurance is insurance cover based on the likelihood of a predefined event happening, instead of indemnifying the insured for actual loss incurred.[66] It is viewed as an arrangement to make a payment upon the existence of a triggering event and is therefore removed from an underlying physical asset or piece of infrastructure.[67] Consequently, it is an 'if/then' contract for insurance. This is because payment is attached to predefined parameters being met. The insurance policy itself is said to be dissociated from an essential physical asset (like a car, agricultural fields, or house) and any damage to that asset.[68] Evidently, parametric insurance is different from traditional insurance policies because it is not based on indemnifying the policyholder on the actual loss incurred from a risk event.[69] It is based on the fact that the insurer agrees to an approved-upon monetary payment when the predefined factors are realised. This in turn makes the pay-out procedure both quick and predictable. A parametric insurance policy will thus consist of only two elements: the triggering event and the pre-approved pay-out process.[70] The policyholders cover is prompted if the parties' predefined parameters are met as measured by an objective index.[71]

Parametric insurance cover may be aligned with property insurance policies to provide appropriate cover to HEIs in the event of climate-change or weather-related events. Therefore, parametric cover may be attractive to HEIs as a feasible

65 Santam "Cyber Security for your Business" 2022 https://www.santam.co.za/blog/business-advice/cyber-security-for-your-business/ (9-10-2022).
66 "What is parametric insurance?" 2018 https://corporatesolutions.swissre.com/insights/knowledge/what_is_parametric_insurance.html (27-10-2022).
67 See (n 65).
68 *Ibid.*
69 *Ibid.*
70 *Ibid.*
71 *Ibid.*

mechanism to manage risks such as catastrophic weather events. The HEIs would not need to prove the loss suffered after such a catastrophic event; rather, the triggering event would automatically lead to the payment of the claim. This will be an extremely valuable option for HEIs in catastrophe-prone areas. Parametric policies are becoming more popular and relevant especially due to the rise of climate-change issues. Insurers are recognising the need for parametric cover due to the rise climate-change-related perils.[72]

4. Recommendations and conclusions

4.1 Recommendations

It is recommended that HEIs take out adequate insurance coverage to protect themselves against the novel risks they face. HEIs should be proactive and not reactive in procuring appropriate insurance. This will require proper risk analysis studies undertaken by the relevant HEIs so that they are able to understand the full extent of the risks they face considering the evolving risk landscape.

Taking out specific liability policies for cyber insurance is instrumental in ensuring that cyber risks and possible breaches related thereto are covered at all times and that any risks associated with cyber issues are transferred to the insurer. This will ensure that all cybersecurity issues that HEIs face are at all times considered and covered by the relevant policy.

In light of climate change risks, it may be viable for HEIs to consider parametric insurance coverage. Parametric insurance coverage will ensure that HEIs are covered in the event of any triggering event related to weather-related incidents, that is despite the loss that they suffer. This will ensure that HEIs are able to deal with any property damage that they suffer due to weather-related incidents. The triggering event will automatically lead to a claims pay-out. This will allow the HEIs to immediately

72 Santam "Digital trends in the insurance industry" 2021 https://www.santam.co.za/about-us/media/corporate-news/digital-trends-in-the-insurance-industry/ (9-10-2022).

deal with any losses related thereto. This type of expedient claim pay-out allows for timeous responses which allow HEIs to carry out its education duties with little interruption.

Some other recommendations for HEIs to consider are providing continuous training to faculty, staff, and students about the risks and safety issues associated with such risks. Creating awareness around the risks is essential in managing and mitigating risks as far as possible. It will also be essential for HEIs to maintain up-to-date risk management policies and procedures. HEIs in different areas face different risks and therefore, setting out these specific risks in appropriate policies is needed. HEIs can also look to having appropriate crisis management planning in place. This means that how an HEI responds to a crisis is critical to its survival.

Risk-pooling with other HEIs that have similar risks may also prove to be a viable option for these institutions. Risk-pooling, in this sense, refers to HEIs that share similar risks each contributing towards the costs of neutralising any eventual loss. This may lead to lower premiums for the HEIs, as they are able to share the risk on an equal basis. These recommendations can go a long way towards managing the novel risks that HEIs face in the current era. It is crucial that these institutions remain proactive in their risk management procedures.

4.2 Conclusion

It is evident that HEIs are facing novel risks in the 21st century, and that their insurance coverage needs to adapt to these new risks. Cybersecurity risks faced by HEIs are prevalent due to the surge in use of online learning and making use of more online platforms to conduct education. Coupled with this are the looming effects of climate change and the possible losses that this will bring to the higher education sphere. Therefore, it is vital that HEIs remain aware of these risks and procure adequate insurance coverage to protect themselves. Here, it is equally important that the HEIs can afford the increased premiums that these risks may bring. Mitigating their risks as far as possible will also become crucial

for HEIs. Ultimately, insurers and HEIs should communicate as to their specific needs and coverage.

Chapter 3

Higher Education Institutions and Construction Contracts: The Demand Guarantee as a Means of Security

Cayle Lupton[1]
Faculty of Law,
University of Johannesburg

Abstract

It is trite that education is an important tool in the mitigation of socio-economic problems and poverty in South Africa. Higher education institutions (HEIs) naturally have an important role to play in this regard. Campus buildings and other infrastructure are particularly important to the business of HEIs. They are used, *inter alia*, to provide student services (such as the delivery of lectures and facilitation of other forms of teaching) and to position the institution as a leader in the local and international communities, respectively. In the event that campus buildings and infrastructure require maintenance, upgrading, or expansion, HEIs may conclude a construction contract with a contractor. Construction contracts may be complex and are inherently risky. This gives rise to the need to ensure security of performance and various methods of such security are available for use. It is, however, the demand guarantee that may best secure the interests of the parties. A demand guarantee is a facility issued by a financial institution in terms of which it agrees to pay the beneficiary a certain sum of money upon delivery of documents

1 LLB, LLM, LLD. Senior lecturer in the Department of Procedural Law, University of Johannesburg and an admitted attorney of the High Court of South Africa.

which comply with the requirements of the guarantee. Although these instruments may be used to secure any conceivable obligation, in South Africa they are widely used in the construction industry. In this context, the demand guarantee may be used to secure the interests of the employer (for the proper performance of the contractor's obligations), or the contractor (for the performance of the employer's payment obligations). Against this background, this chapter aims to recommend to HEIs the use of demand guarantees in construction projects. The point is made in this chapter that by using demand guarantees in construction projects, HEIs will ensure their liquidity, which is essential to the fulfilment of their day-to-day operations.

1. Introduction

Campus buildings and other infrastructure are vital to the business of higher education institutions (HEIs).[2] In relation to teaching and learning, they are used, *inter alia*, in the facilitation of lectures, practical studies, and scientific experiments as well as in the implementation of tools and strategies that promote effective teaching and learning.[3] They also have a significant role to play in positioning HEIs as leaders in the local and international communities. In this regard, campus buildings house faculties and academic centres that equip students to contribute meaningfully to society and the economy,[4] as well as produce research in response to societal, economic and other challenges. HEI establishments involved in the provision of basic goods and services are also noteworthy in this context.[5]

2 The basic function of HEIs is to facilitate teaching, learning and research. See Ford "The functions of higher education" 2017 *The American Journal of Economics and Sociology* 559-561.

3 The projector, a mounted electronic device used to display teaching and learning content, is a widely used tool in this regard.

4 On the different ways in which HEIs contribute specifically to small business development, see Green and Venkatachalam "Institutions of higher education as engines of small business development" 2005 *Journal of Higher Education Outreach and Engagement* 49-67.

5 For example, most law faculties in South Africa, through law clinics, provide legal services to indigent members of the community. Law clinics are therefore important to civil society. See, for example, the case of *Stellenbosch University Law Clinic v*

In the event that campus buildings and other infrastructure require maintenance, upgrading, or expansion, HEIs may enter into construction contracts.[6] Construction contracts can be distinguished from other commercial contracts on two main grounds. The first is that they are generally more complex than other commercial contracts.[7] This can be ascribed to the many aspects – and the extent of those aspects – of construction contracts. These aspects include the duration of the project, its size, procurement and tender procedures, approval processes and structures, supervision, regulatory requirements and expectations, and the many different parties that may potentially become involved, to name but a few. By contrast, other commercial transactions are generally more straightforward. This is especially true of contracts of sale where payment and delivery of the goods do not necessarily involve a host of different factors.[8]

Construction contracts, secondly, are riskier than other commercial contracts.[9] The following risks are most prevalent in construction transactions: design errors and construction defects; natural risks (bad weather, earthquakes, floods and so on), labour risks (strikes and riots); human risks (fraud, vandalism, and disease), site risks (environmental contaminations and latent surface conditions), regulatory risks (complex regulatory approval processes), and financial risks (terrorism, war, and variations in wages and prices).[10] Bailey states that major building

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Lifestyle Direct Group International (Pty) Ltd (16262/2019) 2021 ZAWCHC 133; [2021] 4 All SA 219 (WCC); 2022 (2) SA 237 (WCC).

6 The term "construction contract" is broad and encompasses both contracts for building works (above ground) and engineering works (below ground). See Adriaanse *Construction Contract Law* (2010) 1.

7 See Klee *International Construction Contract Law* (2018) 1; Marxen *Demand Guarantees in the Construction Industry: A Comparative Legal Study of their Use and Abuse from a South African, English and German Perspective* 2017 LLD thesis, University of Johannesburg 2.

8 See Hugo "Payment in and financing of international sale transactions" in Sharrock (ed) *The Law of Banking and Payment in South Africa* (2016) 394-433.

9 Reed *Construction All Risks Insurance* (2014) 1.

10 On these and other risks in construction, see Barru "How to guarantee contractor performance on international construction projects: comparing surety bonds with bank guarantees and standby letters of credit" 2005 *The George Washington International Law Review* 51-52; Adriaanse (n 5) 4-5.

and engineering projects may give rise to "some of the most factually detailed and legally complicated disputes one may encounter in commercial law".[11] This statement finds support in South Africa where, over the last decade, construction contracts have received considerable attention from the judiciary.[12] In fact, there have been several judgments relating specifically to HEIs involved in construction contracts.[13] The general theme emerging from the case law is that construction disputes give rise to difficult (legal and non-legal) questions which mostly result in protracted litigation and arbitration proceedings. Such proceedings may in turn also have a bearing on the completion of the construction works.[14] Moreover, the different regulatory frameworks within which public and private entities (in this context, HEIs and contractors) operate potentially raises the complexity of the transaction and consequently the possibility of disputes between the parties. Clearly, against this background, there is a need for security of performance in construction transactions.

11 Bailey *Construction Law* (2011) 1419. See also Circo *Contract Law in the Construction Context* (2021) 5; *Radon Projects (Pty) Ltd v NV Properties (Pty) Ltd* 2013 (6) SA 345 (SCA) par 1.

12 See *Lombard Insurance Co Ltd v Landmark Holdings (Pty) Ltd* 2010 (2) SA 86 (SCA); *Dormell Properties 282 CC v Renasa Insurance Co Ltd* 2011 (1) SA 70 (SCA); *Compass Insurance Co Ltd v Hospitality Hotel Developments (Pty) Ltd* 2012 (2) SA 537 (SCA); *First Rand Bank v Brera* 2013 (5) SA 556 (SCA); *Coface South Africa Insurance Co Ltd v East London Own Haven t/a Own Haven Housing Association* 2014 (2) SA 382 (SCA); *Kristabel Developments (Pty) Ltd v Credit Guarantee Insurance Corporation of Africa Limited* (23125/2014) 2015 ZAGPJHC 264 (20 Oct 2015); *Mutual and Federal Insurance Co Ltd v KNS Construction (Pty) Ltd* (208/2015) 2016 ZASCA 87 (31 May 2016); and *Mattress House (Pty) Ltd t/a Mia Bella Interiors v Investec Property Fund Ltd* (2017/36270) 2017 ZAGPHC 298 (13 Oct 2017).

13 See, for example, *Ekurhuleni West College v Segal* (1287/2018) 2020 ZASCA 32 (2 April 2020); *WBHO/Pro Khaya JV v The Nelson Mandela University* (2121/19) 2019 ZAECPEHC 68 (1 Oct 2019); and *University of the Western Cape v ABSA Insurance Company* (100/2015) 2015 ZAGPJHC 303 (28 Oct 2015).

14 Oftentimes construction contracts require disputes to be resolved by arbitration pending completion of the construction works. But if disputes demand earlier resolution due to their significant nature, finalisation of construction may not be a prerequisite for arbitration proceedings, thereby resulting in construction delays. See Nugent J's remarks in the *Radon Projects* case paras 3-4.

This contribution aims to recommend to HEIs the use of demand guarantees as a means of security in construction projects. To this end, it explores the operation of and law pertaining to demand guarantees in South Africa. Because English law has traditionally informed the development of the South African law relating to guarantees and commerce in general,[15] English case law and commentary are also referred to in this regard. But before exploring demand guarantees, an overview of construction transactions is provided.

2. Overview of construction transactions

The main parties to construction transactions are the employer and the contractor,[16] but subcontractors, architects, and engineers may also become involved.[17] A comprehensive discussion of the construction transaction falls beyond the scope of this contribution. Instead, a basic account of the transaction is provided with reference to the different parties involved.

Major construction contracts are invariably awarded through tender procedures. This is done to enable the employer to attract a suitable contractor that will best satisfy its construction needs and expectations. These procedures may entail an invitation to the general public or a select group of contractors and typically require a potential contractor to "sign a contract if it is awarded to it, to procure the issue of any performance or other guarantee required by the contract and not to alter or withdraw

15 Van Niekerk and Schulze *The South African Law of International Trade: Selected Topics* (2016) 248; Hugo "Protecting the lifeblood of international commerce: a critical assessment of recent judgments of the South African supreme court of appeal relating to demand guarantees" 2014 *TSAR* 661-669.

16 The employer is also referred to as the building owner, client, and principal and the contractor is also known as the building contractor, main contractor, and head contractor. The terms "contractor" and "main contractor" are used interchangeably in this contribution.

17 This is by no means a closed list. For a list containing these and other parties that may become involved in the construction project, see Mason *Innovating Construction Law* (2021) 11; Klee (n 6) 2-10. Moreover, because the parties to construction transactions and demand guarantees are mostly juristic persons, the pronoun "it" is generally used in this contribution.

his tender in the meantime".[18] As public HEIs are considered organs of state,[19] moreover, certain provisions and regulations relating to government tenders and contracts necessarily become applicable. Most noteworthy in this regard are the so-called general conditions of contract which are supplemented by special conditions of contract.[20] In the event that a contractor tenders for a construction project at a public HEI, it must comply with the requirements arising from these conditions of contract. Of particular significance is general condition 7, titled "performance security", which reads as follows:

> 7.1 Within thirty (30) days of receipt of the notification of contract award, the successful bidder shall furnish to the purchaser the performance security of the amount specified in [the special conditions of contract].
>
> 7.2 The proceeds of the performance security shall be payable to the purchaser as compensation for any loss resulting from the supplier's failure to complete his obligations under the contract.
>
> 7.3 The performance security shall be denominated in the currency of the contract, or in a freely convertible currency acceptable to the purchaser and shall be in one of the following forms:
>
> (a) a bank guarantee or an irrevocable letter of credit issued by a reputable bank located in the purchaser's country or abroad, acceptable to the purchaser, in the form provided in the bidding documents or another form acceptable to the purchaser; or
>
> (b) a cashier's or certified cheque

18 Kelly-Louw "Selective Legal Aspects of Bank Demand Guarantees" 2008 LLD thesis, UNISA 27.

19 For the definition of the term "organ of state" see s 239 of the *Constitution of the Republic of South Africa*, 1996 (hereafter "the Constitution").

20 National Treasury *Government Procurement: General Conditions of Contract* (2010). The scope of application of the general conditions are expressed in condition 2.1 as follows: "These general conditions are applicable to all bids, contracts and orders including bids for functional and professional services, sales, hiring, letting and the granting or acquiring of rights, but excluding immovable property, unless otherwise indicated in the bidding documents".

> 7.4 The performance security will be discharged by the purchaser and returned to the supplier not later than thirty (30) days following the date of completion of the supplier's performance obligations under the contract, including any warranty obligations, unless otherwise specified in [the special conditions of contract].[21]

Such performance security may indeed be a demand guarantee. It follows that only upon compliance with the general conditions of contract, and particularly the performance security condition, will the successful contractor conclude a construction contract with a public HEI.

The construction contract sets out the construction requirements and expectations.[22] Although the contract is concluded between the employer and the main contractor, in practice construction work is often rendered by a subcontractor and not the main contractor.[23] This "modern trend"[24] is ascribed to increasing specialisation in the construction industry and, possibly, the desire to shift accountability (and potential liability) relating to the construction workers themselves from the main contractor to the subcontractor.[25] Two types of subcontractors can be distinguished, namely, domestic subcontractors and nominated subcontractors. The difference between the two lies not in the contractual arrangements, since both subcontractors ultimately conclude a subcontract with the main contractor. Rather, it lies in the way in which they are appointed – nominated subcontractors are expressly indicated in the main construction

21 National Treasury (n 19) condition 7.

22 These requirements and expectations may be narrowly or broadly defined, depending on the specific needs of the employer. On the factors that may influence the scope of construction requirements and expectations, see Haidar *Handbook of Contract Management in Construction* (2021) 34.

23 Adriaanse (n 5) 242; Uff *Construction Law* (2013) 138-139.

24 Ramsden *McKenzie's Law of Building and Engineering Contracts and Arbitration* (2014) 167.

25 Bailey (n 10) 1294 ft 1 explains that "[o]ne of the potential advantages to a main contractor of subcontracting some part or all of its work is that it does not incur obligations *vis-à-vis* the subcontractor's workers that it would do if it employed those workers directly".

contract between the employer and the main contractor, while domestic subcontractors are elected entirely by the main contractor.[26]

It is important to emphasise the fact that no contractual relationship exists between the employer and the (domestic or nominated) subcontractor.[27] The implication is that a discrepancy raised by the subcontractor concerning construction design, materials, work, or even payment is to be directed to the main contractor based on the subcontract. Hence, in most cases, it is the main contractor – and not the employer – that is held liable for discrepancies raised by the subcontractor in relation to the construction work.[28] This position is consistent with the canon of privity of contract, which entails that "a contract generally creates personal rights and duties only for the parties to the contract, and for nobody else".[29]

Architects and engineers that are known as "construction professionals"[30] are typically also engaged in construction transactions. Since the employer will not have in-depth knowledge of the key aspects of the transaction, architects and engineers may be brought on board to assist the employer in this regard.[31] The scope of the services that may be rendered by construction professionals is vast. Firstly, they may assist in

26 Hughes, Champion and Murdoch *Construction Contracts: Law and Management* (2015) 307. There are many advantages for an employer that nominates a subcontractor in the construction contract. Two advantages are especially noteworthy: the first is that nominated subcontracting avoids the need to enter into tender processes in relation to the appointment of a subcontractor. This saves the employer time and money. The second is that it allows the employer control of the allocation of responsibility.

27 Uff (n 22) 318; Adriaanse (n 5) 242.

28 See, for example, *Phenix Construction Technology Ltd v Hollard Insurance Company Ltd* (10995/2015) 2017 ZAGPJHC 174 (4 May 2017).

29 Hutchison and Pretorius (eds) *The Law of Contract in South Africa* (2017) 233. In the construction context, the canon of privity of contract has received much attention from legal commentators. See Bailey (n 10) 1295-1297; Marxen (n 6) 16-19; and Adriaanse (n 5) 246, 278-292.

30 Adriaanse (n 5) 99.

31 Therefore, to regulate the relationship, the employer and construction professional will conclude a contract between themselves.

the design of the building upgrade, development, or expansion. Secondly, they may assist in the tender phase of the transaction. Adriaanse explains that "these professionals will also be involved in making applications for planning permission, preparing the tender documents [and] the selection of a tenderer [...]".[32] Finally, architects and engineers may be responsible for the supervision and inspection of the contractor's work according to the construction contract.[33] Given the nature of some of these services, construction professionals are generally perceived as agents of the employer.[34] The conflicting nature of their position in relation to the transaction (that is, acting as an impartial party regarding supervision and adjudication while being perceived as an agent of the employer) has brought into question their precise role and the extent of their potential liability in this regard.[35] It is nevertheless clear that construction professionals, and especially architects and engineers, fulfil an important function in the construction transaction.

Another aspect of the construction transaction is payment. In construction projects payment is often "staggered". Staggered payment arrangements entail that payment of the contract amount is not made in a lump sum but in intervals subject to the satisfactory completion of certain milestones in terms of the construction project. Once the contractor has completed a particular milestone, a payment certificate confirming the completion must be issued by the employer or engineer. The payment certificate essentially serves to trigger the payment obligations of the employer.[36] The construction contract,

32 See Adriaanse (n 5) 99.

33 Adriaanse (n 5) 104-105. Architects and engineers in this context may be referred to as (quality or quantity) surveyors, adjudicators, or certifiers. See Marxen (n 6) 16; Uff (n 22) 139-140.

34 Marxen (n 6) 15-16.

35 See Nisja "The engineer in international construction: agent? mediator? adjudicator?" 2004 *The International Construction Law Review* 230.

36 After receiving payment, the contractor then pays the subcontractor in terms of the subcontract. See Klee (n 6) 7-9; Bailey (n 10) 351. If the employer does not pay under the payment certificate the contractor may attempt to enforce payment based on the payment certificate or evidence indicating completion of the specific construction works. Alternatively, if an independent

moreover, may or may not provide for the retention of a portion of the monies due under payment certificates. Retention money is a form of protection against improper or defective contractual performance by the contractor.[37] Commentators generally agree, however, that retention money represents disadvantages for both the employer and the contractor.[38]

In view of this background, there is seemingly considerable scope for disputes to emerge in construction transactions. It would, therefore, be wise for the parties to be thorough in the formulation of the construction contract. A precise, clear, and accurate representation of the allocation of risk and the rights and duties of the parties is likely to reduce the occurrence of construction disputes.[39] Standard-form construction contracts may be used to achieve this objective. Such contracts are "carefully formulated by industry experts and professionals who, over many years, have paid meticulous attention to the rights and obligations of the parties to construction contracts".[40] The Joint Building Contracts Committee's suite of agreements and the General Conditions of Contract for Construction Works of the South African Institution of Civil Engineering enjoy widespread use in South Africa.[41] The standard-form contracts of the New Engineering Contract and the *Federation Internationale des Ingenieurs-Conseil* seem to be gaining ground in South Africa.[42]

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guarantee is issued to protect the contractor, it (the contractor) may, by presenting certain stipulated documents, call up the guarantee. See the discussion in par 3 (below) on demand guarantees.

37 Bailey (n 10) 895.

38 Bailey (n 10) 896; Hugo "Construction guarantees and the Supreme Court of Appeal (2010-2013)" in Visser and Pretorius (eds) *Essays in Honour of Frans Malan* (2014) 159-164.

39 Chan Chuen Fye and Gunawansa "Is it the correct time for an ASEAN standard form of building and construction contract?" 2010 *The International Construction Law Review* 448 450-451; Adriaanse (n 5) 5.

40 Lupton *Letters of credit and demand guarantees: a legal study on the impact of targeted financial sanctions from a South African perspective* 2022 LLD thesis, University of Johannesburg 38-39.

41 See Finsen *The Building Contract: A Commentary on the JBCC Agreements* (2018); South African Institution of Civil Engineering *Management Guide to the General Conditions of Contract* (2010).

42 See, for example, *Group Five Construction (Pty) Ltd v Transnet SOC Limited* (45879/2018) 2019 ZAGPJHC 328 (28 June 2019); *SA*

Even when standard-form construction contracts are utilised, however, disputes between the parties (and consequently lengthy and expensive dispute resolution proceedings) are still conceivable. And so, it is imperative to consider using security instruments in construction transactions. This is particularly the case in transactions relating to the higher education sector in which cash plays a vital role in the fulfilment of daily operations and the pursuit of HEI projects.[43] It would accordingly be prudent for HEIs involved in construction transactions to obtain security for the satisfactory performance of the contractor's obligations. Such security must be able to provide the HEI with funds almost immediately and with relative ease. It must also provide the HEI with an assurance that payment will be made upon mere demand irrespective of disputes arising from the construction contract. While several security instruments are available for use, including accessory guarantees,[44] insurance policies,[45] and indemnities,[46] it is the demand guarantee that may best secure the interests of HEIs.[47] Hence the demand guarantee is the focus of this chapter.

National Roads Agency SOC Limited v Fountain Civil Engineering (Pty) Ltd (395/2020) 2021 ZASCA 118 (20 Sep 2021).

43 This is clear from the 2021 report on the financial statistics of HEIs in South Africa as prepared by Statistics South Africa: https://www.statssa.gov.za/publications/P91031/P910312021.pdf (11-04-2023).

44 For background on accessory guarantees, see Kelly-Louw "Construing whether a guarantee is accessory or independent is key" in Hugo and Kelly-Louw (eds) *Jopie: Jurist, Mentor, Supervisor and Friend – Essays on the Law of Banking, Companies and Suretyship* (2017) 110-116. Also see, in this regard, Forsyth and Pretorius *Caney's Law of Suretyship in South Africa* (2010) 28-29.

45 For background on insurance policies, see generally Bird *Insurance Law in the United Kingdom* (2010).

46 For background on indemnities, see Bailey (n 10) 910-911.

47 For a comparative study on all these security instruments, see Marxen (n 6) 90-100; Hugo "Bank guarantees" in Sharrock (ed) *The Law of Banking and Payment in South Africa* (2016) 437, 446-449 (in relation to accessory guarantees and demand guarantees); Kelly-Louw (n 17) 91-92 (in relation to insurance policies and independent guarantees). The conclusion reached in all these commentaries is that demand guarantees are superior to the other security devices under consideration.

3. Demand guarantees

3.1 Operation

A demand or independent guarantee is a facility issued by a guarantor, normally a bank or an insurance company,[48] in terms of which the guarantor agrees to pay a stipulated sum of money to a beneficiary (for example, an HEI in a construction contract) upon the delivery of a conforming demand.[49] The party who approaches the financial institution for the issuance of the guarantee is known as the applicant (the contractor in the construction contract). The circumstances under which a call may be made on a guarantee are expressed in the guarantee itself. Common trigger events include an allegation of breach of the underlying contract on the part of the applicant and the liquidation of the applicant. A growing trend in this regard has been the requirement of a precise demand supported by additional documents such as a notice of cancellation or liquidation order.[50] Provided the demand is in conformance with the requirements of the guarantee, it serves as

48 Interestingly, the vast majority of demand-guarantee case law in South Africa involves an insurance company acting as guarantor rather than a bank. The rationale for this trend is likely to be informed by, *inter alia*, the favourable security requirements of insurance companies. See Lupton and Huneberg "Issuance of independent guarantees by insurance companies" 2023 *Journal for Juridical Science* 16-29.

49 Enonchong *The Independence Principle of Letters of Credit and Demand Guarantees* (2011) 39. Demand guarantees operate in a similar fashion to letters of credit. The main difference between the two instruments, however, is that demand guarantees provide a security function while letters of credit serve as a mode of payment. Horowitz *Letters of Credit and Demand Guarantees: Defences to Payment* (2010) 227 explains this difference as follows: "[l]etters of credit and guarantees share the characteristic of abstraction from the underlying agreement that called for their use. Nonetheless, they differ on one key aspect. Letters of credit are primary both in form and intent. They do what they appear to do: serve as the payment method for the transaction. By contrast demand guarantees are primary in form, but secondary in intent. They bear the appearance of primary instruments, because they represent an on-demand form of payment. However they are secondary in intent, inasmuch as they serve a 'back-up', or standby, role".

50 See Byrne *Standby and Demand Guarantee Practice: Understanding UCP600, ISP98 & URDG 758* (2014) 150.

"conclusive evidence that payment is due".[51] It is, therefore, clear that demand guarantees are intended to ensure swift and easy access to funds. Hence, Kelly-Louw describes these instruments as a "substitute for cash".[52]

Most countries do not have specific legislation governing demand guarantees, including South Africa. In such instances, these instruments may be regulated by internationally established sets of rules which become operative through contractual incorporation. Several international frameworks are available for incorporation. These are the Uniform Rules for Demand Guarantees (URDG 758);[53] the International Standby Practices (ISP98);[54] the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (UNCITRAL Convention);[55] and, in the case where the guarantee takes the form of a standby letter of credit,[56] the Uniform Customs and Practice for Documentary Credits (UCP 600).[57] In the event that none of these rules are contractually incorporated (and the guarantee is not regulated by legislation), the provisions of the guarantee must be interpreted in accordance with the law of contract of the country concerned.[58] None of these sets of rules enjoy strong usage in South Africa.

The operation of the demand guarantee in the context of this contribution may be explained by way of example. Suppose an HEI wishes to develop and upgrade all its campus buildings.

51 *State Bank of India v Denel SOC Limited* [2015] 2 All SA 152 (SCA) par 9.

52 Kelly-Louw "The documentary nature of demand guarantees and the doctrine of strict compliance (part 1)" 2009 *SA Merc LJ* 306-307.

53 International Chamber of Commerce "Uniform Rules for Demand Guarantees 758" 2010.

54 International Chamber of Commerce "International Standby Practices 590" 1998.

55 Since its effective date of January 2000, very few countries have acceded to this Convention, including South Africa.

56 From an operational and legal perspective, the standby letter of credit mirrors the independent guarantee. They diverge, however, with regard to the contexts in which they are typically used. See Kelly-Louw (n 17) 1.

57 International Chamber of Commerce "Uniform Customs and Practice for Documentary Credits 600" 2007.

58 *Minister of Transport and Public Works, Western Cape v Zanbuild Construction (Pty) Ltd* 2011 (5) SA 528 (SCA) par 19.

Following the finalisation of the tendering process, it concludes a construction contract (the underlying contract) with the successful contractor (Party A). In accordance with the underlying contract, Party A is required to provide security for the proper performance of its obligations by procuring the issuance of a demand guarantee in favour of the HEI. Party A approaches its bank (Party B) to provide a guarantee in favour of the HEI.[59] After establishing Party A's creditworthiness,[60] Party B issues the guarantee. The guarantee provides the following: "The HEI will be paid upon presentation of a written demand alleging cancellation of the contract due to defective performance or non-performance by Party A". In the course of the construction, the HEI identifies several deficiencies in the performance by Party A. The HEI consequently cancels the underlying contract and calls up the guarantee. Party B must make payment if the demand by the HEI meets the requirements of the guarantee.

In this example Party B is the guarantor, the HEI the beneficiary, and Party A the applicant. The contract between the applicant and the guarantor is one of mandate. The contract of guarantee between Party B and the HEI is autonomous of the underlying contract and the mandate. This independence is a strong rule of demand-guarantee law and is discussed in more detail below. Once the guarantor has received the demand it must examine the demand to establish whether it is in conformance with the requirements of the guarantee. If it is a compliant demand, the guarantor is liable to pay the beneficiary, after which reimbursement may be sought from the applicant.[61]

Several different kinds of demand guarantees are common in the construction sector, such as payment guarantees, performance guarantees, advance payment guarantees, and retention, maintenance and tender guarantees.[62] The question

59 Enonchong (n 48) 43 states that "[t]he instructions given by the account party to his bank should be in accordance with the terms agreed in the underlying contract, otherwise the beneficiary may refuse to accept the guarantee".

60 Bertrams *Bank Guarantees in International Trade* (2013) 22.

61 Enonchong (n 48) 294.

62 A comprehensive discussion of the different types of demand guarantees is not provided in this contribution. See Bertrams (n 59)

as to which guarantee should be sought is dependent on the specific risk that requires mitigation. For example, if an HEI (as the employer in the construction contract) wishes to cover itself against the financial risks relating to defective performance by or insolvency on the part of the contractor, a performance guarantee may be most appropriate. Indeed, the example provided above relating to the operation of the demand guarantee involves a performance guarantee. Or, where the HEI agrees to make an advance payment of the contract value to the contractor to enable preliminary work on the project, it may be wise for the HEI to require of the contractor to present a guarantee securing the contractor's repayment obligations. Such a guarantee is known as an advance payment guarantee.[63] One last example will suffice. To avoid the negative effect retention monies may have on the cash flow of the contractor,[64] the HEI may require that a retention guarantee be issued in its favour instead. Practically, this means that the HEI will be entitled to call up the guarantee should a defect emerge later in the execution of the works.

Although the different types of demand guarantees may be used to secure different risks in the construction project, they are all based on the same legal principles. These legal principles are examined in the section below.

3.2 Legal principles

Demand guarantees, encountered mostly in the construction context, have received much attention from the South African courts during the past decade.[65] The case law in point generally contributes to the development and a better understanding

36-43.

63 An "advance payment guarantee" should not be confused with a "payment guarantee". The latter may be used to secure the payment undertaking of the employer towards the contractor. Hence the beneficiary of such a guarantee is usually the contractor. See Lupton "Demand guarantees in the construction industry: recent developments in the law relating to the fraud exception to the independence principle" 2019 *SA Merc LJ* 399-404, with reference to the *Phenix* case.

64 Marxen (n 6) 84.

65 Hugo (n 46) 437.

of the law relating to demand guarantees.[66] More specifically, attention is often directed to the two fundamental legal principles of demand guarantees, namely, the principle of documentary compliance and the independence principle.

The first legal principle entails that the guarantor is obliged to pay where the documentary submission complies with the requirements of the guarantee. But if the documents are non-conforming, the guarantor may refuse to pay. The case law to this principle is, however, riddled with confusion and inconsistency. In particular, the question of what the acceptable standard of compliance is in this regard is unclear. Two opposing standards emerge from case law, namely, strict compliance and substantial compliance. The former requires exact compliance with the wording of the requirements of the guarantee.[67] The latter requires material conformity with the requirements of the guarantee.[68] Thus, pursuant to this latter standard, obvious errors such as spelling mistakes are not over-emphasised and do not by themselves render a demand non-conforming. While the courts have had ample opportunity to provide clarity on this issue, they have mostly shied away from making clear pronouncements in this regard.

In his recent doctoral thesis focused on the conformity of demands, Chivizhe submits that, in view of the conflicting baggage that terms such as "strict compliance" and "substantial compliance" carry, placing too much emphasis on determining the applicable standard "has no practical use".[69] He offers the following suggestion:

66 Lupton "'On demand payment' character of independent guarantees" 2022 *TSAR* 569-570.

67 See the *Compass Insurance* case; the *Denel* case; and *Nedbank Ltd v Procprops 60 (Pty) Ltd* (108/2013) 2013 ZASCA 153 (20 Nov 2013). See further Kelly-Louw "An interpretation of a 'compliant demand' for a demand guarantee gone wrong" 2023 *THRHR* 261-273.

68 See *Lombard Insurance Co Ltd v Schoeman* 2018 (1) SA 240 (GJ)); *Schoeman v Lombard Insurance Co Ltd* (1299/2017) 2019 ZASCA 66 (29 May 2019), with reference to the phrase "sufficient compliance".

69 Chivizhe *A Comparative Study of the Law and Practice Relating to the Compliance of Documents Calling for Payment under Letters of Credit and Demand Guarantees* 2021 thesis, North-West University 291.

> The proper approach is to acknowledge the importance of both letters of credit and guarantees as lifeblood of commerce, and to recognise that for both of them to retain their strong security reputation, a high level of conformity is required. On the other hand, too strict a standard, with a concomitant high number of rejections of demands and documents, is likely to stifle their use and usefulness. In determining the level of conformity required, the purpose of the instrument concerned must also be considered as part of a *purposive approach*.[70]

This suggestion, it is submitted, has much merit because a purposive approach is likely to promote the usefulness of these instruments as well as ensure legal certainty and predictability of outcome.

The second legal principle, the independence principle, entails that the liability of the guarantor as against the beneficiary must be ascertained with reference to the provisions of the instrument, and not also the provisions of the underlying contract or any other related contract. This means that if conforming documents are tendered, the guarantor must effect payment regardless of any disputes arising from any of the contracts other than the guarantee. Article 5(a) of the URDG 758 puts it thus:

> A guarantee is by its nature independent of the underlying relationship and the application, and the guarantor is in no way concerned with or bound by such relationship. A reference in the guarantee to the underlying relationship for the purpose of identifying it does not change the independent nature of the guarantee. The undertaking of a guarantor to pay under the guarantee is not subject to claims or defences arising from any relationship other than a relationship between the guarantor and the beneficiary.

Demand guarantees are nevertheless susceptible to abuse. As such, justice and fairness militate against the notion that the independence principle is absolute. In other words, in certain

70 Chivizhe (n 69) 291.

instances a claim on the guarantee can be defended by the guarantor or applicant on the basis of a dispute arising from the underlying contract. In the common-law jurisdictions the legal basis for these "instances", or "exceptions" to the independence principle as they are often referred to, is public policy.[71]

Currently, fraud by the beneficiary is the only firmly established exception in South African law. In the demand-guarantee context, fraud emerging from the documents (typically forgery and falsification) and from the beneficiary's behaviour as it relates to the underlying contract is relevant.[72] Practically, the latter means that where the beneficiary dishonestly presents a claim under a guarantee knowing that it is not entitled to payment, the guarantor or applicant may raise the beneficiary's dishonest behaviour as a defence to payment. In *Guardrisk Insurance Company Ltd v Kentz (Pty) Ltd*, the supreme court of appeal held:[73]

> [i]t is trite that where a beneficiary who makes a call on a guarantee does so *with knowledge that it is not entitled to payment*, our courts will step in to protect the bank and decline enforcement of the guarantee in question.[74]

In English law the fraud exception is similarly formulated with reference to the beneficiary having "no honest belief" in the legitimacy of the demand.[75] Thus, knowledge of the beneficiary to its disentitlement has developed as an integral element of the fraud exception in both South African and English law.

Against this background, two recent developments in South African law – both of which arose in the construction context –

71 Hugo (n 46) 450. See also the letter of credit case of *Sztejn v J Henry Schroder Banking Corp* 31 NYS 2d 1941.

72 The fraud exception as it applies to letters of credit, however, is restricted to forgery and falsification of the documents. See Hugo "Demand guarantees in the People's Republic of China and the Republic of South Africa" 2019 *BRICS LJ* 4 15.

73 *Guardrisk Insurance Company Ltd v Kentz (Pty) Ltd* [2014] 1 All SA 307 (SCA).

74 par 17 of the *Guardrisk* case (the author's emphasis).

75 *National Infrastructure Development Co Ltd v Banco Santander SA* 2016 EWHC 2990 (Comm) par 11.

merit consideration. The first concerns the question of whether an arbitration award based on a dispute emanating from the underlying contract or a final payment certificate reflecting a nil balance owed for works in terms of the underlying contract, may constitute a valid defence to payment. The question first arose in the *Dormell* case in 2011 where Bertelsmann AJ, writing for the majority, concluded that an arbitration award against the beneficiary meant that the beneficiary "lost the right to enforce the guarantee".[76] Therefore, the court recognised a further defence to payment: namely, an arbitral award. The period after the *Dormell* case saw an increase in cases where banks raised contractual disputes to escape liability under guarantees. This continued until 2014 when the Supreme Court of Appeal in the *Coface* case held that "the decision of the majority in *Dormell* was clearly wrong",[77] and found that a defence based on a payment certificate issued in terms of the underlying contract (and, by implication, a defence based on an arbitral award relating to the underlying contract) violates the independence principle and therefore is unacceptable.[78] While the approach in the *Coface* case is sensible in instances where the call on the guarantee precedes the arbitral award or issuing of the payment certificate (as was the position in the above cases), it is doubtful whether it should also be applied in instances where the call on the guarantee occurs after the award or certificate is issued. This is because in such instances the arbitral award or payment certificate may serve as evidence indicating that the demand is in fact a dishonest one. Put differently, it was made by the beneficiary in the knowledge of the disentitlement to payment.[79]

Secondly, the question has arisen of whether the beneficiary's grossly disproportionate demand must be considered with reference to the principles of the fraud exception. In the *Phenix* case, the court was concerned with a situation where the beneficiary's demand was for the full amount guaranteed, yet it knew that it was entitled only to a portion of the guaranteed

76 the *Dormell* case par 41.
77 the *Coface* case par 25.
78 the *Coface* case paras 9-26.
79 Hugo (n 14) 666.

amount.[80] The court held that because the beneficiary had knowledge of its disentitlement to the full amount, its demand was fraudulent.[81]

Proving fraud, however, is no easy task, since courts do not lightly infer fraud. In *Raubex Construction (Pty) Ltd v Bryte Insurance Company Limited*,[82] the Supreme Court of Appeal put it as follows:

> Fraud will not be readily inferred; particularly where it is sought to be established in motion proceedings. A mere error, misunderstanding or oversight, however unreasonable, does not amount to fraud and it is insufficient to show that contentions are incorrect. A party has to go further and show that the representor advanced the contentions in bad faith, knowing them to be incorrect.[83]

Hence a defence based on fraud has rarely succeeded in South Africa.[84] To date, no other defence to payment has been raised successfully in the South African courts.[85] Commentators nevertheless agree that notions of justice and fairness require the recognition of an illegality exception.[86] In the construction

80 the *Phenix* case par 21.
81 the *Phenix* case par 53. See the case discussion in Lupton (n 63) 404-408.
82 the *Raubex* case [2019] 2 All SA (SCA).
83 the *Raubex* case par 24. See further *Loomcraft Fabrics CC v Landmark Holdings (Pty) Ltd* 1996 (1) SA 812 (A) 817G; *RD Harbottle (Mercantile) Ltd v National Westminster Bank Ltd* [1977] 2 All ER 862 (QB) 870b-d.
84 To the author's knowledge, a defence based on fraud has succeeded in only two South African cases: namely, the *Phenix* case and *Group Five Construction (Pty) Ltd v MEC for Public Transport, Roads and Works Gauteng* (2009/31971) 2015 ZAGPJHC 55 (13 Feb 2015).
85 See, for example, the contentions raised regarding prescription in *Investec Bank Ltd v Lombard Insurance Co Ltd* (69330/2018) 2019 ZAGPPHC 251 (26 June 2019); bad faith in the *Bryte* case; and the issue of breach of negative stipulations in the underlying contract in *Joint Venture between Aveng (Africa) (Pty) Ltd and Strabag International GmbH v South African National Roads Agency SOC Ltd* 2021 (2) SA 137 (SCA).
86 See Lupton and Kelly-Louw "Emergence of illegality in the underlying contract as an exception to the independence principle of demand guarantees" 2020 *Comparative and International Law Journal of Southern Africa* 1 29-31, with reference to the *Mattress House* case. See also Van Niekerk and Schulze (n 14) 291. An illegality defence has emerged in English law. See in this regard

context, an illegality defence could conceivably be invoked in the event of non-compliance with applicable building codes or zoning laws, an unlawfully awarded tender or a failure to obtain the necessary licences for engineering projects, to name a few.[87] The question as to the requirements and parameters of a potential illegality defence needs to be determined by the courts.[88]

4. Conclusion

Campus buildings and other infrastructure are important to the business of HEIs. In the event that they require maintenance, upgrading, or expansion, HEIs may enter into construction contracts with contractors. Construction contracts may be complex and inherently risky. This gives rise to the need to ensure the security of performance. In this contribution, an argument was made in favour of the use of demand guarantees in construction projects. More specifically, it was contended that it is in the best interests of HEIs to require that a demand guarantee be issued in its favour to secure the proper performance of the contractor's obligations.

From the discussion above, demand guarantees ensure easy and swift access to funds. This is attributed, in the first place, to the principle of documentary compliance. The mere presentation of conforming documents entitles the beneficiary to payment. Conventional demand-guarantee practice accordingly does not require an investigation beyond the documents, which may otherwise result in payment delays. The independence principle, secondly, ensures that disputes arising from the underlying construction contract do not affect the guarantor's payment obligations. Thus, an HEI, as beneficiary of a guarantee, can expect payment soon after it tenders conforming documents,

Group Josi Re v Walbrook Insurance Co Ltd & Others 1996 1 Lloyd's Rep 345 (CA); *Mahonia Ltd v JP Morgan Chase Bank* 2003 2 *Lloyd's Rep* 911 (QB); and *Mahonia Ltd v JP Morgan Chase Bank* 2004 EWHC 1938.

87 See Marxen (n 6) 156-157.

88 Lupton and Kelly-Louw (n 85) 31 nevertheless recommend a set of minimum requirements for an illegality defence to succeed: namely, that the alleged illegality must (i) be clearly established, (ii) be sufficiently serious, and (iii) directly affect or taint the guarantee.

regardless of any objections raised by the contractor relating to the construction work. Moreover, even if the guarantor or the contractor, as applicant of the guarantee, raises fraud as a defence to the HEI's demand, a clear and convincing case will need to be established for it to succeed with this defence. The demand guarantee therefore is an effective and reliable means of security available to HEIs involved in construction transactions. The author concludes by stating that by using demand guarantees in construction projects, HEIs will ensure their liquidity, which is essential to the fulfilment of their day-to-day operations.

Chapter 4

The Nature of the South African University-Student Contract

Michele van Eck[1]
Faculty of Law,
University of Johannesburg

Abstract

Relationships underscore education. One of these relationships is between the universities and students. The exact nature of this university-student relationship has been wrought with historical uncertainty in jurisdictions like the United States. The approach to the university-student contract in the United States developed from applying the *in loco parentis* doctrine to the bystander approach, which eventually recognised the contractual nature of the university-student contract. From a South African perspective, the university-student relationship has always been underscored by contractual principles, however, in the post-constitutional era there are additional considerations as to the exact scope and application of the university-student contract. The first is to determine whether the university-student contract would be classified as a private or public contract. In private contracts, normal contractual principles and doctrines apply, as well as compliance with specific legislative mechanisms such as the Protection of Personal Information Act 4 of 2013, the Consumer Protection Act 68 of 2008, and the National Credit Act 34 of 2005. On the other hand, a public contract would exist either if the university were an organ of state, or where the university wields public power under section 1(b) of the Promotion of

1 Bcom (Law), LLB, LLM, LLD, B.Th, BTh (Hons) Associate professor and Head of the Private Law Department at the University of Johannesburg.

Administrative Justice Act 3 of 2000 (PAJA), which is typically the case of a public university. Insofar as PAJA is applicable, public universities will be required to comply with the procedural fairness of decisions as set out in section 3 of PAJA. This chapter comes to the conclusion that, although the university-student relationship may have certain commercial elements embedded within its operation, it certainly is not solely a commercial transaction. Added to the consideration of whether a private or public contract exists, the terms of such a contract (whether express, tacit, or implied) would also regulate the relationship between the student and the learning material (or the knowledge transfer and skills acquisition), the relationship between the teacher and the student (or the pedagogical and methodological approach to teaching and learning), as well ensuring the constitutional rights of a student, which cannot necessarily be labelled as purely a commercial transaction. Rather, the university-student relationship is more akin to a *sui generis* contract and cannot be viewed as a purely commercial transaction.

1. Introduction

Relationships underscore education. There has been much focus placed on the microcosmic teaching and learning relationships, such as the relationship between the student and the learning material (or the knowledge transfer and skills acquisition),[2] as well as the relationship between the teacher and the student (or the pedagogical and methodological approach to teaching and learning).[3] However, it would be impossible to accomplish

2 This being the knowledge transfer and skills acquisition in the teaching and learning process. Take, for instance, Van Niekerk "Exploring the difficult dialogues technique as a tool for value-added law teaching and learning" 2019 *Stell LR* 138-151; Louw and Broodryk "Teaching legal writing skills in the South African LLB curriculum: The role of the writing consultant" 2016 *Stell LR* 535-553; Snyman-Van Deventer and Swanepoel "Teaching South African law students (legal) writing skills" 2013 *Stell LR* 510-527; Greenbaum "Teaching legal writing at South African law faculties: A review of the current position and suggestions for the incorporation of a model based on new theoretical perspectives" 2004 *Stell LR* 3-21.

3 This being the pedagogical and methodological approaches undertaken in the teaching and learning process. Take, for

the ideals, goals, and functions set out in the microcosmic teaching and learning level without the proper functioning of the macrocosmic teaching and learning relationships, which includes the governmental, legislative, and regulatory relationships within educational structures. One of these macro-level teaching and learning relationships is the relationship between the higher educational institutions (HEIs) and the student, which may be classified for the purposes of this chapter as the university-student relationship.[4]

In some jurisdictions, like the United States, the exact nature of the university-student relationship has historically been wrought with uncertainty and has, only recently, been viewed as possessing a commercial contractual nature. Although South Africa has similarly, both in the pre-constitutional and post-constitutional era, confirmed that the university-student relationship is underpinned by the principles of contract, the exact nature of the university-student contract in the post-constitutional period has the added complication of distinguishing the type of contract applicable (*eg* whether it is a public or private contract), as well as compliance with several legislative provisions.[5]

This chapter intends to consider the different ideological approaches to the university-student relationship by considering the positions of the United States and South Africa and thereby illustrate the dimensions and complexities of the university-student contract. This chapter illustrates that the university-student contract is not a purely commercial undertaking in the

instance, Lumina "Students' perceptions of the problem method in law: Implications for teaching practice" 2005 *Stell LR* 349-364; Greenbaum (n 1); Hutchison "Recontextualising the teaching of commercial transactions law for an African university" 2021 *Acta Juridica* 275-296.

4 The Higher Education Act 101 of 1997 (hereafter "the HEA") makes reference to several types of higher educational institutions (HEIs), however, for the purposes of this chapter focus is placed specifically on the university structures.

5 Examples of applicable legislation in private university-student contracts may include, for example, the Protection of Personal Information Act 4 of 2013, the Consumer Protection Act 68 of 2008, and the National Credit Act 34 of 2005.

United States and the South African contexts, but can rather be described as a *sui generis* contract.

2. The position in the United States

The university-student relationship has historically been contentious and wrought with uncertainty in jurisdictions like the United States. As early as the 1900s, the university-student relationship rested on the contractual relationship between the university and the parents of the student.[6] One of the terms of this contractual relationship was that the university would assume the parental role in relation to the student,[7] which was bundled into the doctrine of *in loco parentis.*[8] According to Claassens, the concept of *in loco parentis* means "[i]n place of the parent",[9] and the use of this doctrine in describing the university-student relationship meant that the university did not only assume the role of the parent, but also acted as a type of guardian of the student.[10] In other words, the university was "entrusted by the parents" to take responsibility for the wellbeing of the student until they reach the age of majority at 21 years of age.[11] In this, the parents delegated their parental duties to the university,[12] who could (as a functioning *quasi* parent) enforce disciplinary measures against the student.[13] In this, the application of the *in loco parentis* doctrine in universities was not too dissimilar to its

6 Buchter "Contract law and the student-university relationship" 1973 *Indiana Law Journal* 253.
7 *Ibid.*
8 Zwara "Student privacy, campus safety, and reconsidering the modern student-university relationship" 2012 *Journal of College and University Law* 419-432. This was particularly the case in the 1960s and 1970s in the United States.
9 Claassens *Claassen's Dictionary of Legal Words and Phrases* 2022. See also *Bradshaw v Rawlings* 612 F. 2d 135 – Court of Appeals, 3rd Circuit (1979) 140.
10 Jebe and Park "The student-university relationship and access to student online activity" 2019 *Connecticut Public Interest Law Journal* 45-56.
11 Claassens (n 8).
12 See *Furek v University of Delaware* 594 A. 2d 506 - Del: Supreme Court (1991) 517.
13 Buchter (n 5) 253; Lewis "The legal nature of university and the student--university relationship" 1983 *Ottawa Law Review* 249-252.

application in primary and secondary schools, and was also not too far removed from a parent's responsibility to make decisions about the wellbeing of their child.[14] Ultimately, the *in loco parentis* doctrine provided a wider discretionary scope for universities, and fostered what has been described as a one-sided relationship.[15]

The paternalistic approach imbued in the *in loco parentis* doctrine was, however, short-lived.[16] The civil rights and human rights movements in the 20th century brought a greater focus on individualistic rights and autonomy of student decision-making and, consequently, embraced a more liberal approach to university-student relationships.[17] This liberal approach is, at its heart, contractual in nature,[18] and includes terms like the registration or payment of university fees of the student.[19] It also created a legal mechanism for students to be bound to the university's policies and procedures, as well as disciplinary measures.[20] This eventually became known as the bystander approach, as universities were not actively involved in student decisions or lives but were only obligated to perform their contractual duties,[21] which were seen as being commercial in nature and nothing more.[22] This commercial approach also facilitated the perception that universities function as business enterprises.

There appears to be a general acceptance that the university-student relationship starts with, and is underpinned by, contractual principles.[23] Put differently, the university-

14 Jebe and Park (n 9) 56. See also its limited application in high school settings in the *Furek* case 517.
15 *McCauley v University of the Virgin Islands* 618 F. 3d 232, 245.
16 The *McCauley* case 245 notes that the public university has moved on from *in loco parentis* and evolved into something very different to this model. See also *Nero v Kansas State University* 861 P. 2d 768 - Kan: Supreme Court (1993).
17 Jebe and Park (n 9) 56-57. See also Zwara (n 7) 432.
18 Jebe and Park (n 9) 56. See also Buchter (n 5) 254.
19 Lewis (n 12) 254.
20 Lewis (n 12) 255.
21 Jebe and Park (n 9) 57. Zwara (n 7) 434.
22 Zwara (n 7) 435.
23 See Birtwistle "University student admissions a simple matter of contract" 2003 *Education Law Journal* 25.

student relationship is, at the very least, partly contractual,[24] and there are some elements of contract theory that are embedded in this relationship. However, the engagement and duties between a university and student are much wider than simply being contractual,[25] which is summarised in *Slaughter v Brigham Young University* as follows:[26]

> It is apparent that *some* elements of the law of contracts are used and should be used in the analysis of the relationship between plaintiff and the University to provide some framework into which to put the problem of expulsion for disciplinary reasons. This does not mean that 'contract law' must be rigidly applied in all its aspects, nor is it so applied even when the contract analogy is extensively adopted. There are other areas of the law which are also used by courts and writers to provide elements of such a framework. These included in times past *parens patriae,* and now include private associations such as church membership, union membership, professional societies, elements drawn from 'status' theory, and others. Many sources have been used in this process, and combinations thereof, and in none is it assumed or required that all the elements of a particular doctrine be applied. The student-university relationship is unique, and it should not be and cannot be stuffed into one doctrinal category. It may also be different at different schools.

Therefore, the duties of a university are not necessarily limited to the contractual obligations agreed to between the parties. These

24 See, for example, *Ross v Creighton University* 957 F. 2d 410 Court of Appeals, 7th Circuit (1992) 412; *Carr v St. John's Univ., New York* 17 AD 2d 632 - NY: Appellate Div. 2nd Dept. 1 634; *Zumbrun v University of Southern California* 25 Cal. App. 3d 1 - Cal: Court of Appeal 2nd Appellate Dist. 5th Div. 19; *Wickstrom v North Idaho College* 725 P. 2d 155 - Idaho: Supreme Court 1986; *Steinberg v Chicago Medical School* 371 NE 2d 634 - Ill: Supreme Court (1977); and *DeMarco v University of Health Sciences* 352 NE 2d 356 - Ill: Appellate Court, 1st Dist. (1976).

25 *Slaughter v Brigham Young University* 514 F. 2d 622 - Court of Appeals 10th Circuit (1975).

26 the *Slaughter* case 623.

additional obligations on universities would not necessarily be incorporated into the university-student contract,[27] but are linked to the values and rights embedded in the constitution and could include the university's duty to ensure a student's right to safety, privacy, and the protection of a student's right to free speech (to name but a few). This recognition of the wider duties of universities has brought about what one may call a transitional phase of the university-student relationship in the United States.[28] The exact nature of this relationship still requires legal clarity as to exactly what the scope of the duties of universities is towards students.[29] One may even argue that the contemporary university-student relationship exists somewhere in between the *in loco parentis* doctrine and the bystander approach, thereby placing the university in the functionary role of an educational facilitator.[30] Universities are, however, unique in their function and,[31] in a sense, one may call the contract between universities and students a form of a *sui generis* contractual engagement, which is not too different to the approach undertaken in South Africa.

3. The position in South Africa

3.1 Introductory comments

The South African courts have recognised the contractual nature that underpins the relationship between universities and students, which was confirmed in several judgements, including *Schoeman v Fourie*,[32] *Sibanyoni v University of Fort Hare*,[33] *Mkhize v Rector, University of Zululand,*[34] *Lunt v University of Cape Town*,[35] and *Mokgoko v Acting Rector, Setlogelo Technikon.*[36] Most of these cases

27 Jebe and Park (n 9) 57; Zwara (n 7) 436, notes that what exactly this duty is, remains unclear.
28 See, for example, Zwara (n 7) 419.
29 Zwara (n 7) 436.
30 *Ibid.*
31 *Ibid.*
32 *Schoeman v Fourie* 1941 AD 125 136.
33 *Sibanyoni v University of Fort Hare* [1985] 3 All SA 89 (Ck) 102.
34 *Mkhize v Rector, University of Zululand* [1986] 1 All SA 254 (D) 256.
35 *Lunt v University of Cape Town* [1989] 3 All SA 269 (C) 273-234.
36 *Mokgoko v Acting Rector, Setlogelo Technikon* [1994] 4 All SA 121 (B) 127.

(save for the *Mokgoko* case) were decided in the pre-constitutional era of South Africa, but have, nevertheless, established valuable principles for regulating the university-student relationship. For instance, drawing from the principles established in *Sibanyoni*, one may say that the terms in the university-student contract are that universities agree to provide tuition (and, where relevant, accommodation) to students,[37] and students, in turn, agree to follow the rules and policies of the university and pay tuition fees.[38] Further to this, but under the interpretation of the University of Zululand Act,[39] the *Mkhize* case also found that the contract was one that occurred on an annual basis and that the university was free to decide whether a student would be re-admitted in an academic year.[40] In fact, "[i]n the absence of … an implied term [to the contrary], there would be no reason why an applicant for admission or re-admission should be in any better position than an applicant for membership of a club".[41] In other words, our courts have viewed the university-student contract as fixed, one-year contracts that are renewable and are consecutive in nature.[42]

Since then, the constitutional era in South Africa and the promulgation of the Higher Education Act[43] (HEA) has changed the teaching and learning landscape in South Africa and, consequently, the university-student relationship (which will be discussed in the sections that follow).

3.2 Private and public contracts

Zwara is correct in stating that higher educational structures come in all shapes and sizes,[44] and such diversity is recognised in the HEA. The HEA regulates tertiary education in South Africa,[45] and therein provides learning conditions for knowledge

37 See, for example, the *Sibanyoni* case 102.
38 *Ibid*.
39 the University of Zululand Act 43 of 1969.
40 the *Mkhize* case 256.
41 *Ibid*.
42 the *Mokgoko* case 127.
43 The Higher Education Act 101 of 1997.
44 Zwara (n 7) 419.
45 See the HEA.

creation and transfer.[46] The HEA envisages different tertiary educational structures, including public and private institutions under HEIs,[47] which may include public and private universities, university colleges, and Technikons. As this chapter addresses the university-student contract, the focus is placed specifically on universities under the HEA.

Traditionally, in a South African context, the legal relationship between universities and students is contractual in nature (see point 3.1 above).[48] Yet, the type of decision-making power exercised by a university will influence the type of contract that would be concluded between a university and a student. Contractual relationships may be broadly grouped into private contracts and public contracts.

Private contractual engagements are, as the name suggests, those contracts that are between private citizens (including natural and juristic persons) and a governmental body is not a party to the contract. Private contracts are underpinned by substantive contract theory, wherein the individual rights and duties are expressed in the contract or legislative provisions. Cornelius describes the nature of private contracts as being *ad hoc* legislation *inter partes*.[49] These private contracts are primarily regulated by the common law principles of contract, which are amended by legislation and developed by case law.[50] Some of the more prominent legislative interventions in private contract, which may be applicable to the university-student contract, are the Protection of Personal Information Act (POPIA), the Consumer

46 Preamble of HEA.
47 s 1 definition of "higher institutional education" of the HEA. See also ch 7 recognising private higher institutional education entities and ch 3 recognising public higher institutional education entities.
48 s 1 definitions of "university" and "providing higher education" of the HEA, which notes that it is a higher educational institution that provides services at an undergraduate and postgraduate level in the fields of (i) registering students, (ii) being responsible for the provision of a higher education curriculum, (iii) the assessment of student performance, and (iv) conferring higher education qualifications on students.
49 Cornelius "The complexity of drafting" 2004 *TSAR* 692.
50 Hutchison and Pretorius *The Law of Contract in South Africa* Oxford University Press (2022) 11-12.

Protection Act (CPA) and the National Credit Act (NCA).[51] Furthermore, the Constitution has also influenced the operation and functioning of private contracts. Unlike public contracts, the constitutional values and ideals do not apply directly to private contractual engagements,[52] but, rather, the values of the Constitution (as expressed in the Bill of Rights) apply indirectly through the mechanism of public policy.[53]

In contrast, public contracts have at least one government body (often referred to as an organ of the state or a juristic person wielding public power) that is a party to the contract. As a result, public contracts have, in addition to compliance with substantive contract theory, the added dimension of ensuring that public power is properly exercised and not abused. In addition, public contracts that relate to the procurement of goods and services are heavily regulated by means of legislative requirements.[54] In the context of the university-student contract, however, the university is the entity that provides the service and, as a result, the procurement legislative provisions would not be applicable to student engagements. Put differently and in summary, public contracts are one part private (subject to substantive contract theory) and one part public (subject to administrative law).[55] Typically, a public university will include both private and public elements to the university-student relationship, as well as any relationship with persons that are paying for the student's tuition

51 Buchter (n 5); Protection of Personal Information Act 4 of 2013 (POPIA); Consumer Protection Act 68 of 2008 (CPA) and National Credit Act 35 of 2005 (NCA).

52 See *Barkhuizen v Napier* 2007 (5) SA 323 (CC); *Beadica 231 CC v Trustees, Oregon Trust* 2020 (5) SA 247 (CC). See also Hutchison and Pretorius (n 48) 14-17.

53 See the *Barkuizen* case and the *Beadica* 231 case. See also Hutchison and Pretorius (n 49) 14-17.

54 Broad-Based Black Economic Empowerment Act 53 of 2003; Preferential Procurement Policy Framework Act 5 of 2000; Promotion of Administrative Justice Act 3 of 2000 (hereafter "PAJA"); Promotion of Access to Information Act 2 of 2000; Prevention and Combating of Corrupt Activities Act 12 of 2004; and Public Finance Management Act 1 of 1999.

55 Quinot, Anthony, Bleazard *et al Administrative Justice in South Africa* (2021) 3, which defines administrative law as the "quest for balancing rights, interests and obligations, in the determination of which public and legal policy play a central role".

fees (such is the case with a minor student where their parent or guardian pays for tuition fees).

3.3 The application of PAJA

To determine whether the university-student contract is public or private in nature, one would have to first consider whether the university is an organ of state or whether such a university has exercised public power, as well as the origin of such power. Herein, the Promotion of Administrative Justice Act (PAJA) provides guidance as to whether a contractual engagement would be public or private in nature.

PAJA is the legislative mechanism to regulate administrative action with the intention of ensuring that such action is "lawful, reasonable and procedurally fair".[56] Section 1 of PAJA describes an administrative action as an instance where:[57]

> ... any decision taken, or any failure to take a decision, by-
>
> (a) an organ of state, when-
>
> (i) exercising a power in terms of the Constitution or a provincial constitution; or
>
> (ii) exercising a public power or performing a public function in terms of any legislation; or
>
> (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision which adversely affects the rights of any person and which has a direct, external legal effect....

If a university falls within the ambit of either section 1(a) or 1(b) of PAJA, then the university-student contract would be considered public in nature and subject to the provisions of PAJA. There is, however, some uncertainty as to the exact nature of public universities. Whilst some courts have viewed public universities as a juristic entity performing a public function under section 1(b)

56 preamble of PAJA.
57 s 1 definition of "administrative action" of PAJA.

of PAJA,[58] there appears to be growing support for the argument that public universities are, rather, organs of state in terms of section 1(a)(i)-(ii) of PAJA.[59] This position has been confirmed, for example, in the 2018 Constitutional Court judgement of *Harrielall v University of KwaZulu-Natal* and, more recently, in the 2022 judgment of *Chairperson, Council of the University of South Africa v Afriforum NPC.*[60] Also, in *Mzansi Fire & Security v Durban University of Technology*, the court found that public universities are organs of state in instances where a university procures security services (and, arguably, any other services).[61] In 2023, the Supreme Court of Appeal in *Dyantyi v Rhodes University* ruled that public universities exercise public power in terms of section 1 of PAJA and consequently are considered organs of state.[62]

Regardless of the technicality of whether a university would fall within the ambit of section 1(a) or 1(b) of PAJA, it appears that public universities will have an administrative element attached to their contractual relationships as a supplier of higher education and in the procurement of services and goods. After all, Chetty J describes public universities as being established by statute and funded by the state,[63] which would naturally require some form of accountability for the use of such monies. This means that students registered at a public university would conceivably have the procedural rights afforded under section 3 of PAJA.[64] This notwithstanding, not all actions of a public university would fall within the ambit of PAJA. Take, for instance, *University of the Free State v Afriforum*, in which the amendment of the university's language policy was not considered to be administrative in

58 *Eden Security Services CC v Cape Peninsula University of Technology* 2014 ZAWCHC 148. See also *Mbuthuma v Walter Sisulu University* 2020 (4) SA 602 (ECM) par 45-48.
59 See *Mzansi Fire & Security (Pty) Ltd v Durban University of Technology* 2022 (5) SA 510 (KZD) par 20; *Harrielall v University of KwaZulu-Natal* 2018 (1) BCLR 12 (CC) para 15; and *Chairperson, Council of the University of South Africa v Afriforum NPC* 2022 (2) SA 1 (CC).
60 the *Harrielall* case par 15; the *Afriforum* case.
61 the *Mzansi* case.
62 *Dyantyi v Rhodes University* 2023 (1) SA 32 (SCA) par 19-20.
63 the *Mzansi* case par 32.
64 the *Dyantyi* case par 19-20.

nature.[65] Whereas disciplinary action against students,[66] and tenders and procurement actions of public universities, have been seen as administrative in nature and therefore must comply with the requirements for procedural fairness under PAJA.[67] To determine whether PAJA is applicable, Toni AJ notes that "[a] primary indicator used by the courts in determining the nature of the power to be exercised by a repository of public power is the source of the power",[68] and that "[w]hen a power is sourced in legislation, it is likely to be administrative in nature. Substantial constraints on the power would be an indication that the power is administrative in nature".[69] A further consideration lies in whether public funds are used by one of the contracting parties.[70]

In the post-constitutional case of *Mohuba v University of Limpopo*, the court confirmed that that the relationship between a student and a university is not entirely private or public in nature, but seemingly consists of a combination of these elements.[71] Ultimately, determining whether the university-student contract is public or private in nature is not related to whether the contract is concluded by a private or public university, but rather rests upon the source of the power that the university wields and whether such power is derived from the contract between the parties or whether it is derived from legislation.[72] In other words, the question is whether the parties exercise their powers out of the contract (which indicates a private contract) or out of legislation (which indicates a public contract).[73] The answer to this question is factual and determinable on a case-by-case basis. Although many functions of public universities would likely fall within the ambit of either section 1(a) or 1(b) of PAJA (and thereby place at

65 the *Afriforum* case par 16, 18.
66 the *Dyantyi* case par 19-20.
67 the *Mzansi* case.
68 *Mbuthuma v Walter Sisulu University* 2020 (4) SA 602 (ECM) par 39, referring to *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) (1999 (10) BCLR 1059; [1999] ZACC 11) para 143.
69 the *Mbuthuma* case par 39.
70 adapted from principles in the *Mzansi* case par 32.
71 *Mohuba v University of Limpopo* (730/2022) [2023] ZASCA 139 (27 October 2023) par 18.
72 See *Cronje v United Cricket Board of South Africa* 2001 (4) SA 1361 (T).
73 See the *Cronje* case.

least some elements of the university-student contract as a public contract), there may be an argument to be made that private universities could also conclude public contracts insofar as they are acting within the terms of section 1(b) of PAJA (as the private university's power is still found within the legislative function of the HEA).

3.4 Further complexities

As the university-student relationship has, in part, a contractual nature, the CPA provides specific requirements that may be relevant to such contractual engagements.[74] Take, for instance, the fact that the university-student contract must be in plain and understandable language.[75] Further, the terms of the university-student contract must not be unfair or unreasonable as contemplated under section 48 of the CPA.[76] What is of interest is the apparent inconsistency between the HEA and the CPA. In terms of regulation 43 of the CPA, there is a presumption that certain contractual terms would be unfair and unreasonable under section 48. An example of where a provision would be presumed unfair and unreasonable may be found in regulation 44(3)(b), which relates to the limitation of liability of a supplier (in this case the university), which would be, *prima facie*, unfair where:[77]

> [a contractual provision] exclude[es] or restrict[s] the legal rights or remedies of the consumer against the supplier or another party in the event of total or partial breach by the supplier of any of the obligations provided for in the agreement, including the right of the consumer to set off a debt owed to the supplier against any claim which the consumer may have against the supplier.

74 s 1 of the CPA notes that services include "the provision of any education, information, advice or consultation, except advice that is subject to regulation in terms of the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002)". See also s 5(1)-(2) of the CPA, in which it appears that educational services are contemplated as one of the services that would be protected under the CPA.
75 s 22 of the CPA.
76 s 48 of the CPA.
77 reg 44(3)(b) of the CPA.

This means that an exemption clause limiting the university's liability in the instances of breach would be, *prima facie,* unfair and unreasonable under section 48 of the CPA. However, the HEA provides a blanket limitation of liability to universities in terms of section 67, which states that "[t]he State, the CHE and any person appointed in terms of this Act are not liable for any loss or damage suffered by any person as a result of any act performed or omitted in good faith in the course of performing any function contemplated in this Act". If one were to interpret section 67 of the HEA as applying in a purely private contractual engagement, then there may be the contention that section 67 of the HEA is exempt from regulation 44(3)(b) as the limitation of liability relates to omissions due to "good faith". However, acting in good or bad faith is not necessary to determine contractual breach. Put differently, although bad faith may be an indicator of breach, it is not a requirement for breach. Therefore, a university that acts in good faith may still, on the face of the contract, be in *mora* regardless of whether a person acted in good faith. As section 67 provides an overarching limitation to liability for universities, it would be implied in university-student contracts and would consequently be in conflict with regulation 44(3)(b) of the CPA, thereby triggering a *prima facie* unfair and unreasonable term under section 48 of the CPA.

This conflict between section 67 of the HEA and regulation 44(3)(b) of the CPA may, however, be resolved through legislative interpretation. In this, the CPA also provides that, should there be a conflict between its provisions and that of another piece of legislation (in this case the HEA), and the conflict cannot be reconciled, then the provision to the best provision of the consumer (in this case the student) would prevail.[78] However, this would only apply if one could sustain the argument that section 67 of the HEA relates to private contractual engagements. In a public contract setting, the interpretation may be somewhat different. The deluge of case law on the interpretation of the HEA is one of the sources of uncertainty in university-student contracts, which may be further complicated by attempting to reconcile the application of the HEA and the CPA in public and private contracts.

78 s 3, 4 of the CPA.

4. Concluding thoughts

The modern approach to the university-student relationship is underpinned, at least in part, by contractual principles, and in some instances has been viewed as a commercial transaction.[79] The university-student contract generally regulates fees, the discipline of students, student conduct, and general student matters.[80] However, both the United States and South African positions have illustrated that the university-student contract is more than simply a commercial contract. Rather, it is something unique and more akin to a *sui generis* contract which holds unique rules and application. In South Africa, the classification of a university-student contract as a private contract will require additional considerations, such as unequal bargaining power, the application of contracts of adhesion (where students are required to sign contracts upon registration with the university),[81] and the application of legislative protections set out in POPIA, the CPA, and the NCA. However, the university-student contract may also be classified as a public contract, wherein students are afforded the right of procedural fairness under section 3 of PAJA.

Although the university-student relationship may have certain commercial elements embedded within its operation, it certainly is not solely a commercial transaction. Added to the consideration of whether a private or public contract exists, the terms of such a contract (whether express, tacit, or implied) would also regulate the relationship between student and the learning material (or the knowledge transfer and skills acquisition), the relationship between the teacher and the student (or the pedagogical and methodological approach to teaching and learning), as well as ensuring the constitutional rights of a student. Rather, the university-student relationship is more akin to a *sui generis* contract, and cannot be viewed as a purely commercial transaction.

79 Buchter (n 5) 262.
80 See Buchter (n 5) 254.
81 See also Buchter (n 5) 265. See also Dodd "Non-contractual nature of the student-university contractual relationship" 1985 *University of Kansas Law Review* 701-714.

Part 2:

Impact and Influences on Academic Freedom

Chapter 5

Academic Freedom and Academics' Right to Criticise their Employer

Louis Koen[1]
Faculty of Law,
University of Johannesburg

Abstract

Academic freedom is an essential aspect of a democratic society and is recognised as such in international law. In South Africa, academics are generally regarded as employees, and, as such, their freedom of expression may be limited by labour law. The common law imposes a duty of utmost good faith on employees to act in the best interests of their employer, which can restrict an employee's freedom of expression. Therefore, it is crucial to understand the limitations on an employee's freedom of expression and how they restrict an employee's ability to criticise their employer. This chapter considers the existing legal framework regarding an employee's right to criticise their employer, specifically in the context of academic freedom. The Committee on Economic, Social and Cultural Rights (CESCR) recognises that academic freedom is not absolute and may need to be limited in certain circumstances, including limitations brought about by an academic's countervailing duties to respect the academic freedom of others, ensure fair discussion of contrary views, and treat all without discrimination on any prohibited grounds. Therefore, academic freedom does not permit an academic to propagate hate speech or discriminatory speech. Nevertheless, it affords an academic broad rights to freely express their opinion on academic matters, including criticism of the institutions they work in (i.e. their

1 LLB, LLM (*cum laude*) and an LLD candidate. Lecturer in the Department of Public Law at the University of Johannesburg.

employer). While the *Motsoeneng* case in South Africa appears to provide some protection for academics to criticise their employer, this chapter argues that it is more restrictive than legitimate restrictions on academic freedom recognised in international law. This chapter critically analyses the protection of academic freedom in international law and argues for an interpretation of the common law in a manner that aligns with this international law position. To this end, this chapter argues that, in the context of academic freedom, criticism of the employer must be in the public interest, and must be interpreted within the unique context of a higher education institution (HEI) where criticism ought to be presumed to be in the public interest unless the academic in question acted in bad faith.

1. Introduction

Academics have a dual role as both an academic and an employee that may sometimes impose seemingly conflicting obligations on them. In their capacity as employees, academics owe their institution a duty of good faith.[2] This duty of good faith has been interpreted relatively broadly as an obligation to always protect the employer's interest and has also increasingly been applied to utterances made by employees on social media.[3] It has generally been regarded as a legitimate limitation on employees' right to freedom of expression. South African labour law accordingly restricts an employee's ability to criticise their employer where such criticism is likely to harm the employer's reputation.[4]

Yet, academics may occasionally have legitimate cause to criticise certain actions by their employer during their research. The Committee on Economic Social and Cultural Rights (CESCR) recognises academic freedom as an important element of the right to education.[5] It notes that, even though the right to academic

2 Coetzee "A legal perspective on social media use and employment: Lessons for South African educators" 2019 *PELJ* 1-8.
3 Phungula "The clash between the employee's right to privacy and freedom of expression and social media misconduct: What justifies employee's dismissal to be a fair dismissal?" 2020 *Obiter* 504-518.
4 Phungula (n 2) 518.
5 Commission on Economic, Social and Cultural Rights (CESCR) "General Comment No. 13: The Right to Education" (Art. 13) 1999

freedom is not explicitly recognised within the right to education, the realisation of the right to education depends on the effective recognition of academic freedom. The CESCR defines the concept of academic freedom broadly and notes that:

> academic freedom includes the liberty of individuals to *express freely opinions about the institution or system in which they work*, to fulfil their functions without discrimination or fear of repression by the State or any other actor, to participate in professional or representative academic bodies, and to enjoy all the internationally recognized human rights applicable to other individuals in the same jurisdiction.[6] [emphasis added]

The CESCR accordingly recognises the freedom to criticise one's own institution (employer) as an important component of academic freedom. Unlike conventional employees who are not academics, the freedom to criticise the employer affects not only the right to freedom of expression but also the right to education. While academic freedom does not confer an unfettered right to criticise the institution, it is clearly broader than the restrictions imposed on other employees not to make statements that could be harmful to the employers' reputation.

This chapter aims to consider the extent to which labour law permits an academic employee to criticise their employer in the scope of the right to academic freedom. It considers existing case law and arbitral awards on employees' right to criticise their employer to draw on best practices in balancing the rights of academic employees with the duty of good faith owed to the employer in terms of labour law.

2. Academic freedom and the right to criticise one's institution

The CESCR's recognition of the freedom to criticise one's own institution as an important component of academic freedom

E/C.12/1999/10 (hereafter "CESCR General Comment No 13") par 38.

6 par 38 of General Comment 13 of 1999.

has not always enjoyed universal recognition. There are varying interpretations of what the concept of academic freedom entails and what the limits of academic freedom are. For example, in the United Kingdom, the concept of academic freedom is defined as the freedom:

> ...within the law to question and test received wisdom, and to put forward new ideas and controversial and unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges they may have at their institutions.[7]

On the face of it, this definition does not necessarily conflict with the understanding of the concept of academic freedom as defined by the CESCR. Nevertheless, it has been argued that the requirement of "within the law" means that academic freedom is subject to any other legal restrictions. This, it is argued, has the effect of the common law duty of good faith to an employer prevailing over the right to academic freedom. Therefore, in the context of the United Kingdom, there is an argument to be made that academic freedom does not extend to the right to criticise one's employer. In a South African context, there has been more limited attention paid to this aspect of academic freedom, with the literature largely focused on the debate surrounding the extent to which academic freedom extends to institutional autonomy.[8] While this debate may be highly relevant in a broader South African context, it ultimately falls outside the scope of this chapter.

Nevertheless, the European Court of Human Rights (ECtHR) has endorsed a broader understanding of the concept of academic freedom which offers a valuable point of departure for the purposes of this chapter. In the case of *Sorguç v Turkey*,[9] the

7 s 202 of the Education Reform Act, 1988.

8 See *inter alia* Kruger "The Genesis and Scope of Academic Freedom in the South African Constitution" in *Kagisano No 8: Academic Freedom* (2013); Malherbe "State involvement and the issues of academic freedom, autonomy and accountability" paper presented at the Council on Higher Education. Regional Forum on Government Involvement in Higher Education, Institutional Autonomy and Academic Freedom (23 March 2006, Pretoria).

9 *Sorguç v Turkey* Appl. no. 17089/03 (23 June 2009).

ECtHR was confronted with a case where a university professor (the applicant) had criticised the appointment and promotion process within universities and in particular the examination process for assistant professors.[10] After the publication of this paper, an assistant professor who had been appointed in terms of this process, and to whom the applicant had referred in his article (albeit not by name), instituted a claim for damages against the applicant.[11] This claim for defamation was ultimately successful and the applicant was ordered to pay one million liras in compensation as well as legal costs and interest.[12]

The applicant approached the ECtHR arguing that the decision infringed upon his right to freedom of expression and academic freedom.[13] The court stressed the importance of academic freedom in a democratic society and noted that academic freedom consists of "the academics' freedom to express freely their opinion about the institution or system in which they work and freedom to distribute knowledge and truth without restriction".[14] The court noted that the applicant had clearly made the remarks in the course of exercising his academic freedom as they concerned his assessment of the appointment and promotion system in universities.[15] Therefore, the state would need to demonstrate that there was a pressing social need for restricting the applicant's ability to freely express his view on these matters.[16]

In *Yazici v Turkey*,[17] the ECtHR further expanded on the protection of academic freedom and academics' right to criticise the institutions within which they work. In the *Yazici* case, the applicant had published an academic article in which he raised concerns around plagiarism committed by certain academics and pointed out a specific instance where a colleague's book appeared to have been substantially plagiarised.[18] The article resurfaced

10 the *Sorguç* case par 6.
11 the *Sorguç* case par 7.
12 the *Sorguç* case par 16.
13 the *Sorguç* case par 22.
14 the *Sorguç* case par 35.
15 the *Sorguç* case par 32.
16 the *Sorguç* case par 35.
17 *Yazici v Turkey* Appl. No. 40877/07 (15 April 2014).
18 the *Yazici* case par 7.

after this first publication when the Higher Education Council indicated that it would be establishing a committee to examine ethical issues in the academy. This saw a summary of the initial article being published online, along with new remarks by the applicant in which he said that the first to be investigated ought to be the colleague whose book had purportedly been plagiarised and who was also the founder of the Higher Education Council.[19] This colleague subsequently instituted and ultimately succeeded in a defamation claim against the applicant.[20]

The applicant then approached the ECtHR, alleging that the restriction on his academic freedom violates his right to freedom of expression. The court emphasises that academics and academic institutions perform an essential public function which may require them to show greater tolerance of public scrutiny and criticism.[21] In this case, the allegations of plagiarism were also made in the context of a broader debate on the establishment of an ethics committee and were made by the applicant within his capacity as an academic.[22] Therefore, the court observes that the matters are presumed to have been raised in the public interest and that there is little scope for restricting academic expressions made in good faith in the course of an academic debate in the public interest.[23]

The ECtHR's approach to academic freedom accordingly aligns with that of the CESCR. However, unlike the CESCR, the ECtHR reads the right to academic freedom into the more generally accepted right to freedom of expression, instead of the right to education. The ECtHR has also emphasised that academic freedom is not restricted to academics' ability to conduct and disseminate their research.[24] It also extends protection to the expression of "their views and opinions, even if controversial or unpopular, in the areas of their research, professional expertise

19 the *Yazici* case par 10.
20 the *Yazici* case par 13-16.
21 the *Yazici* case par 56.
22 the *Yazici* case par 55.
23 the *Yazici* case par 57.
24 *Erdoğan v Turkey* Appl. No. 346/04 and 39779/04 (27 May 2014) par 40.

and competence".[25] Therefore, the medium of publication of academic views is not restricted to academic journals, provided that the matters in respect of which an opinion is expressed are related to their function as an academic.[26]

This more comprehensive understanding of the concept of academic freedom has also been endorsed by the United Nations Educational, Scientific and Cultural Organization (UNESCO), who defines academic freedom as scholars'

> right, without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express freely their opinion about the institution or system in which they work, freedom from institutional censorship and freedom to participate in professional or representative academic bodies.[27]

Therefore, while individual countries might sometimes define academic freedom more restrictively, international law generally regards academic freedom as inclusive of the freedom to criticise the institution in which they work. In the context of South Africa, where there is no legislative definition of academic freedom, greater weight should also be attached to the definition accepted in international law than to a more restrictive comparative definition from another domestic law system.

The Constitution clearly requires South African courts to consider international law when interpreting the rights in the Bill of Rights.[28] This consideration of international law is not confined to instruments which South Africa has ratified, and extends to a range of international law instruments as well as decisions of human rights bodies and courts interpreting those

25 the *Erdoğan* case par 40.
26 the *Erdoğan* case par 41.
27 UNESCO "Recommendation Concerning the Status of Higher Education Teaching Personnel" (RSHETP) 1997 par 27.
28 s 39(1)(b) of the Constitution of the Republic of South Africa, 1996 (hereafter "the Constitution").

instruments (such as the ECtHR).[29] Therefore, when interpreting the right to freedom of expression and the right to education in the context of an alleged infringement of academic freedom, the courts must consider these decisions and, where possible, prefer an interpretation that is consistent with these decisions.

3. Employees' right to freedom of expression

While international law may recognise an academic's right to criticise their institution as a fundamental component of academic freedom, academics are generally employees in terms of South African labour law and subject to the restrictions associated therewith. As previously mentioned, the common law imposes a duty of good faith on employees which has been interpreted as an obligation to always act in the best interests of their employer.[30] Nevertheless, the courts have also made it clear that an employee does not lose their constitutional rights, such as the right to freedom of expression, merely because they are in the workplace.[31] Therefore, it is important to understand the contemporary limitations on an employee's freedom of expression and the extent to which these limitations restrict an employee's ability to criticise their employer. Phungula argues that, while an employee enjoys the right to freedom of expression, this right may be

29 See *S v Makwanyane* 1995 6 BCLR 665 (CC) at par 35, where decisions of the ECtHR are specifically included among the sources of international law which courts are obliged to consider. The court noted that "[i]n the context of section 35(1), public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which Chapter Three can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions of Chapter Three".

30 Coetzee (n 1) 8.

31 *Independent Risk Distributors SA (PTY) Ltd v Commission for Conciliation, Mediation and Arbitration* [2022] ZALCJHB 282 (11 October 2022) par 35.

justifiably limited if the expression has the potential to damage the name of the employer or otherwise harm their reputation.[32] Coetzee expresses a similar view and notes that the:

> [c]ommon law compels employees to act in the best interests of the employer and to behave honestly. Employees who criticise or make derogatory remarks about their employer, institution or profession on social media open themselves up to disciplinary proceedings.[33]

Phungula adds that an employee who publishes comments about their employer, which are later proven to have the potential to damage the reputation of the employer, may be fairly dismissed.[34] In advancing this argument, Phungula relies on a series of arbitral awards from the Commission for Conciliation, Mediation and Arbitration (CCMA), including the case of *Media Workers Association of SA obo Mvemve v Kathorus Community Radio* (the "*Media Workers Association* case").[35]

The *Media Workers Association* case concerned an applicant, a radio presenter, who had been dismissed following criticism of his employer on his Facebook account.[36] In these posts, the employee had criticised the station's board and suggested that the board had protected the station manager, who was a criminal.[37] The applicant was then charged with misconduct in bringing the employer's name into disrepute and, upon a finding of guilt, the chairperson of the hearing recommended his dismissal.[38] However, the board decided not to dismiss the applicant, subject to him retracting the statements and issuing an apology.[39]

The applicant subsequently failed to comply with this condition and was dismissed, after which he referred an unfair dismissal dispute to the CCMA. The CCMA found that his

32 Phungula (n 2) 512.
33 Coetzee (n 1) 8.
34 Phungula (n 2) 512.
35 *Media Workers Association of SA obo Mvemve v Kathorus Community Radio* (2010) 31 ILJ 2217 (CCMA)
36 the *Media Workers Association* case par 5.1.
37 *Ibid*.
38 *Ibid*.
39 the *Media Workers Association* case par 5.2.

dismissal had been fair, as the remarks damaged the employer's reputation.[40] The commissioner considered the applicant's refusal to apologise as an indication of a lack of remorse.[41] At no point did the commissioner engage in any balancing between the employee's right to freedom of expression and the employer's interest. In so doing, the commissioner seemingly suggests that a dismissal would be fair as soon as the employer establishes that the remarks made by the employee had the potential to harm the employer's reputation.

While these cases are largely supportive of the suggestion by Phungula that any expression which has the likelihood of harming the employer's reputation can be reasonably limited, the issue is not so clear cut. There are also CCMA awards which have recognised that an employee's public criticism of their employer may, in some instances, be protected speech for which dismissal would not be fair. The most well-known case in this respect is the case *Motsoeneng v the South African Broadcasting Corporation SOC Ltd* (the *Motsoeneng* case).[42]

The *Motsoeneng* case concerned a suspended senior employee who had called a press conference in which he raised grievances in respect of his employer, its board, and the judge of the Labour Court who was adjudicating his dispute with the employer.[43] He was subsequently dismissed over these remarks which had brought the employer's name into disrepute and violated the employee's duty to act in the employer's interest.[44] Motsoeneng then referred the dispute to the CCMA, alleging that his dismissal was unfair and that a press conference prohibition violates his freedom of expression.[45]

The commissioner in the *Motsoeneng* case considers the right to freedom of expression in much more detail than other similar CCMA awards, and recognises that an employee is entitled

40 the *Media Workers Association* case par 5.7.
41 *Ibid*.
42 *Motsoeneng v the South African Broadcasting Corporation SOC Ltd* (2018) 39 ILJ 2809 (CCMA).
43 the *Motsoeneng* case par 18.
44 *Ibid*.
45 the *Motsoeneng* case par 25.

to freedom of expression in relation to their employer.[46] The commissioner reiterates that an employee has an important duty "to use his utmost endeavours to protect and promote the business and interests of the [employer] and to preserve its reputation and goodwill".[47] However, the award recognises that there are certain instances in which it may be permissible for an employee to criticise their employer. According to the *Motsoeneng* case, an employee's criticism of their employer may attract judicial protection if:

> (a) the disclosure is made in the public interest (and typically does not involve a matter of only private concern);
>
> (b) the employee does not – either dishonestly or negligently –— indulge in misleading statements, and has no reason to doubt their veracity; and
>
> (c) the employee acts in good faith (*ie* with no ulterior motive, revenge or malice: without personalising the complaint and having exhausted internal remedies).[48]

Based on these requirements, it can be argued that there is no conflict between the award in the *Media Workers Association* case and the *Motsoeneng* case. Ultimately, the arbitrator in the *Media Workers Association* case made much of the fact that the employee had not exhausted internal remedies.[49] Similarly, in terms of the *Motsoeneng* case, public criticism of an employer by an employee would not attract judicial protection if there was a failure to exhaust internal remedies.[50] Nevertheless, it is also clear that dismissal would not be permitted in every instance where an employee publicly criticises their employer, even if such criticism poses reputational harm to the employer. Therefore, Phungula's argument that an employee's freedom of expression may be justifiably limited wherever the remarks pose the potential to harm the employer's reputation would not be entirely correct.

46 the *Motsoeneng* case par 51.
47 the *Motsoeneng* case par 52.
48 the *Motsoeneng* case par 51.
49 the *Media Workers Association* case par 5.7.
50 the *Motsoeneng* case par 51.3.

Nevertheless, much uncertainty exists in this area of the law, as the *Motsoeneng* case also used conservative language in formulating its recognition that public criticism of an employer "may potentially" enjoy judicial protection. Furthermore, in assessing whether the comments made by Motsoeneng were in the public interest, the arbitrator focused almost exclusively on the employee's duty to act in the best interest of his employer.[51] It can accordingly be said that South African labour law currently places substantial restrictions on employees' ability to publicly criticise their employer, albeit that these restrictions may be somewhat less severe than some academics have suggested.

4. Balancing the duty of the academic as an employee and academic freedom

If the approach suggested by Phungula and the line of cases he referred to are correct, academics would not be permitted to publicly criticise their employer where such criticism poses the risk of reputational harm. If, instead, the approach in the *Motsoeneng* case is followed, it would appear to provide some protection for academics to criticise their employer. Nevertheless, even this more permissive approach appears to be more restrictive than the legitimate restrictions on academic freedom recognised in terms of international law. In the following section, the existing law on employees' right to criticise their employer will be considered in the specific context of academic freedom and the restrictions on academic freedom recognised in terms of international law.

The CESCR recognises that academic freedom is not absolute and may need to be limited in certain circumstances, just as other forms of expression may need to be limited. In the CESCR's view, these limitations are brought about by academics' countervailing duties, which include the duties to "respect the academic freedom of others, to ensure the fair discussion of contrary views, and to treat all without discrimination on any of the prohibited grounds".[52] Therefore, academic freedom

51 the *Motsoeneng* case par 52.
52 par 38 of General Comment 13 of 1999.

would not permit an academic to propagate hate speech or discriminatory speech against any person on one of the prohibited grounds.[53] These are important limitations to academic freedom.

The *Motsoeneng* case does not explicitly mention that the speech in question must not amount to hate speech to enjoy protection. However, this requirement does exist as the *Motsoeneng* case envisages an additional limitation to the right to freedom of expression brought about by the employment relationship. Hate speech does not enjoy protection in terms of the right to freedom of expression,[54] which would have made the specific listing of a hate speech exclusion in the *Motsoeneng* case otiose. The CESCR does not explicitly recognise any other limitations on the right to academic freedom and academics' ability to criticise their employer.

Nevertheless, certain other limitations are recognised by other human rights bodies, such as the ECtHR. The ECtHR has recognised that the permissible bounds of protected speech may be exceeded where there is no factual basis for the expression.[55] However, this does not mean that a statement must be true to enjoy protection in terms of the right to freedom of expression. In the context of academic freedom, the ECtHR has held that what is required is merely a reasonable factual basis for the statement, particularly where the statement is made during an academic debate in the public interest.[56] This limitation is broadly in line with the recognition by the *Motsoeneng* case that an employee should not deliberately or negligently make misleading statements.

53 The prohibited grounds are set out in art 2(2) of the International Covenant on Economic, Social and Cultural Rights and are the grounds of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

54 s 16(2) of the Constitution. See also *Qwelane v South African Human Rights Commission* 2021 (6) SA 579 (CC) at par 78 where the Constitutional Court explains that "[h]ate speech is the antithesis of the values envisioned by the right to free speech – whereas the latter advances democracy, hate speech is destructive of democracy".

55 *Jerusalem v Austria* Application no. 26958/95 (27 February 2001) par 47.

56 the *Sorguç* case par 32.

The limitation in the *Motsoeneng* case requiring the disclosure to be in the public interest also appears justifiable. However, the approach by the ECtHR in relation to academic freedom differs fundamentally concerning when a disclosure would be in the public interest. The *Motsoeneng* case seems to suggest that a disclosure which risks harming the reputation of the employer would only be in the public interest in exceptional circumstances.[57] In contrast, the ECtHR presumes that an academic who expresses an opinion in relation to "areas of their research, professional expertise and competence" is acting in the public interest.[58] It further presumes that open and frank debates about the functioning and operation of HEIs is in the public interest.[59]

The public nature of an HEI may accordingly require an adaptation of the principles of the *Motsoeneng* case in an academic context. This would be better aligned with the *Yazici* case discussed earlier, where the ECtHR recognised the need for a greater tolerance to criticism by academics and academic institutions.[60] While the public may have a less pressing interest in an ordinary private employer's operations, its interest in an HEI's operations is much greater. Therefore, in the context of academic freedom, the public interest requirement – while relevant – must be interpreted within the unique context of an HEI, where criticism would be presumed to be in the public interest unless the academic in question acted in bad faith.

Therefore, the requirement in the *Motsoeneng* case that the employee must have acted in good faith is also generally reasonable. However, requiring the raising of the concerns internally should not always be a strict prerequisite for the speech in question to enjoy protection. While there is certainly value in having the concerns raised internally, criticism may also arise in respect of matters that are generally known within an institution even if there had not been a formal grievance process followed. The mere fact that concerns had not been raised internally

57 the *Motsoeneng* case par 52.
58 the *Erdoğan* case par 41.
59 the *Sorguç* case par 32.
60 the *Yazici* case par 56.

should not be sufficient to deprive the speech of its protected nature. This approach also accords better with that of the ECtHR, considering that the applicant in the *Sorguç* case had not raised any internal dispute. Yet, this did not affect the protected nature of the speech or result in the speech falling outside the bounds of academic freedom.

5. Conclusion

It has become increasingly clear that academics need to balance their obligations as an employee with their obligations as an academic. As demonstrated in this chapter, an academic is restricted in the extent to which they may publicly criticise their employer as a matter of labour law. These restrictions exist notwithstanding the fact that international law generally recognises that academic freedom includes an academic's right to criticise their own institution or employer.

The extent of the limitation on an employee's ability to criticise their employer is also uncertain. Some academics and a series of CCMA awards suggest that an employee's right to freedom of expression may be justifiably limited as soon as the employee's speech poses a reputational risk to the employer. This is particularly problematic in the context of academic freedom and the freedom to criticise one's employer, as most forms of criticism almost invariably present some risk of reputational harm to the institution. An interpretation that is too quick to recognise a limitation on an academic employee's right to freedom of expression as justifiable would not accordingly align with the protection granted to academic freedom in terms of international law. Nevertheless, the *Motsoeneng* case represents a welcome recognition that an employee may publicly criticise their employer in certain instances. Despite the value of this recognition, the *Motsoeneng* case and its requirements for an employee's criticism of their employer is still more restrictive than the permissible limitations imposed on academic freedom by international law. Therefore, the principles in the *Motsoeneng* case should be used in a modified form when considering the balancing exercise between a university as an employer's rights and that of its employee as an academic.

Criticism of the operations of an HEI which had been made by an academic in good faith should generally be presumed to be in the public interest. The public nature of an HEI and its important role in society diminishes the employer's right to demand that its employees prevent criticism of it that could harm its reputation. Nevertheless, it is axiomatic that such criticism should have a reasonable foundation in fact and not be driven by "ulterior motive, revenge or malice".[61]

The courts are empowered to develop the common law in order to promote the spirit, purport, and object of the Bill of Rights.[62] In recognising the important value of academic freedom, the courts ought to develop an academic employee's common law duty of good faith to recognise these instances where an academic may legitimately criticise their employer without attracting disciplinary action.[63] This development of the common law would ensure a better alignment between labour law and the protection of academic freedom as a fundamental component of academic employees' right to freedom of expression and the right to education.

61 the *Yazici* case par 57.

62 s 39(2) of the Constitution.

63 The Council of Europe has, for example, recognised that academic freedom would be of little practical value if the exercise thereof is frequently visited with the sanction of dismissal. Therefore, the council has noted that academic freedom must be capable of being exercised "without the fear of disciplinary action, dismissal or any other form of retribution". See in this respect Council of Europe (CoE) CM/Rec(2012)7 "Committee of Ministers (COM) on the responsibility of public authorities for academic freedom and institutional autonomy" 2012.

Chapter 6

Ghana's Proposed Anti-LGBTQ+ Bill And its Implication on Academic Freedom in Institutions of Higher Learning

Theophilus Edwin Coleman[1]
Faculty of Law,
University of Johannesburg

Abstract

Debates concerning the criminalisation of LGBTQ+ activities in Ghana have been at the centre stage of political discussions over the last decade. However, the debates have assumed a different dimension after the LGBTQ+ community officially launched an advocacy centre in Ghana. The launch of the advocacy centre, done at the blind-side of many Ghanaians, drew extensive criticism on social media. Most significantly, the establishment of the LGBTQ+ advocacy centre triggered moral entrepreneurs, primarily the church and other Christian-oriented civil society organisations, to institute stringent measures to quell LGBTQ+ activities in all facets of Ghanaian life. In light of the public uproar against the establishment of the advocacy centre and the massive support of the Ghanaian populace to criminalise LGBTQ+ activities, a private member's bill, entitled the Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill of 2021, is currently undergoing various stages of parliamentary

1 BA, LLB, LLM, LLD. Senior Postdoctoral Research Fellow, Centre for International and Comparative Labour and Social Security Law (CICLASS), research associate at the Research Centre for Private International Law in Emerging Countries (RCPILEC), Faculty of Law, University of Johannesburg.

appraisals. A survey conducted by Afrobarometer reveals that most Ghanaians have heralded the Bill as a necessary step to curb practices that are "abominable" to Ghanaian culture and values. The Bill criminalises LGBTQ+ activities in Ghana. The overall objective of the Bill is to prohibit advocacy of LGBTQ+ activities. Furthermore, the Bill imposes an obligation on state institutions – including institutions established by the Constitution of the Republic of Ghana of 1992, such as the courts, the Commission for Human Rights and Administrative Justice (CHRAJ), and the National Commission for Civic Education (NCCE) – to strictly adhere to and uphold Ghanaian family values as enshrined in the Bill. Also, teachers and other educational instructors at schools, including higher education institutions (HEIs), are under a legal duty to uphold the Ghanaian family values contained in the Bill. Any person, including teachers and instructors in HEIs, who breaches the duty to uphold the Ghanaian family values and proper sexual human rights commits a criminal offence and is liable on summary conviction to a fine or a term of imprisonment. The extent of restriction and criminal sanctions imposed by the Bill has raised some concerns in the academic space and in HEIs about the political encroachment on the value of academic freedom as protected by the 1992 Constitution of Ghana. This chapter accordingly seeks to explore the implication of the Anti-LGBTQ+ Bill on academic freedom in HEIs in Ghana. The chapter explores the constitutional foundations of freedom of speech, belief, conscience and thought, including academic freedom and the inroads the Bill seeks to achieve. The chapter further discusses the constitutionality of the provisions in the Bill that restrict academic freedom by reflecting on landmark cases by the Supreme Court of Ghana. This chapter suggests that the provisions of the Bill that restrict free speech, freedom of thought, belief, and conscience, including academic freedom, be expunged from the Bill as they are at variance with the core principles and fundamental rights in the 1992 Constitution of Ghana.

> "The university classroom is peculiarly the marketplace of ideas…"[2]

2 *Keyishian v Board of Regents of University of the State of New York* 385 US 589, 603 (1967). Also quoted in the following: Niehoff and

1. Introduction

Debates concerning the criminalisation of Lesbian, Gay, Bisexual, Transgender, Queer, and other related (LGBTQ+) activities in Ghana have been at the centre stage of political discussions over the last decade. However, the debates have assumed a different dimension after the LGBTQ+ community officially launched an advocacy centre in Ghana.[3] The launch of the advocacy centre was on the blind side of many Ghanaians. This drew extensive criticism on social media. Most significantly, the establishment of the LGBTQ+ advocacy centre triggered moral entrepreneurs,

Sullivan *Free Speech: From Core Values to Current Debates* (2022) 50; Rabban "A functional analysis of individual and institutional academic freedom under the First Amendment" in Alstyne (ed) *Freedom and Tenure in the Academy* (1993) 252; Davis "Protecting the marketplace of ideas: The First Amendment and public school teachers" 2005 *First Amendment Law Review* 335-336; Blocher "Institutions in the marketplace of ideas" 2008 *Duke Law Journal* 821 821-825; Labaree "The peculiar problems of preparing educational researchers" 2003 *Educational Researcher* 13 13-22; Scott "What kind of freedom is academic freedom?" 2022 *Critical Times* 1 1-19; Stone "Restrictions of Speech Because of its Content: The peculiar case of subject-matter restrictions" 1978 *University of Chicago Law Review* 81 81-115; Wernicke "Teachers' speech rights in the classroom: Analysis of *Cockrel v Shelby County School District*" 2003 *University of Cincinnati Law Review* 1471-1472; Ingber "The marketplace of ideas: A legitimizing myth" 1984 *Duke Law Journal* 1-85; Strauss "Dangerous thoughts? Academic freedom, freedom of speech, and censorship revisited in a post-September 11th America" 2004 *Washington University Journal of Law and Policy* 343 343-367; Vollenhoven "The right to freedom of expression: The mother of our democracy" 2015 *Potchefstroom Electronic Law Journal* 2299-2327; Welner "Locking up the marketplace of ideas and locking out school reform: Court's imprudent treatment of controversial teaching in America's public schools" 2003 *UCLA Law Review* 959 960-1030; Levin "Educating youth for citizenship: The conflict between authority and individual rights in public schools' 1986 *The Yale Law Journal* 1647 1647-1680; Chemerinsky "Teaching that speech matters: A framework for analyzing speech issues in schools" 2009 *University of California, Davis Law Review* 825 825-241; and Gordon "When the classroom speaks: A public university's first amendment right to a race-conscious admissions policy" 2000 *Washington and Lee Journal of Civil Rights and Social Justice* 57 57-85.

3 Coleman and Kyerematen, "Created in the image of God, criminalised by the laws of Ghana" 2022 https://www.africanlawmatters.com/blog/blog-created-in-gods-image (25-09-2022).

primarily the church and other Christian-oriented civil society organisations, to institute stringent measures to quell LGBTQ+ activities in all facets of Ghanaian life.[4] In light of the public uproar against the establishment of the advocacy centre, a private member's bill, entitled the Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill of 2021,[5] is currently undergoing various stages of parliamentary appraisals. Most Ghanaians have heralded the Bill as a necessary step to curb practices that are "abominable" to Ghanaian culture and values.[6] The Bill imposes an obligation on state institutions – including constitutionally established bodies, such as the Commission for Human Rights and Administrative Justice (CHRAJ) and the National Commission for Civic Education (NCCE) – to strictly adhere to and uphold Ghanaian family values, as enshrined in the ill.[7]

In addition, school teachers and instructors are under a positive legal obligation to uphold the Ghanaian family values contained in the bill.[8] Any person, including teachers and educational instructors, who breaches the duty to uphold the Ghanaian family values and proper sexual human rights commits a criminal offence and they shall be liable on summary conviction to a term of imprisonment or a fine.[9] The extent of restriction and criminal sanctions imposed by the Bill has raised concerns in the academic space and higher education institutions (HEIs) about the political encroachment on the value of academic freedom protected by the 1992 Constitution of Ghana. One of the main

4 *Ibid*.
5 Parliament of Ghana "Bills" 2021 https://www.parliament.gh/docs?type=Bills&OT (25-09-2022) (hereafter "the Bill").
6 Moral entrepreneurs are the driving force pushing for the criminalisation of LGBTQ+ activities in Ghana. According to Tettey, moral entrepreneurs are "individuals or organizations that assume responsibility for promoting, and/or enforcing, views and regulations that reflect their moral beliefs, with the goal of ridding society of perceived ills". See Tettey "Homosexuality, moral panic and politicised homophobia in Ghana: Integrating discourses of moral entrepreneurship in Ghana media" 2016 *Communication, Culture and Critique* 86-94.
7 cl 3(2) of the Bill.
8 cl 3(2)(a) of the Bill.
9 cl 4 of the Bill.

arguments by the sponsors of the Bill is that fundamental rights enshrined in the Constitution of Ghana are not absolute, and thus subject to the law and pursuance of public good and interest. Hence, according to the proponents of the Bill, the restriction of the right to freedom of expression, speech, and academic freedom is legally justified, considering that the rights contained in Ghana's Constitution are not absolute. Against this background, the scope and aim of this chapter are hinged.

This chapter reflects on the impact of the Anti-LGBTQ+ Bill on academic freedom in institutions of higher learning in Ghana. The contribution explores the constitutional foundations of freedom of speech, belief, conscience and thought, including academic freedom and the negative inroads of the restrictions in Ghana's proposed Anti-LGBTQ+ Bill. The contribution also reflects on the main arguments of the sponsors of the Bill regarding the legal justification to limit fundamental rights contained in the 1992 Constitution of Ghana. The chapter further discusses the constitutionality of the provisions in the Bill that restrict academic freedom by reflecting on pronouncements by the Supreme Court of Ghana regarding the protection of fundamental rights in Ghana. This chapter argues that the provisions in the bill restricting academic freedom fall short of the legal threshold required to limit fundamental rights contained in the 1992 Constitution of Ghana.

This chapter is organised into six main sections. The first section discusses the framework and scope of academic freedom. It reflects on the status of academic freedom in HEIs in Ghana. The next section provides an overview of the Anti-LGBTQ+ Bill, particularly the extent to which the Bill restricts freedom of speech and expression and academic freedom. The third section appraises the key arguments advanced by the sponsors/proponents of the Bill as justification to limit fundamental rights and freedom, including academic freedom. The fourth section discusses the international legal framework guaranteeing academic freedom, freedom of expression and opinion. The fifth section explores the parameters of restricting fundamental rights under Ghanaian law by reflecting on the pronouncements of courts in Ghana. The sixth section concludes by suggesting that

the restriction and criminalisation of academic freedom by the Anti-LGBTQ+ Bill falls short of the constitutional justification required to limit fundamental rights. It also argues that the limitations are unjustifiable and erode the parameters of academic freedom. This chapter suggests that the arguments advanced by the sponsors of the Bill do not meet the threshold required to limit academic freedom.

2. Academic freedom, opinion, and expression: history and parameters

The modern conception of academic freedom was formulated in Germany and other European HEIs in the 19th century.[10]

10 Fuchs "Academic freedom – Its basic philosophy, function, and history" 1963 *Law and Contemporary Problems* 431 431-466; Ludlum "Academic freedom and tenure" 1950 *The Antioch Review* 3 3-34; Socha "Policed pedagogy controlling and dominating classrooms, curriculum, and courses" in Nocella and Socha (ed) *Policing on Campus: Academic Repression, Surveillance and the Occupy Movement* (2013) 39-53. Some academics trace the history of academic freedom to Socrates after the execution of Galileo. See Ledoux, Marshall and McHenry "The erosion of academic freedom" 2010 *Educational Horizons* 249 249-256. According to Fuller, the classical conception of academic freedom is attributed to the works of Wilhelm von Humboldt. See, Fuller "The genealogy of judgement: Towards a deep history of academic freedom" 2009 *British Journal of Education Studies* 164 164-177. For various historical accounts and perspectives on academic freedom generally, see Livingstone "Finding revelation in anthropology: Alexander Winchell, William Robert Smith and the heretical imperative" 2015 *The British Journal for the History of Science* 435 436-454; Metzger *The Development of Academic Freedom in the United States* (1955); McIver *Academic Freedom in Our Time* (1955); Schrecker *No Ivory Tower: McCarthyism and the Universities* (1986); Nocella, Best and McLaren "Introduction: The rise of the academic-industrial complex and the crisis in free speech" in Nocella, Best and McLaren (eds) *Academic Repression: Reflections from the Academic-Industrial Complex* (2010); Hayes "Academic freedom and the diminished subject" 2009 *British Journal of Educational Studies* 127 127-145; Scott "Knowledge, power, and academic freedom" 2009 *Social Research* 451 452-480; Steward "Taking liberties: Academic freedom and the humanities" 2008 *Profession* 146 146-171; Veit "Academic freedom in Germany before and after 1933 under the Republic of Weimar and under Hitler" 1937 *Peabody Journal of Education* 36 36-44; Becker "Academic freedom in England and Germany: A comparative perspective" 2006 *World Studies in Education* 5 5-24; Karran "Academic freedom:

The concept opposed governmental, political, and religious interference in academic and research activities in HEIs.[11] Prior to the formulation of the concept, the 18th-century HEIs were under the sponsoring authority of political states and religious institutions.[12] At the core of the concept is the idea that HEIs, where scholars were to formulate and transmit knowledge to students and pursue academic and scientific truths, must be without political and religious interference.[13] The foundations of academic freedom are thereby enmeshed in the role of HEIs and the responsibilities of scholars to transmit knowledge and pursue scientific truth. The pursuit of academic freedom opposed religious and political dogmas of religious institutions and the political state. The resultant impact of such religious and political influence was an alteration of the purpose of higher education, which is to pursue objective scientific truth without the influence of political and religious inclinations.

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in justification of a universal ideal" 2009 *Studies in Higher Education* 263 263-283; Beiter "Measuring the erosion of academic freedom as an international human right" 2016 *Vanderbilt Journal of Transnational Law* 597 560-691; and Zeleza "Academic freedom in the neo-liberal order: Governments, globalisation, governance, and gender" 2003 *Journal of Higher Education in Africa* 149 149-194.

11 Fuchs (n 9) 432.

12 Brickman "Academic freedom: Past and present" 1968 *Journal of Thought* 152 152-155; Axelrod "Academic freedom and its constraints: A complex history" 2021 *Canadian Journal of Higher Education* 51-52; McConnell "Academic freedom in religious colleges and universities" 1990 *Law and Contemporary Problems* 303 305-306; and Andreescu "Academic freedom and religiously affiliated universities" 2008 *Journal for the Study of Religions and Ideologies*162 163-183.

13 Dworkin "We need a new interpretation of academic freedom. Academic freedom and the future of the university – Lecture series" 1996 *Academe* 10 10-15; Lynch "Academic freedom and the politics of truth" in Lackey (ed) *Academic Freedom* (2018) 23-35; Badamchi "Academic freedom: How to conceptualize and justify it?" 2022 *Philosophy and Social Criticism* 619-623; Aarrevaara "Academic freedom in a changing world" 2010 *European Review* 55-59; Whittington "Academic freedom and the mission of the university" 2022 *Houston Law Review* 821 823-829; and Suissa and Sullivan "How can universities promote academic freedom? Insights from the front line of the gender wars" 2022 *Impact: Philosophical Perspectives on Education Policy* 2 10-11.

An early formulation of the scope and purpose of academic freedom is said to have been captured in the writings of Paulsen. Paulsen averred that:

> it is no longer, as formerly, the function of the university teacher to hand down a body of truth established by authorities, but to search after scientific knowledge by investigation, and to teach his hearers to do the same ... For the academic teacher and his hearers there can be no prescribed and no proscribed thoughts. There is only one rule for instruction: to justify the truth of one's teaching by reason and the facts.[14]

Prior to that, Immanuel Kant had reflected on the notion of academic freedom in 1794 that:

> only a ruler who is himself enlightened and has no fear of phantoms, yet who likewise has at hand a well-disciplined and numerous army to guarantee public security, may say what no republic would dare say: Argue as much as you would like and about whatever you like, but obey.[15]

Essentially, Kant argued that academics should be granted a degree of civil freedom since a "lesser degree of civil freedom gives intellectual freedom enough room to expand to its fullest extent".[16] Hutcheson argues that the essays of Kant served as a basis for the development of academic freedom in German universities by scholars.[17] Also in Germany, academic freedom as developed by Alexander von Humboldt encapsulated the doctrines of the freedom to teach (*Lehrfreiheit*),[18] and the freedom

14 Paulsen *The German Universities and the University Study* (Translated by Thilly and Elwang 1906) 228-231. Also quoted in Michell *The Coup at Catholic University: The 1968 Revolution in American Catholic Education* (2015) 34.

15 Kant "An answer to the question: What is enlightenment?" in Reiss (ed) *Kant's Political Writings* (Translated by HB Nisbet 1977) 54-60.

16 Kant (n 14) 54-60.

17 Hutcheson "Why tenure needs protection in these troubled times" in DeVitis and Sasso (ed) *Colleges at the Crossroads: Taking Sides on Contested Issues* (2018) 113-126.

18 Altbach "Academic freedom: A realistic appraisal" 2021 *Higher Education* 2 2-3; Lodewyckx "Academic freedom in Germany"

to learn (*Lehrnfreiheit*).[19] The 17th and 18th centuries' Eurocentric conception of academic freedom represented the idea that scholars had the duty to teach research in pursuit of scientific truths in HEIs without political or religious interferences. The German and Eurocentric conception of academic freedom remains relevant and valuable in the 21st-century university environment in many countries.

In America, the German influence and understanding of academic freedom can be seen in the 1915 Declaration of the American Association of University Professors (AAUP). The AAUP Declaration of 1915 (revised in 1940) embodies the principles of academic freedom.[20] Under the declaration, academic freedom

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1941 *The Australian Quarterly* 82 82-89; Rockwell "Academic freedom: German origin and American development" 1950 *Bulletin of the American Association of University Professors (1915-1955)* 225-227; Commager "The University and freedom: Lehrfreiheit and Lehrnfreiheit" 1963 *The Journal of Higher Education* 361-364; Palonen "The politics of academic freedom: Weber, Westminster and contemporary universities" 2016 *Max Weber Studies* 149-161; Zavale and Langa "African diaspora and the search for academic freedom safe havens: Outline of a research agenda" 2018 *Journal of Higher Education in Africa* 1-9; Neumann Jr "Academic freedom, job security and costs" 2017 *Journal of Legal Education* 595 595-596; Jones "TF Tout and the idea of the university" in Barron and Rosenthal (eds) *Thomas Frederick Tout (1855-1929): Refashioning History for the Twentieth Century* (2019) 71-85; Eisenach *The Lost Promise of Progressivism* (2021) 94; and Eastman and Boyles "In defense of academic freedom and faculty governance: John Dewey, the 100th Anniversary of the AAUP, and the threat of corporatization" 2015 *Education and Culture* 17-26.

19 Macfarlane "Re-framing student academic freedom: A capability perspective" 2012 *Higher Education* 719-722; Metzger "Profession and constitution: Two definitions of academic freedom in America" 1988 *Texas Law Review* 1265 1269-1271; Landauer, Cowan, Hillway, and Goldberg "Further comments on institutional neutrality" 1970 *AAUP Bulletin* 123-126; Steinzor "A Techer's reaction to the idea of a university" 1962 *Improving College and University Teaching* 145-147. See generally: Russell *Academic Freedom* (1993); and Josephson "Lehrfreiheit, Lernfreiheit, Wertfreiheit: Max Weber and the University Teachers' Congress in Jena 1908" 2004 *Max Weber Studies* 201 202-219.

20 American Association of University Professors (AAUP) "AAUP's 1915 Declaration of Principles" (hereafter, AAUP Declaration of Principles) 1915 https://aaup-ui.org/Documents/Principles/Gen_Dec_Princ.pdf (01-10-2022). See also Wilson "The AAUP's 1915 declaration of principles: Conservative and radical, visionary and myopic" 2016 *Journal of Academic Freedom* 1-19; Cain *Establishing*

comprises three main elements: freedom of inquiry and research, freedom of teaching within an HEI, and sometimes the freedom of extramural utterance and action.[21] In America, academic freedom extends to students. This protection of students' freedom to learn was not part of the initial AAUP Declaration of 1915. The gap was remedied in 1967 when the AAPU adopted the Joint Statement on Rights and Freedoms of Students (hereafter "the 1967 AAUP Joint Statement"), where the liberty of students to learn was included in the rubrics of academic freedom from an American perspective.[22]

The 1967 AAUP Joint Statement provides that the liberty to teach and the freedom to learn are inseparable aspects of academic freedom.[23] From the student's perspective, therefore, academic freedom entails the liberty the students have to choose or study subjects of interest or concern to them and arrive at conclusions and express their opinions based on the said conclusions.[24] The 1967 AAUP Joint Statement also protects students from improper academic evaluation[25] and permits students to form associations.[26] Students also have the freedom of inquiry and expression,[27]

Academic Freedom (2012) 29-50; Gilbert "Public university professors: Employees or appointees" 2020 *Kentucky Law Journal Online* 1-9; Metzger "The 1940 Statement of Principles on academic freedom and tenure" 1990 *Law and Contemporary Problems* 3 3-77; and Schrecker "One historian's perspective on academic freedom and the AAUP" 2014 *Academe* 30 31-34.

21 AAUP Declaration of Principles of 1915.

22 American Association of University Professors (AAUP) "Joint statement on rights and freedoms of students" (hereafter "AAUP Joint Statement") n.d. https://www.aaup.org/report/joint-statement-rights-and-freedoms-students (01-10-2022); Appiagyei-Atua "Students' academic freedom in African universities and democratic enhancement" 2019 *African Human Rights Law Journal* 151-156; Mullendore "The joint statement on rights and freedoms of students: Twenty-five years later" 1992 *New Directions for Student Services* 5 6-23; Miller "The evolution of the joint statement on the rights and freedoms of students" 1993 *Journal of Student Affairs Research and Practice* 176 176-181; Alstyne (ed) *Freedom and Tenure in the Academy* (1993); and Cooper and Lancaster "Perceived adherence to the joint statement on the rights and freedoms of students on college campuses" 1995 *Journal of Student Affairs Research and Practice* 179 180-188.

23 preamble of AAUP Joint Statement of 1967.

24 art II(A) of AAUP Joint Statement of 1967.

25 art II(B) of AAUP Joint Statement of 1967.

26 art IV(A) of AAUP Joint Statement of 1967.

27 *Ibid.*

among other civil and political rights. The contours of academic freedom, as explained above, seek to serve a long-term goal of advancing knowledge in society without religious, political, or other societal constraints and restrictions.

In America, the principles underlying academic freedom have been upheld by courts. In *Keyishian v Board of Regents of the University State of New York*,[28] the United States Supreme Court considered whether the regents at the State University of New York could require academic staff to sign a loyalty oath as part of their conditions of employment. This condition was based on a state law, the New York State Education Law (Feinberg Law).[29] The law required that educators declare whether they were or had been a member of the Communist Party (considered a subversive organisation). Based on the content of Feinberg's Law, membership in the Communist Party was a precondition to deny or terminate the employment relationship between the educators and the HEI.[30]

The other issue that the Supreme Court considered was whether section 3021 of the Education Law and section 105(3) of the Civil Service Law, which referred to "treasonable or seditious speech or act", threatened the right to freedom of speech (enshrined in the First Amendment). Underlying this is the hallowed concept of academic freedom in HEIs.[31] The US Supreme Court declared the New York State Education Law unconstitutional, as the law was overbroad and vague.[32] The court stated further that membership in a subversive organisation in and of itself –without intention or further action – is not

28 *Keyishian v Board of Regents of the University State of New York* 385 US 589, 603 (1967). See also *Alder v Board of Education of City of New York* 342 US 485 (1952); Hiers "Institutional academic freedom or autonomy grounded upon the first amendment: A jurisprudential mirage" 2007 *Hamline Law Review* 1-58. See generally Huq "Easterbrook on academic freedom" 2010 *The University of Chicago Law Review* 1055 1056-1072; and Golden "Constitutional law: Academic freedom gains full constitutional protection" 1967 *Tulsa Law Review* 270 270-275.

29 the *Keyishian* case paras 5-6.

30 the *Keyishian* case par 6.

31 the *Keyishian* case paras 12-14.

32 the *Keyishian* case par 30.

a justifiable reason to terminate the employment of faculty members.[33] The US Supreme Court re-affirmed the importance of open dialogue in a democratic HEI environment.[34] Based on the findings of the court, it described the university classroom as a marketplace of ideas.[35] In the view of the court:

> Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore of special concern of the First Amendment, which does not tolerate laws that cast palls of orthodoxy over the classroom... The nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of multitude of tongues than through any kind of authoritative selection...[36]

As mentioned, academic freedom includes the liberty of students to choose an interest of study, and to form and express their opinions based on their conclusions. American courts have affirmed this liberty, for instance in *Sweezy v New Hampshire, by Wyman, Attorney General*.[37] In that case, the Attorney-General

33 the *Keyishian* case par 26.
34 the *Keyishian* case par 20.
35 the *Keyishian* case par 19.
36 *Ibid*.
37 *Sweezy v New Hampshire, by Wyman, Attorney General* 354 US 234 (1957). See generally Cooper Jr "Constitutional law – rights of states to investigate subversive activities" 1960 *Louisiana Law Review* 595 596-600; Porter "The Supreme Court and individual liberties since 1952" 1959 *Kentucky Law Journal* 48 49-62; Cramton "The Supreme Court and state power to deal with subversion and loyalty" 1958 *Minnesota Law Review* 1025 1025-1082; Mommer "State loyalty program and the supreme court" 1968 *Indiana Law Journal* 462 463-470; Daughtrey Jr "The legal nature of academic freedom in United States colleges and universities" 1991 *University of Richmond Law Review* 233 234-271; McCarthy and Patterson "Academic freedom in the schools" 1978 *The Journal of General Education* 299 300-310; Park "Sovereignty and First Amendment rights of higher education institutions: An affirmative action and institutional approach" 2020 *First Amendment Studies* 110 110-127; Inazu "The strange origins of the constitutional right of association" 2010 *Tennessee Law Review* 485 485-562; and Byrne "The threat to constitutional freedom" 2004 *Journal of College and University Law* 79 79-142.

of New Hampshire, on behalf of the New Hampshire legislature, investigated the beliefs and associations of Professor PM Sweezy of the University of New Hampshire, who was suspected of being engaged in subversive behaviour. Professor Sweezy also refused to testify about the content of the speech he delivered at the HEI and denied being a member of the Communist Party and having knowledge about the communist infiltration into the Progressive Party of New Hampshire.[38] The US Supreme Court ruled that the Attorney-General of New Hampshire had gone too far in conducting investigations on behalf of the legislature. The court stated that legislative investigations could encroach upon the liberties of individuals, especially in situations where the said investigative powers are broad and ill-defined.

The court highlighted the harm of governmental intrusion into the intellectual life of a university, and struck down or overturned the decision of the New Hampshire Supreme Court.[39] In terms of the application of the concept of academic freedom to students, the US Supreme Court averred that: "teachers and students must always remain free to inquire, to study and to evaluate, and gain maturity and understanding, otherwise our civilisation will stagnate and die".[40] Academic freedom means that, internally, HEIs must respect the opinions expressed by students. The respect for academic freedom also includes the idea that HEIs must respect associational rights, such as freedom of association. This position was upheld by the United States Supreme Court in *Healy v James*,[41] where the court held that the refusal of the Central Connecticut State College to recognise a campus chapter for Students for a Democratic Society (SDS) was unconstitutional and violated the First Amendment

38 the *Sweezy* case 234.
39 the *Sweezy* case 261.
40 the *Sweezy* case 250.
41 *Healy v James* 408 US 169 (1972) (*Healy*). See generally Terbeek "Healy v James: Official campus recognition for student for student groups" 1973 *Cleveland State Law Review* 373 374-387; Bogaty "Beyond 'Tinker' and 'Healy': Applying the First Amendment to student activities" 1978 *Columbia Law Review*1700 1701-1713; and Patton "Trumping the First Amendment: Student-driven calls for speech restriction on public college campuses" 2017 *Case Western Reserve Law Review* 189 190-212.

rights.[42] In Africa, the history of academic freedom is said to have been inextricably intertwined with the concept underlying the establishment of universities in Egypt around 2000 BCE in the Per-ankh.[43] Academic freedom since the establishment of universities in Per-ankh has been a critical component of university life in many African countries.[44] The commitment to academic freedom in Africa is expressed in two key declarations, namely the Dar es Salaam Declaration on Academic Freedom and Social Responsibility of Academics of 1990,[45] and the Kampala Declaration on Intellectual Freedom and Social Responsibility of 1990.[46] These two declarations seek to protect academic and intellectual freedom in Africa.

The contemporary understanding of academic freedom is undergirded by the understanding that HEIs must have the autonomy to produce research and teaching to improve and enhance societal development, and improve human conditions. Academic freedom also mirrors the autonomy of HEIs. Institutional autonomy of HEIs mirrors the idea of self-governance and self-regulation without governmental, political, or religious influences.[47] This mission of HEIs promotes

42 the *Healy* case 185-194.

43 Appiagyei-Atua (n 21) 155.

44 *Ibid.*

45 Shivji "The jurisprudence of the Dar es Salaam Declaration on Academic Freedom" 1991 *Journal of African Law* 128 129-141; Kanywanyi "Academic freedom, the autonomy of institutions of higher education and the social responsibility of academics" 2006 *Journal of Higher Education in Africa* 69 70-81 Chachage *Academic Freedom and Social Responsibilities of Academics in Tanzania* (2008) 1-5; Appiagyei-Atua, Beiter and Karran "The compositive theory: An African contribution to the academic freedom discourse" 2015 *South African Journal on Human Rights* 315 316-329; and Rajaoson "Academic freedom and social responsibility reflections from the African experience" 2002 *Higher Education Policy* 375 376-379.

46 Laakso "Academic mobility in Africa" 2021 *Politikon* 442-445; Agbo and Lenshie "Between the state and intellectuals: Dialectics of the struggles for academic freedom in Africa" 2017 *International Journal of Humanities and Social Science Studies* 361 366-370; and Tierney and Lanford "The question of academic freedom: Universal right or relative term" 2014 *Frontiers of Education in China* 3 18-19.

47 Matei and Iwinska "Diverging paths? Institutional autonomy and academic freedom in the European higher education area" in Curaj, Deca, and Pricopie (eds) *European Higher Education Area: The Impact of Past and Future Policies* (2018) 345-368; and Maassen, Gornitzka

a democratic agenda and socio-economic development in societies.[48] The historical understanding and aspects of academic freedom have influenced essential international instruments, constitutions of countries, and legislation and policy frameworks preventing political, religious, and societal erosion into academic freedom.

3. International legal architecture and standards on academic freedom

Several international instruments protect and set standards regulating academic freedom. In addition to international instruments, some regional instruments imbibe and ascribe to the tenets of academic freedom and institutional autonomy. The International Covenant on Civil and Political Rights (ICCPR) of 1966 protects academic freedom. The ICCPR guarantees the right to hold an opinion without interference.[49] Article 19(2) of the ICCPR provides that: "everyone has the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice".[50] However, the right to hold an opinion is subject to specific responsibilities as provided by law, including the respect for the rights and reputations of others and the protection of national security, public policy or public

and Fumasoli "University reform and institutional autonomy: A framework for analysing the living autonomy" 2017 *Higher Education Quarterly* 239 240-250. Adams argues that although institutional academic autonomy is significant, it is not the same as academic freedom. See Adams "Resolving enmity between academic freedom and institutional autonomy" 2021 *Journal of College and University Law* 1-70.

48 Kratou and Laakso "The impact of academic freedom and democracy in Africa" 2022 *Journal of Development Studies* 809 809-826; Slaughter "Academic freedom and the state: Reflections on the uses of knowledge" 1988 *The Journal of Higher Education* 241 241-262; Adedeji "African renaissance, economic transformation and the role of the university" 1998 *Indicator South Africa* 64 64-67; and Tierney and Lechuga "Social significance of academic freedom" 2010 *Cultural Studies* 118 119-113.

49 art 19 of the International Covenant on Civil and Political Rights (hereafter "ICCPR") of 1966.

50 art 19(2) of ICCPR.

health or morals.[51] Several academics believe that article 19(2) of the ICCPR guarantees academic freedom and protects academic discourses between students and academics.[52] By guaranteeing academic freedom, the ICCPR recognises the institutional autonomy of HEIs. Another international instrument that protects academic freedom is the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966.

Article 13 of the ICESCR provides for the right to education. However, it does not explicitly provide for academic freedom and institutional autonomy to protect the independence of research and opinion in academic environments.[53] Even though article 13 of the ICESCR does not explicitly provide for academic freedom and institutional autonomy, the Committee on Economic Social and Cultural Rights (CESCR) in the General Comment 13 of 1999 on the Right to Education ("General Comment 13 of 1999") provides that the right to education can be fully enjoyed when academic staff and students have academic freedom and autonomy. In the words of the CESCR: "the right to education can be enjoyed if accompanied by academic freedom of staff and students... and that staff and students throughout the education sector are entitled

51 art 19(3)(a) and (b) of ICCPR.

52 Taylor "Thinking allowed in the academy: International human rights law and the regulation of free speech and academic freedom under the 'Model Code'" 2020 *University of Queensland Law Journal* 117-118; Blell, Liu and Verma "A one-sided view of the world: women of colour at the intersections of academic freedom" 2022 *The International Journal of Human Rights* 1; Quinn and Levine "Intellectual-human rights defenders and claims for academic freedom under human rights law" 2014 *International Human Rights Law Review* 209 216-217; Beiter, Karran and Appiagyei-Atua "Academic freedom and its protection in the law of European states: Measuring an international human right" 2016 *European Journal of Comparative Law and Governance* 254 261-265; Rajagopal "Defending academic freedom as a human right: An internationalist perspective" 2003 *International Higher Education* 3 3-5; Beiter, Karran and Appiagyei-Atua "Measuring the erosion of academic freedom as an international human right: A report on the legal protection on of academic freedom in Europe" 2016 *Vanderbilt Journal of Transnational Law* 597-602; and Rajagopal "Academic freedom as a human right: An internationalist perspective" 2006 *Academe* 25-28.

53 Nkhata "Academic freedom, institutional autonomy and the University of Malawi: An analysis of some trends and prospects" 2017 *Law, Democracy and Development* 127 127-152.

to academic freedom."[54] Hence the ICESCR recognises academic freedom and institutional autonomy as an entitlement of every academic, intellectual or student. According to the committee:

> Members of the academic community, individually or collectively, are free to pursue, develop and transmit knowledge and ideas, through research, teaching, study, discussion, documentation, production, creation, or writing. Academic freedom includes liberty of individuals to express freely opinions about institution or system in which they work, to fulfil their functions without discrimination or fear of repression by the State or any other actor, to participate in professional or representative academic bodies, and to enjoy all the internationally recognized human rights applicable to other individuals in the same jurisdiction. The enjoyment of academic freedom carries with it obligation, such as the duty to respect academic freedom of others, to ensure fair discussion of contrary views and to treat all without discrimination on any of the prohibited grounds.[55]

For academic staff and students to enjoy their academic freedom, their institutions – notably HEIs – must enjoy a certain degree of autonomy.[56] According to the CESCR, institutional autonomy requires a degree of self-governance regarding decision-making and academic work standards.[57] The fact that HEIs must enjoy autonomy does not mean that their operations must be at variance with the public systems of governance. Hence, the system of self-governance also means that the decision-making, management, and other related affairs must be consistent with principles of public accountability. This principle is significant, primarily when HEIs are funded with state funds. The mere fact that HEIs are funded with state funds does not mean their autonomy can

54 par 38 of the Commission on Economic, Social and Cultural Rights (CESCR) "General Comment No. 13: The Right to Education" (Art. 13) 1999 E/C.12/1999/10 (hereafter "CESCR General Comment No 13").
55 par 38 of CESCR General Comment 13.
56 par 40 of CESCR General Comment 13.
57 *Ibid.*

be eroded. The CESCR accordingly suggests a balance to be struck in ensuring that HEIs are accountable but that their autonomy is not eroded.[58] Also, in furtherance of transparency, institutional arrangements in HEIs must thus be fair, just, and transparent.[59]

Other international instruments commit to academic freedom and institutional autonomy as a propeller for the enjoyment of education rights. In the United Nations Educational, Scientific and Cultural Organization (UNESCO)'s Recommendation Concerning the Status of Higher Education Teaching Personnel of 1997 ("Recommendation Concerning Higher Education") the significance of academic freedom as a springboard for maintaining international and domestic standards in higher education is re-emphasised.[60] The Recommendation Concerning Higher Education provides that, in maintaining the international and domestic standards in higher education, the concept of academic freedom must be upheld religiously.[61] In upholding the principle of academic freedom, teaching personnel are free to teach without interference.[62] HEIs must not be compelled to teach or utilise a curriculum that is at variance with international and national standards.[63] In addition, HEI teaching personnel must have the "freedom to carry out research without interference or suppression in accordance with nationally and internally recognised principles of intellectual rigour, scientific inquiry, and research ethics".[64]

Most importantly, teaching personnel in HEIs in fidelity to academic freedom must have liberty to express their opinion about the system in which they work (their institution) without

58 *Ibid*.
59 *Ibid*.
60 The ILO/UNESCO "The ILO/UNESCO Recommendation Concerning the Status of Teachers" (hereafter "Recommendation Concerning Higher Education") 1997 https://www.right-to-education.org/sites/right-to-education.org/files/resource-attachments/ILO_UNESCO_Recommendation_Concerning_the_Status_of_Teachers_1966_En.pdf (7-10-2022).
61 preamble of Recommendation Concerning Higher Education.
62 art 28 of Recommendation Concerning Higher Education.
63 *Ibid*.
64 art 29 of Recommendation Concerning Higher Education.

censorship.[65] According to the recommendation, institutional autonomy deals with a degree of self-governance in decision-making that advances the tenets of public accountability, especially in publicly funded institutions.[66] Also, "autonomy is the institutional form of academic freedom and a necessary precondition to guarantee the proper fulfilment of the functions entrusted to higher education teaching personnel and institutions".[67] States are required to protect the autonomy of institutions of higher learning from threats of interference from any source.[68]

From a regional perspective, steps were taken in the 1990s by academics to establish standards for the protection of academic freedom and institutional autonomy.[69] These commitments led to the Dar Es Salaam Declaration and the Kampala Declaration. Under the Dar es Salaam Declaration, members of the academic community have the "right to fulfil their functions of teaching, researching, writing, learning, exchanging and disseminating information and providing services without fear of interference or repression from the state or any other public authority".[70] Subject to certain restrictions, academics must enjoy the freedom of movement without harassment.[71] Also, academics have the freedom to teach without any interference.[72]

In accordance with the highest standard of education principles, members of staff and students have the right to initiate, participate in, and determine academic programmes in

65 art 27 of Recommendation Concerning Higher Education.
66 art 17 of Recommendation Concerning Higher Education.
67 art 18 of Recommendation Concerning Higher Education.
68 art 19 of Recommendation Concerning Higher Education.
69 It is noteworthy that the African Charter on Human and Peoples' Rights of 1981 (the Banjul Charter) does not explicitly provide for academic freedom as a protected right. However, the African Commission on Human and Peoples' Rights in *Kenneth Good v The Republic of Botswana* (Communication No. 313/05) [2010] ACHPR 106 (26 May 2020) recognised academic freedom within the framework of the Banjul Charter.
70 art 14 of the Dar es Salaam Declaration on Academic Freedom and Social Responsibility (hereafter "Dar es Salaam Declaration") of 1990.
71 art 15 of Dar es Salaam Declaration.
72 art 20 of Dar es Salaam Declaration.

their institutions.[73] The Dar es Salaam Declaration recognises the students' dimension of academic freedom. It provides that HEIs must guarantee the participation of student bodies either collectively or individually.[74] A student can challenge their instructor on academic matters without fear of victimisation or reprisal.[75] However, a student wanting to exercise this right must have reasonable grounds to do so.[76] The Dar es Salaam Declaration also guarantees institutional autonomy and other associational rights of academics in an academic community.[77]

The Kampala Declaration provides that every person has the right to education and to participate in intellectual activities.[78] An African intellectual shall not be persecuted, harassed, or intimidated because of his or her intellectual works.[79] An African intellectual has the liberty of movement and this right shall not be restricted by any administrative body or action, whether directly or indirectly.[80] To uphold academic freedom as a guiding standard in Africa, the Kampala Declaration provides that an African intellectual shall have the freedom to pursue intellectual activities – including research, teaching, and dissemination of results – without interference or hinderance and in accordance with universally accepted principles and professional standards.[81] In addition, teaching and research members of the intellectual community shall have security of tenure and shall not be dismissed, except for reasons such as misconduct or proven negligence, among others.[82] The Kampala Declaration also recognises the right of students to initiate, participate in, and determine academic programmes of their institutions.[83]

73 art 18 of Dar es Salaam Declaration.
74 art 23 of Dar es Salaam Declaration.
75 art 25 of Dar es Salaam Declaration.
76 *Ibid.*
77 arts 26-27 of Dar es Salaam Declaration.
78 art 1 of the Kampala Declaration on Intellectual Freedom and Social Responsibility (hereafter "Kampala Declaration") of 1990.
79 art 3 of Kampala Declaration.
80 art 4 of Kampala Declaration.
81 art 6 of Kampala Declaration.
82 art 8 of Kampala Declaration.
83 art 7 of Kampala Declaration.

The Kampala Declaration cloaks intellectual communities with autonomy and other associational rights.[84] In addition, intellectual communities have institutional autonomy to make their decisions and govern themselves.[85] The autonomy and decision-making rights of intellectual communities, according to the Kampala Declaration, must be determined in accordance with democratic means of self-government, involving active participation of all members, irrespective of the academic community.[86] It is noteworthy that, under international law, academic freedom is circumscribed or limited by certain conditions and factors, including the standards and principles determined by national laws and ethical considerations. Nevertheless, international law (to which Ghana subscribes), does not subject academic freedom and the pursuance of intellectual activities to political and religious precepts of society. Academics are free to engage in intellectual activities and must not be subjected to any form of persecution or harassment because of their academic work.

4. Academic freedom in Ghana: history and parameters

Historically, successive post-independent Ghanaian governments have attempted to regulate and control academic and intellectual activities in Ghana. For instance, in the 1960s, under a government informed by the tenets of socialism, the government attempted to control the appointment of professors through the so-called "special professors" appointment framework. Under this regime, the president of Ghana could directly appoint professors, known as "special professors". The special professors were responsible to the president of Ghana.[87] Also, attempts were made by the government to exercise control over the appointment of heads of

84 art 10 of Kampala Declaration.
85 art 11 of Kampala Declaration.
86 art 12 of Kampala Declaration.
87 Owusu-Ansah "Academic freedom: Its relevance and challenges for public universities in Ghana today" 2015 *Journal of Education and Practice* 173-178.

departments in HEIs.[88] The attempt by the government to control academia led to the passage of the University of Ghana Act 79 of 1961, which made the head of state the chancellor of the University of Ghana.[89] Through the University of Ghana Act, the government exercised extensive control over universities in Ghana.

This system of governmental control unleashed some form of governmental supervision and constraints on academic and intellectual activities in Ghana. Arguably, the extent of governmental control over academic activities was to restrict intellectual opposition to the government, especially about the ills and human rights abuses by the government of the day. Governmental control was possible because most post-independent constitutions (before the 1992 Constitution) of Ghana did not explicitly provide academic freedom as a constitutional right.[90] The control of academic activities morphed into state repression of academics. In some instances, the government's ideological inclinations permeated several institutions'

88 See generally Ajayi, Goma and Johnson *The African Experience with Higher Education* (1996).

89 s 4(1) of University of Ghana Act 79 of 1961. See also s 4 of the University of Science and Technology, Kumasi Act 80 of 1961 (later Act 555 of 1998), which made the head of state the chancellor and the head of the university. S 4(2) provided that, in the absence of a head of state, the person acting shall be the chancellor of the university. Similarly, the University of Cape Coast Act 390 of 1971 made the head of state the chancellor and the head of the university. It is noteworthy that these laws have been amended, and the universities have the autonomy to appoint their chancellors, following their internal structures.

90 See The Ghana (Constitution) Order in Council of 1957; Constitution of the Republic of Ghana of 1960 (First Republican Constitution); The Constitution of the Republic of Ghana of 1969 (Second Republican Constitution – Art 12(6) makes provision for freedom of expression and conscience but does not explicitly refer to academic freedom). Unfortunately, the Second Republican Constitution in art 49(b) vested the appointment of the chairman of the university council with the president. Art 49(b) of the Second Republican Constitution was remedied by art 55(1) of the Third Republic of Ghana (Promulgation) Decree of 1979. Art 27(1) of the Third Republican Constitution of Ghana of 1979. conferred autonomy on universities to appoint their own chancellors. It further provided that an individual's freedom of conscience shall not be hindered. In addition, art 55(1)(b) prohibited the president from holding office as a chancellor or head of any university in Ghana.

educational curricula.[91] In 1966, the extent of intrusion and restriction of academic freedom had become apparent, and the vice-chancellor of the University of Ghana commented on it. At a congregation of the university, Alexander Kwapong stated:

> As you all know, this institution [University of Ghana] has been subjected to the most merciless and persistent attacks by the regime of Kwame Nkrumah. When it seemed that all the several institutions of this country had fallen before the resistless advance of his totalitarian power, this institution appeared to be one of the few but most important bastions of freedom still left in the country. Academic freedom was held up to be a shibboleth behind which imperialist, colonialist and neo-colonialist agents and their stooges sheltered, and in the rapid march towards the new socialist paradise and African unity, there was no place for this outworn bourgeois concept.[92]

Ghanaian students have also had their share of academic freedoms limited.[93] Over time and with the coming into force of the Fourth Republican Constitution of Ghana, governmental interference – with the appointment of professors and heads of department – has diminished. The apogee of academic freedom and institutional autonomy is cemented with the constitutional guarantee of independent research and intellectual activities in Ghana. Academic freedom is protected in the Fourth Republican Constitution of Ghana of 1992 (hereafter "the 1992 Constitution"). Article 21(1)(b) provides that all persons shall have the freedom of thought, conscience, and belief, including academic freedom. Academic freedom under the 1992 Constitution is a general freedom everyone in Ghana can enjoy. Ghanaian courts still need to provide an explanation of the parameters of academic

91 Serra and Gerits "The politics of socialist education in Ghana: The Kwame Nkrumah Ideology Institute, 1961-66" 2019 *The Journal of African History* 407 407-428.

92 Kwapong "Address by the Vice-Chancellor, Dr Alexander Kwapong, to the congregation of the University of Ghana" 1966 *Minerva* 542-545.

93 Gyampo "Student activism and democratic quality in Ghana's Fourth Republic" 2013 *Journal of Student Affairs in Africa* 49 49-66.

freedom under the 1992 Constitution. Save that, the Supreme Court (in *Frank Bo Amissah v The Attorney-General*)[94] mentioned that courts have a duty to enforce the content of article 21(1)(b).[95] The constitutional guarantee of the autonomy and freedom of academics in Ghana is further consolidated with an elaborate legislative framework that establishes the structures for the governance of HEIs.

Currently, all universities in Ghana are governed by an act of parliament that establishes the structure, administration, and internal processes or organisation of HEIs, awards of degrees, membership of the university council, and functions of the academic board, among other elaborate legislative directions.[96] The Act of Parliament establishing HEIs confers on those institutions a high degree of institutional autonomy, at least in theory. All the acts establishing the public institutions of higher learning prescribe that the activities of universities must be circumscribed within the rubrics of public accountability. Even though the university structures are considered to have a certain degree of institutional autonomy, the government of the day seems to exercise some political control over the appointment processes in the university. For instance, the chairperson of the University Council of the University of Cape Coast is appointed by the president.[97] In addition, the statutes of all public universities require a certain number of government representatives on the council of the university.

In a recent move by the Government of Ghana to indirectly control public universities, the Parliament of Ghana is considering the Public Universities Bill of 2020. The Bill circumvents the constitutional guarantee of academic freedom to a regime where the government exercises a certain degree of control over

94 *Frank Bo Amissah v The Attorney-General* Writ 7/2000 (Supreme Court, 2003).
95 *Ibid*.
96 See, for instance, the University of Ghana Act 806 of 2010; the University of Cape Coast Act (PNDCL 278) of 1992; the University for Development Studies Act (PNDCL 279) of 1992; the University of Science and Technology Act 80 of 1961 (as amended); the University of Professional Studies Act 850 of 2012; and the University of Education Act 672 of 2004.
97 s 6 of PNDCL 279 of 1992.

the affairs of universities in Ghana. The Bill was received with immense criticism from the academic community in Ghana.[98] The response of the Ghana Academy of Arts and Science to Parliament, in opposition to the Bill, noted with concern the possibility of governmental control over academic institutions and public universities and a limitation on innovation and creativity in academic environments, and accordingly advised that the Bill should not be passed by Parliament. The memorandum to the Bill provides that the purpose of the Bill is to limit grave improprieties in utilising resources in public universities. This objective is problematic, especially considering that Ghana has comprehensive legislation to ensure public-sector accountability and compliance, with which universities must comply.[99]

The Bill confers power on the president to appoint the chancellors and chairperson of university councils of all public universities in Ghana.[100] This shifts the power of appointment from the university council to the president. Also, depending on the university, the Bill reduces the composition of university council members from 21 to 13.[101] The president appoints 8 out of the 13 members of the university council under the proposed Bill. The university council has the power to appoint the vice-chancellor, who runs the day-to-day affairs of the university.[102] Considering that the president appoints most of the council members, the appointment of the vice-chancellor is practically a presidential appointee. The president can dissolve the university council, especially if there is an emergency on a public university

98 The Ghana Academy of Arts and Science "Ghana Academy of Arts and Science kick against Public Universities Bill" 2020 https://www.modernghana.com/news/1002883/ghana-academy-of-arts-and-sciences-kick-against.html (11-10-2022). See also, Awotwe, Acquah and Agyapong "A review of the implications of the Public Universities Bill, 2020 on the University Financing in Ghana" 2021 *IOSR Journal of Economics and Finance* 1-5; Appiagyei-Atua "A Critical review of the relationship between academic freedom and Ghana's public universities: From pre-independence to the Fourth Republic" 2021 *Global Campus Human Rights Journal* 129 129-148.

99 cl 5(1)(a) of the Public Universities Bill of 2020.

100 cl 5(1)(a)-(f) of the Public Universities Bill of 2020.

101 cl 16(2) of the Public Universities Bill of 2020.

102 cl 7(a)-(i) of the Public Universities Bill of 2020.

campus.[103] There is a litany of provisions in the Bill that seeks to achieve one main objective – to exercise governmental control over the activities of universities in Ghana.

Contemporary constraints on academic freedom deserve to be mentioned. With the advent of social media, academics who share unpopular views are vilified, ridiculed, and – in some cases – harassed online.[104] These new trends of social media vilification of academics go to the core of limiting contrary academic opinions and views in Ghana. Another disturbing trend is that academics in Ghana who hold contrary political opinions are subjected to unwarranted social media attacks and vilification by political party communicators. The digital and social media or online persecution of academics for expressing their views is at variance with the standards of academic freedom (as explained above). One of the main challenges to academic freedom in Ghana is that HEIs, especially public universities, rely on public funding.

With the penchant of the Ghanaian government to assume control over academic and intellectual freedom, one of the issues often neglected in academic freedom discourse is the infiltration of political, religious, and other societal ideologies in the academic environment, intellectual discourse, and research. With the proposed Public Universities Bill, a government can circumvent academic freedom and pursue a political, religious, and social agenda. This contribution argues that, considering the political and religious nature of discussions on LGBTQ+ activities in Ghana, a political- and religious-oriented government who are against LGBTQ+ activities can pursue a religious and moral agenda through the majority of government representatives on the university councils. Since 2005, discussions on the criminalisation of LGBTQ+ activities in Ghana have always

103 cl 5(5) of the Public Universities Bill of 2020.

104 For a general discussion of the impact of social media on academic freedom, see Kwestel "Protecting academic freedom or managing reputation? An evaluation of university social media policies" 2020 *Journal of Information Policy* 151 151-183; Wilson "The changing media and academic freedom" (2016) *Academe* 8 8-12; and Cox "Dear professor, be careful with those tweets, okay? Academic freedom and social media" 2020 *Political Science and Politics* 521 521-526.

assumed political and religious twists, with politicians at the mercy of moral entrepreneurs.[105] More recently, with the debates on the criminalisation of LGBTQ+ activities reaching its crescendo, some churches threatened political actors that if they vote against the Anti-LGBTQ+ Bill, they would be voted out of power by their church members.[106]

5. The Anti-LGBTQ+ Bill

5.1 General overview

Under Ghanaian law, a section of members of parliament can present a bill to Parliament to be passed into law – this is known as a private member bill. A bill typically emanates from the executive based on which public funding is allocated from the Consolidated Fund to enforce such a bill. With private member bills, funding must be privately secured and not charged to the Consolidated Fund.[107] Following article 108 of the 1992 Constitution, the Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill of 2021 was presented to Parliament. The Bill is currently undergoing various stages of constitutional appraisal. Even though a section of members of parliament sponsored the Bill, the provisions of the Bill are informed by ideologies of right-wing Christian groups or Churches in Ghana. The primary objective of the Bill, therefore, is to uphold the moral tenets of Ghanaian society and advance the cultural objectives provided under the Directive Principles of State Policy (Chapter Six) of the Constitution of Ghana.[108] After the content of the Bill was published, it struck several nerves and ignited chilling

105 Ako "Towards the Decriminalisation of Consensual Same-Sex Conduct in Ghana: A Decolonization and Transformative Constitutionalism Approach" 2021 LLD thesis, University of Pretoria 119-134; Baisley "Framing the Ghanaian LGBT rights debates: Competing decolonisation and human rights frames" 2015 *Canadian Journal of African Studies* 383-390.

106 Darko "We will vote out any government that opposes the anti-LGBTQ+ bill – Church of Pentecost' 2021 https://www.myjoyonline.com/we-will-vote-out-any-government-that-opposes-anti-lgbtq-bill-church-of-pentecost/ (27-09-2022).

107 art 108 of the Constitution of the Republic of Ghana of 1992.

108 art 39 of the Constitution of the Republic of Ghana of 1992.

debates in Ghana. Fundamental to those debates is Ghana's stringent restriction on freedom of speech, opinion, expression, and academic freedom.

The Bill seeks to provide proper human sexual rights and Ghanaian family values.[109] The meaning of Ghanaian family values includes the "respect for the sanctity of marriage as a lifelong relationship between a man and a woman, each of whose gender is assigned at birth".[110] It also includes the:

> recognition of the nuclear and extended family as the basic unit for all Ghanaian ethnic communities as well as the recognition that the purpose of Government is to protect and advance the family as the basic unit of society and to safeguard the best interest of children.[111]

Further, under the Bill, Ghanaian family values encapsulate the duty of parents, guardians, and teachers to "ensure that children and young people receive equal protection against exposure to physical, emotional, and moral hazards".[112]

The Bill contentiously notes that Ghanaian family values encompass the idea that gender is a social construct assigned to males and females at birth.[113] Also, to uphold Ghanaian family values is to recognise that the chieftaincy institution is the ultimate source of political and traditional authority in Ghanaian ethnic communities.[114] Most importantly, Ghanaian family values, per the Bill, include the duty to cherish values such as selflessness and communalism, among others.[115] According to the sponsors, the Bill is necessary as it seeks to protect public morals in Ghana and most Ghanaians do not subscribe to homosexual activities

109 preamble of the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021.
110 cl 2 of the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021.
111 *Ibid.*
112 *Ibid.*
113 *Ibid.*
114 *Ibid.*
115 *Ibid.*

and thus these activities must be criminalised.[116] They also argue that homosexual activities are an imposition of morally depraved western countries and an act alien to Ghanaian culture. The sponsors support the Bill because LGBTQ+ activities threaten the public health of Ghana.[117]

5.2 Contextualising the negative and positive obligations to promote Ghanaian family values and proper sexual human rights

Under the Bill, every Ghanaian has a legal duty to promote and protect Ghanaian family values and proper sexual human rights.[118] The scope of application of this duty extends to constitutionally mandated bodies and the arms of government, such as the executive, judiciary, and legislature, the Commission for Human Rights and Administrative Justice (CHRAJ) and the National Commission for Civic Education (NCCE), as well as the media and creative arts industry. In addition, teachers or educational instructors, religious instructors, parents, guardians, churches, mosques, or any other religious or traditional institution or organisation must protect the proper sexual human rights and Ghanaian family values contained in the Bill.[119] The Bill requires that the abovementioned persons or institutions collectively ensure that the proper sexual human rights and Ghanaian family values are integrated into the fabric of national life.[120] They are also enjoined to make conscious efforts to introduce the proper human sexual rights and Ghanaian family values into relevant aspects of national planning.[121]

116 Memorandum to the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021 at 1-3.
117 Memorandum to the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021 at 5.
118 cl 3(1) of the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021.
119 cl 3(2) of the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021.
120 cl 3(3)(a) of the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021.
121 cl 3(2)(b) and (c) of the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021.

The Bill imposes a positive duty on the state, organs of the government, constitutional bodies, and the courts in terms of promoting and putting in place measures that ensure the realisation of the objects outlined in the Bill. The negative obligation arises from the duty imposed on the state, arms of government, teachers, educational instructors, parents, churches, mosques, and other religious bodies to refrain from undermining the Ghanaian family values and proper sexual human rights. Also, individuals are prohibited from soliciting, procuring, counselling, facilitating, or promoting any act undermining Ghanaian family values and proper sexual human rights.[122] Through the positive and negative obligations imposed by the Bill, a specific duty is prescribed to academics (teachers and educational instructors) in the context of LGBTQ+ matters – protect and promote Ghanaian family values and proper sexual human rights. Hence, in LGBTQ+ debates and intellectual discourse engaged in by academics, teachers and educational instructors must have the primary objective of promoting the object and purport of the Bill.[123]

The memorandum to the Bill explains that the negative and positive duties imposed on individuals and state institutions ensure that persons refrain from facilitating and encouraging, whether by a personal act or otherwise, directly or indirectly, any activity that undermines the values contained in the Bill.[124] The Bill does not provide the scope and content of the obligation prescribed in clause 3. However, the duty in clause 3 of the Bill can arise in instances where those persons or institutions perform their legal duties – this duty may be prescribed by the Constitution (in case of constitutionally mandated bodies) or by a contract (such as a contract of employment – in the case of a teacher, educational instructor, or academic). From the perspective of academia, an academic, a teacher, or an educational instructor has several obligations. These obligations include research, teaching, facilitating students' academic works, publishing research

122 cl 4(1) of the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021.
123 cl 3(2)(b) and (c) of the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021.
124 Memorandum to the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021 at 5.

results, and developing curricula and programmes, among others. For academics, teachers, or educational instructors to effectively discharge this obligation, they must have the freedom and autonomy without external interference or fear of being held criminally liable for performing their duties. The obligation in clause 3 of the Anti-LGBTQ+ Bill effectually means that an academic, teacher, or educational instructor must perform their duties regarding the positive and negative obligations imposed by the Bill.

Hence, any intellectual and academic discourse, academic activities, and research output that challenge the object and purport of the Bill logically contravenes and undermines the values in the Bill. Similarly, a student who engages in research activity on LGBTQ+ matters and forms an opinion that is at variance with the object and purpose of the Bill contravenes and undermines the negative and positive duties imposed by the Bill. Undermining the positive and negative duties imposed by the Bill to promote and protect Ghanaian family values and proper sexual human rights attracts penal sanctions.[125] According to the Bill, a person may be convicted and face a fine or a prison term of not less than two months and not more than four months for undermining Ghanaian family values.[126]

Engaging in academic activities in an academic environment that can challenge the arguments and the values underlying the Bill attracts penal sanctions and breaches the hallowed principle of academic freedom protected by the 1992 Constitution. Conversely, a research contribution or academic activity that supports and gives meaning to the values outlined in the Bill will not undermine the values outlined in the Bill and therefore not attract penal sanction. The specific obligation on academics, teachers, and educational instructors to – in the performance of their work-related functions – mandatorily give effect to Ghanaian family values and promote proper sexual rights in Ghana unnecessarily

125 cl 3(2)(b) and (c) of the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021.

126 cl 4(2) of the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021.

intrudes into almost all aspects and domains of freedom of speech and expression and academic freedom.

6. Anti-LGBTQ+ Bill and the limitation of academic freedom

One of the arguments touted by the sponsors of the Bill is that fundamental rights are not absolute and can be limited within the framework of the 1992 Constitution. The centre of gravity of the arguments that the sponsors of the Bill rely on to restrict the litany of rights – such as freedom of speech, freedom of expression, opinion, belief or thought, among others – is the advancement of Ghanaian cultural values. The sponsors of the Bill aver that: "we believe it is ripe for Parliament to actualise the intentions of the framers of the Constitution by providing a legal framework for the promotion of values that define our nationhood".[127] The traditional and cultural values in question relate to the values outlined in article 39 of the 1992 Constitution. Article 39 imposes a positive duty on the state to "encourage the integration of appropriate customary values into the fabric of national life through formal and informal education and the conscious introduction of cultural dimensions to relevant aspects of national planning".[128] According to the sponsors of the Bill, limiting freedom of speech, expression, opinion, thought and belief, as well as academic freedom, is to pave the way for the actualisation and integration of social and cultural values into the national fabric of life.

The critical question that arises is whether the restriction of the rights mentioned above is justified within the framework of the 1992 Constitution. As mentioned, rights are not absolute. Fundamental rights can be limited under certain restricted and defined circumstances. However, the basis of the limitation must meet a legal threshold. Unfortunately, unlike in other countries, the 1992 Constitution does not provide an extensive framework

127 Memorandum of the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021 at 15.
128 art 39 of the Constitution of the Republic of Ghana of 1992.

and parameters for limiting rights.[129] Suffice it to say there are some limitation clauses in the 1992 Constitution. These limitation clauses deal primarily with the right against non-discrimination. For instance, article 17(4) of the 1992 Constitution provides:

> (a) for the implementation of policies and programmes aimed at redressing the social, economic or educational imbalance in the Ghanaian society; (b) for matters relating to adoption, marriage, divorce, burial, devolution of property, on death or other matters of personal law; (c) for the imposition of restrictions on the acquisition of land by persons who are not citizens of Ghana or on the political and economic activities of such persons and for other matters relating to such persons or (d) for making different provision for different communities having regards to their special circumstances, not being provision which is inconsistent with the spirit of this Constitution.[130]

Also, article 41 of the 1992 Constitution provides that the "enjoyment of rights and freedom are inseparable from the performance of duties and obligations".[131] Under the 1992 Constitution, every citizen must respect the freedom and legitimate interests of others and refrain from acting in a manner detrimental to other persons' welfare.[132] Article 12 of the Constitution also provides that the fundamental rights in the Constitution are subject to the respect of the right and freedoms of others and the public interest. The High Court restated this in *Charles Ayuune Akurugu v The Attorney-General*:[133]

> Indeed all persons have the right to freedom of speech and expression, which includes freedom of thought, conscience, and belief. But article 12(2) of the Constitution,

129 See, for instance, s 36 of the Constitution of the Republic of South Africa of 1996 and art 24 of the Constitution of the Republic of Kenya of 2010.
130 art 17(4) of the Constitution of the Republic of Ghana of 1992.
131 art 41 of the Constitution of the Republic of Ghana of 1992.
132 art 17(4) of the Constitution of the Republic of Ghana of 1992.
133 *Charles Ayuune Akurugu v The Attorney-General* Suit No. HR/00039/2015 (29 March 2017).

> 1992 makes these rights subject to the respect for the rights and freedoms of others and the public interest. And it ought to be remembered that by the very nature of human rights, they are considered inherent in a democracy and intended to secure the freedom and dignity of man.[134]

The court also stated that for any measure restricting a fundamental right, particularly those rights contained in article 21 of the 1992 Constitution, one must ascertain whether the said restriction is proportionate or justified.

From the above, certain factors must be considered when limiting fundamental rights. First, the enjoyment of fundamental rights is subject to respect for the rights of others. Secondly, human rights are subject to the public interest. Thirdly, the law or conduct limiting a fundamental right must be proportionate or justifiable (one of the most critical factors). Ghana's apex court explained the proportionality and justifiability test in the consolidated case of *Ahumah Ocansey v The Electoral Commission and the Centre for Human Rights & Civil Liberties v The Attorney-General*.[135] In that case, the Supreme Court of Ghana adopted the Canadian proportionality test (referred to as the Oakes test)[136] to ascertain whether a law or measure justifies the objective it seeks to achieve, whether it interferes with a protected right although that interference is justified, or whether the means are proportionate to the end.[137] The parameters of the proportionality test under Ghanaian law were pontificated by Acquah JSC in the case *Republic v Thompson Books Limited (No. 2)*.[138] The learned judge, in that case, explained the proportionality test in the following manner:

> Now from the language of article 164 and similar provisions like 21(4)(c), the law in question must be reasonably necessary or required; in the public interest, national

134 the *Ayuune* case.
135 *Ahumah Ocansey v The Electoral Commission and the Centre for Human Rights & Civil Liberties v The Attorney-General* [2010] SCGLR 575.
136 *R v Oakes* [1986 1 SCR 103.
137 the *Ahumah* case.
138 *Republic v Thompson Books Limited (No. 2)* [1996-1997] SCGLR 484.

> security etc. This really implies that, for any law to qualify as being reasonably necessary or required, the objective of that law must be of such sufficient importance as to override a constitutionally protected right or freedom. In other words, the objective of the law must not be trivial or frivolous, otherwise that law will not be reasonably necessary or required. The objective must be sufficiently important in the sense that it must relate to concerns which are pressing and substantial. After this, it is important to show that the law itself is a fairly proper means of achieving this important objective. This will involve an examination of the provisions of the law to determine if they infringe fundamental principles of law such as natural justice and whether they unduly impair a constitutional right. The second stage depends on the nature of the law and the issues at stake.[139]

The above abstract limitation analysis can be simplified in chronological order – considering the limitation of rights by the Anti-LGBTQ+ Bill. The first point of consideration in the limitation analysis is to ascertain whether the limitation of a right in the 1992 Constitution (in this case, academic freedom, freedom of thought, belief and conscience, and freedom of speech) is proportionate or justifiable. In determining whether a law is proportional or justifiable, the analysis must first commence with

139 the *Thompson Books* case 500-501. The Oakes test also prescribes that the basis for the limitation of a right must be demonstrably justified. This means that the justification must be informed by strong evidence. Scientific or social science evidence will be required to ascertain whether the measure or the reason for the limitation is demonstrably justified. See *Egan v Canada* 1995 2 SCR 513; *Canada Attorney-General v Hislop* 2007 1 SCR 429. Where such evidence does not exist, the cases of *Libman v Quebec Attorney General* 1997 3 SCR 569; *R v Sharpe* 2001 1 SCR 45; *Harper v Canada (AG)* 2004 1 SCR 827; *R v Bryan* 2007 1 SCR 527; and *Thompson Newspapers Co. v Canada AG* 1998 1 SCR 877 provide that evidence can be developed by using logic. However, where the limitation is minimal, the case of *British Columbia Freedom of Information and Privacy Association v British Columbia Attorney General* 2017 1 SCR 93 provides that scientific or social science evidence may not be needed. The decision in the *Freedom of Information and Privacy Association* case does not apply to the Anti-LGBTQ+ Bill since the erosion of the rights is grave and not minimal.

ascertaining the objective of the measure or law that denies an academic. In this case, what is the objective of the Anti-LGBTQ+ Bill for limiting academics' intellectual or academic freedom,[140] freedom of speech,[141] or freedom of thought, belief, and conscience?[142] The next issue is to determine whether the measure to prevent academics from enjoying their academic freedom is prescribed by legislation. If the said measure is prescribed by legislation, then the analysis must explore whether the objective of the measure is sufficiently important. If the answer is not affirmative, the limitation analysis ends, and the measure will be struck down. If the answer is affirmative, the limitation analysis continues.

The next stage in the limitation analysis is determining whether the measure is proportional to the objective. At this stage, the following questions must be asked:

1. Does the measure infringe on a protected right? If no, the limitation analysis ends, and if yes, the test continues.
2. Is the measure reasonably connected to the objective? If no, the test ends, and the measure is struck down; if yes, the test continues.
3. Does the measure least impair the affected right? In other words, is the measure the best alternative? If no, the test ends and the measure is struck down. If yes, the test continues.
4. In terms of the cost-benefit analysis, do the benefits of the objective outweigh the adverse effects of the measures, considering all the circumstances? If the adverse effect of the measure outweighs the benefits of the objective, the measure fails. If the benefit of the measure outweighs the adverse effects, the measure passes the test.

140 art 21(1)(b) of the Constitution of the Republic of Ghana of 1992.
141 art 21(1)(a) of the Constitution of the Republic of Ghana of 1992.
142 art 21(1)(b) of the Constitution of the Republic of Ghana of 1992.

7. Proportionality or justifiability in the limitation analysis

7.1 The objective of the measure or the law

Generally, determining the objective of the law is straightforward. The Bill, and the memorandum itself, point to the objective of the law. Also, determining the objective of a law or measure is a matter of interpretation.[143] In addressing the objective of the Anti-LGBTQ+ Bill, it is vital to refer to the provisions of the Bill and the memorandum. The Bill seeks to criminalise LGBTQ+ activities in Ghana by ascribing a penal sanction on all persons belonging to the LGBTQ+ community. It also applies to a person who expresses themselves on social media or any technological platform with the intent to support or change opinion regarding acts prohibited by the Bill. The memorandum of the Bill further explains that restricting the fundamental rights of all persons is to give effect to the cultural and traditional aspirations of the framers of Constitution under article 39 of the 1992 Constitution.

In seeking to actualise the cultural aspirations of Ghanaians, the sponsors suggest that LGBTQ+ activities are alien to Ghanaian culture and therefore an imposition of foreign norms by morally depraved western countries. This contribution suggests that even though in the limitation analysis, the Supreme Court of Ghana provided reasons for the limiting rights, the measure must be based on accurate sets of facts. This is because the threshold of limiting fundamental rights is high in that not every reason can be relied upon to limit such freedoms or rights. It even becomes problematic where the reasons advanced are factually inaccurate and a complete mischaracterisation of the law. To buttress this, it is essential to highlight some factual inaccuracies touted in the memorandum of the Bill.

143 In *Tehn Addy v Electoral Commission* 1996-1997 SCGLR 216, the Supreme Court of Ghana, on the one hand, laid down a very discernible and critical principle in Ghanaian human rights law jurisprudence that whenever the need arises for rights to be interpreted broadly, the said right must be interpreted broadly. The court, on the other hand, averred that, when a right is being interpreted *vis a vis* the exercise of power, the power must be interpreted strictly.

The focal point of the reasons advanced by the sponsors of the Bill is that Ghanaian and African culture abhors same-sex relationships. Hence, such acts are alien to Ghanaian and African cultures. To begin with, some academics have suggested that the consistent reliance of African countries on African culture and values to disregard the respect for fundamental rights is unjustified.[144] Suffice it to say that the sponsors of the Bill rely on pronouncements by the National House of Chiefs that homosexuality is unknown in African culture.[145] This contribution argues that the reasons advanced by the sponsors of the Bill do not consider anthropological and historical facts on the issue. This is because available academic and anthropological studies reveal that the claim of homosexuality being alien to African and Ghanaian culture is inaccurate.

To provide some context, Ako, a Ghanaian scholar, has asserted that homosexuality was part of pre-colonial African culture.[146] He explains that, even though pre-colonial African societies valued heterosexual relationships for purposes of childbirth and continuation of the family system, they also valourised same-sex relationships as an important part of some African societies.[147] Epprecht also provides that pre-colonial African societies embraced same-sex relationships.[148] According to Ngwena, same-sex relationships are part of our Africanness.[149] Ambani opines that some parts of African societies accepted same-sex relationships.[150]

144 El-Obaid and Appiagyei-Tuah "Human rights in Africa: A new perspective on linking the past to the present" 1996 *McGill Law Journal* 819-819.

145 Memorandum to the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021 at 1-2.

146 Ako "Domesticating the African Charter on Human and Peoples' Rights in Ghana: Threat or promise to sexual minority rights?" 2020 *African Human Rights Yearbook* 99-106.

147 Ako (n 145) 106.

148 Epprecht "Bisexuality and the politics of normal African ethnography" 2006 *Anthropologica* 187 190-192.

149 See Ngwena *What is Africanness? Contesting Nativism in Race, Culture, and Sexualities* (2018).

150 Ambani "A triple heritage of sexuality? Regulation of sexual orientation in Africa in historical perspective" in Namwase and Jjuuko (eds) *Protecting the Human Rights of Sexual Minorities in Contemporary Africa* (2017) 23-24.

In addition to the academic and anthropological observations, there are incontestable accounts of the existence of homosexual relationships in some parts of Africa. The *Yan Daudu* system among the Hausa people in Northern Nigeria was described as "men who are more or less exclusively homosexual (not always, but often transvestite or at least effeminate males)".[151] In Uganda, the record shows that Kabaka Mwanga II had a sexual relationship with men and executed them afterwards.[152] Thoonen reveals that the sexual orientation of Kabaka Mwanga II was a common reflection of sexualities in pre-colonial African societies.[153] In Ghana, Signorini discovered a unique type of marriage between persons of the same sex among the Nzema people, also known as *agonwole agyale*. While Signorini was speculative about the sexual relations in this type of marriage,

151 Salamone "Hausa concept of masculinity and the Yan Daudu" in Ouzgane and Morrell (eds) *African Masculinities: Men in Africa from the Late Nineteenth Century to the Present* (2005) 80. See generally Gaudio *Allah Made Us: Sexual Outlaws in an Islamic African City* (2009); Murray "Review: Allah made us: Sexual outlaws in an Islamic African city by Rudolf Pell Gaudio" 2010 *Language in Society* 696; Murray and Roscoe (eds) *Boy-Wives and Female Husbands* (1998); Zilmman, Davis and Raclaw (eds) *Queer Excursions: Retheorizing Binaries in Language, Gender, and Sexuality* (2014); Wilcox *Queer Religiosities: An Introduction to Queer and Transgender Studies in Religion* (2021); Pittin *Women and Work in Northern Nigeria: Transcending Boundaries* (2002); Ayeni "Human rights and the criminalisation of same sex relationships in Nigeria: A critique of the Same Sex Marriage (Prohibition) Act" in Namwase and Jjuuko (eds) *Protecting the Human Rights of Sexual Minorities in Contemporary Africa* (2017); Murray "Gender-defined homosexual roles in Sub-Saharan Islamic cultures" in Murray and Roscoe (eds) *Islamic Homosexualities: Culture, History and Literature* (1997); Bolich *Transgender, History and Geography* (2007); and Gaudio "Men Who Talk Like Women: Language, Gender and Sexuality in Hausa Muslim Society" 1996 PhD thesis, Stanford University.

152 Blevins "When sodomy leads to martyrdom: Sex, religion, and politics in historical and contemporary contexts in Uganda and East Africa" 2011 *Theology & Sexuality* 51-54; Hoad "Arrested development or the queerness of savages: Revisiting evolutionary narratives of difference" 2000 *Postcolonial Studies* 133 155-156; Rao "Re-membering Mwanga: Same sex intimacy, memory and belonging in post-colonial Uganda" 2015 *Journal of Eastern African Studies* 1 1-19; and Nabutanyi "(Un)complicating Mwanga's sexuality in NaKisanze Segawa's the triangle" 2020 *A Journal of Lesbian and Gay Studies* 439.

153 Thoonen *Black martyrs* (1941) 168.

the *agonwole agyale* was a system that represented a "sublimation of deep feeling which is of considerable value as a social cohesion in Nzema culture and which is recognised by that society".[154] It is noteworthy that most ethnic groups in Ghana had elaborate laws that characterised the type of sex. However, those laws did not criminalise homosexual relationships.[155] Same sex relationships were criminalised after the promulgation of the Criminal Ordinance 12 of 1892 by the British Colonial Government, and this was brought into the current Criminal Offence Act 29 of 1960. Hence, by logical reasoning, the criminalisation of consensual same-sex relationships was an introduction of the British colonial government and not because African and Ghanaian culture abhorred consensual same-sex relationships.

Besides, the constitutional provision that the sponsors of the Bill claim to give effect prescribes a procedure to actualise the cultural aspirations of the framers of the Constitution. Article 39 of the 1992 Constitution prescribes that the state must strive to integrate cultural values into national life and planning through formal and informal education. Article 39 of the 1992 Constitution does not prescribe that in achieving the cultural objectives, a penal code should be utilised, or fundamental rights contained in other sections of the Constitution should be restricted. Accordingly, the claims by the sponsors of the Bill to criminalise and restrict fundamental freedoms are a mischaracterisation of article 39. As such, they cannot be a valid reason to restrict the freedom of speech, thought, belief, and conscience, including academic freedom.

Another reason advanced by the sponsors of the Bill to criminalise freedom of speech and academic freedom concerning LGBTQ+ matters is the containment of the spread of HIV infection

154 Signorini "Agonwole agyale: The marriage between two persons of the same sex among the Nzema of Southwestern Ghana" 1973 *Journal Des Africanistes* 221-222. See also Dankwa "The one who says I love you: Same-sex love and female masculinity in postcolonial Ghana" 2011 *Ghana Studies* 223 223-224.

155 See Sarbah *Fanti Customary Laws: A Brief Introduction to the Principles of the Native Laws and Customs of the Fanti and Akan Sections of the Gold Coast with a Selection of the Cases Thereon Decided in the Law Courts* (1897); Rattray *Ashanti law and Constitution* (1929).

in Ghana. According to the sponsors of the Bill, same-sex relationship is a super-spreader of HIV/AIDS in Ghana.[156] They further argue that about 18.1% of persons living with HIV are men sleeping with men. Hence, restriction and criminalisation of LGBTQ+ activities are significant in reducing the spread of HIV.[157] Again, this reason to restrict and criminalise the enjoyment of fundamental rights poses some concerns. While it may fall within the scope of the constitutional directive of dealing with public health concerns,[158] the issue remains regarding the existence of a causal link between the criminalisation and restriction of fundamental rights and the limitation of the spread of HIV. This causal link in the public health analysis cannot be neglected. The sponsors of the Bill failed to provide a causal link between criminalisation and restriction of fundamental rights and HIV reduction in Ghana. Neither did they reference another country that had established such a causal link. Murray and Viljoen argue that most HIV infection is spread through unprotected heterosexual sexual intercourse.[159]

Finally, one central argument relied upon by the sponsors of the Bill is that most Ghanaians abhor such rights primarily because of their religious inclination. Thus, the restriction of the rights in the Bill is justified. This objective of the Bill is problematic because the current constitutional dispensation in Ghana prescribes that the object of the law must be to protect all persons, including the vulnerable and minority groups. Failure to do so exposes persons in minority groups to abuse and other discriminatory treatments by the public. Regarding religious foundation as a basis to restrict fundamental rights, the sponsors of the Bill, which include Christian, Charismatic Council, and Coalition of Muslim Organisations of Ghana, seek to create an overarching moral and religious foundation for the advancement

156 Memorandum to the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021 at 5.
157 *Ibid.*
158 art 21(4) of the Constitution of the Republic of Ghana of 1992.
159 Murray and Viljoen "Towards non-discrimination on the basis of sexual orientation: The normative basis and procedural possibilities before the African Commission on Human and Peoples' Rights and the African Union" 2007 *Human Rights Quarterly* 86 96-97.

and restriction of fundamental rights.[160] Fortunately, the Constitution does not give room for the utilisation of majority religious beliefs and dogmas as a basis to restrict fundamental rights. As was explained by Archer J in *Osam-Pinanko v Lartey and Another*,[161] "there is no established religion in Ghana recognised as the religion of the State. The courts of Ghana apply the laws of the country and not what the Christian Bible teaches".[162] This pronouncement by Archer J (as he then was) is profound in the sense that the dogmas and teachings of a particular religion cannot be the basis upon which to organise the activities and enjoyment of the fundamental right of individuals.

7.2 Is the limitation measure prescribed by legislation?

This stage requires an inquiry into whether the restriction on academic freedom, freedom of speech, thought, and belief is prescribed by legislation (assuming the Bill is passed into law).[163] An affirmative response means that the limitation analysis continues. With an affirmative limitation, the next question is to assess whether the objective of the limitation measure is sufficiently important. Is the case of the criminalisation and restriction of free speech and academic freedom, among others, sufficiently important? The reason advanced by the sponsors of the Bill to restrict and criminalise freedom of thought, conscience, academic freedom, and free speech is to actualise the cultural values contained in article 39 of the 1992 Constitution. In addition, the sponsors of the Bill argue that because of the spread of HIV/AIDS in Ghana, same-sex relationships should be criminalised. They also suggest that because of the religious beliefs of most Ghanaians, the restriction and criminalisation of academic freedom, freedom of thought, belief and conscience is justified. According to this test, the reasons advanced by the sponsors of the

160 Memorandum to the Promotion of Proper Human Rights and Ghanaian Family Values Bill of 2021 at 2-3.

161 *Osam-Pinanko v Lartey and Another* [1967] GLR 330.

162 *Osam-Pinanko v Lartey* [1967] GLR 330 382-385.

163 See *R v Urbanski*; *R v Elias* 2005 2 SCR 3; *R v Thomsen* 1998 1 SCR 640; *R v Therens* 1985 1 SCR 613. According to *Irwin Tot Limited v Quebec (Attorney General)* 1998 1 SCR 927, a prescribed law must be ascertainable in accordance with prescribed and objective standards and not vague.

Bill must not be frivolous. For instance, if the sponsors of the Bill could substantiate with scientific evidence that criminalisation and restriction of fundamental rights have a causal link to the reduction of HIV/AIDS, such measures and objectives of the Bill could have constituted sufficient grounds to proscribe LGBTQ+ activities in Ghana.

Since the dogmas of religious organisations do not constitute the basis for the enjoyment of constitutional rights, the objective of the Bill is insufficient to restrict the rights of individuals. Also, article 39 of the Constitution cannot be a sufficient ground to limit the fundamental rights of individuals. In addition, the sponsors of the Bill have failed to establish that the restriction of fundamental rights has a causal link to the reduction of HIV/AIDS. Since the Bill's sponsors could not provide such a causal link, the objective of the Bill becomes a mere extrapolation or inference, if not frivolous and without basis. Such frivolity cannot be a basis for restricting a right. Also, the requirement that the legislation limiting the right must be sufficiently important means that the objective of the law must be consistent with principles underlying freedom and democratic society. The foregoing principle was established in the Canadian case of *Figueroa v Canada Attorney General*.[164] Hence, the object of the Anti-LGBTQ+ Bill must be to advance the democratic gains of Ghana and not to derail them. Advancing equality, protecting the vulnerable and minority groups in society, and promoting and ensuring that the interest of all persons are critical principles informing Ghanaian democracy, which the Bill fails to promote. With the objectives of the measures being insufficiently important, the limitation analysis must end at this point. However, for academic reflection, it is necessary to explore the implications of the Bill on other factors in the limitation analysis.

7.3 Is the measure proportional to the objective?

Determining whether the measure is proportional to the objective is contingent on several other factors. The first is whether the limiting measure or law infringes on a protected right. The

164 *Figueroa v Canada Attorney General* 2003 1 SCR 192.

extent and scope of infringing the right to free speech, freedom of thought, belief and conscience have been explained in the previous section. The extent of restriction proposed by the Bill is further compounded by the reality that a teacher, educational instructor, or an academic who fails to uphold Ghanaian family values and proper sexual human rights will be criminally liable. Since it is established that the Bill infringes on academic freedom, freedom of thought and conscience, and freedom of speech, the next step is to determine whether the measure or law is rationally connected to the objective. The rational connection test means that the limitation measure or law must not be arbitrary, unfair, or based on irrational considerations.[165]

The rational connection test requires a causal link or relationship between the limit (restriction of a right) and the objective. Scientific observation and evidence are essential in establishing a rational connection, showing that the limit affects the objective.[166] The rational connection test is vital and must be applied stringently, especially in the case of the Anti-LGBTQ+ Bill because it concurrently restricts several rights. The practical application of this test means that the sponsors of the Bill must provide scientific evidence and observation proving that there is a causal link between the limitation of academic freedom, for instance, and the spread of HIV/AIDS in Ghana. The sponsors of the Bill again failed to adduce scientific evidence to substantiate the basis of their limitations.

The proportionality test also requires that the limiting measure or law must impair the affected right as little as possible.[167] This test requires that the sponsors of the Bill prove whether, among a host of alternatives available, there is no measure that is less right-impairing or less restrictive in achieving the objective. The sponsors argue that the objective of the Bill is to actualise the cultural aspirations outlined in article 39 of the 1992 Constitution. The reason for effectuating this cultural objective is that LGBTQ+ activities are at variance with

165 *R v Butler* 1992 1 SCR 452; *Thomson Newspapers Co. v Canada Attorney General* 1998 1 SCR 887; *R v Sharpe* 2001 1 SCR 45.
166 *R v Butler* 1992 1 SCR 452.
167 *R v Edward Books and Art Limited* 1986 2 SCR 713.

the cultural values of Ghana. When giving effect to article 39 of the 1992 Constitution, the sponsors of the Bill were required by article 39 itself to adopt formal and informal education as tools or mechanisms to actualise cultural objectives, not to impose right restrictions and penal sanctions to achieve the said objective.[168]

Article 39 does not confer the authority on the sponsors of the Bill to employ penal sanctions or right-restrictive measures to give effect to the cultural objectives of Ghana. The content of article 39, therefore, provides a less restrictive alternative for the sponsors of the Bill and not the penal sanction or right-restrictive measures adopted in the Bill. In sum, the reasons advanced by the sponsors of the Bill to limit fundamental rights – such as freedom of speech, freedom of thought, belief and conscience, academic freedom, and freedom of expression – do not meet the threshold required to justify the limitation of fundamental rights. This is because the basis of the restriction does not meet the proportionality or justifiability analysis touted by the Supreme Court of Ghana.

8. Concluding reflections and observations

This chapter explored the implication of the Anti-LGBTQ+ Bill on academic freedom in HEIs in Ghana. It discussed the constitutional and historical foundations of academic freedom in Ghana. It reflected on the key arguments in the Bill and provided incontrovertible counter-narratives to those arguments, which the sponsors of the Bill failed to acknowledge. This chapter also discussed the constitutionality of the provisions in the Bill that restrict academic freedom, freedom of speech, expression, opinion, thought, belief, and conscience. It reflected on the pronouncements by the Supreme Court of Ghana regarding the protection of rights and the parameters of limiting fundamental rights contained in the 1992 Constitution of Ghana. It argued that the provisions in the Bill restricting academic freedom, freedom of speech and expression falls short of the legal threshold required to limit individual rights contained in the 1992 Constitution. The chapter suggested that the limitation of rights is legally

168 art 39 of the Constitution of the Republic of Ghana of 1992.

unjustifiable, especially considering the reasons advanced by the sponsors in the memorandum of the Bill.

Chapter 7

Some Perspectives on the Impact of Disciplinary Procedures on Academic Freedom in State Universities in Zimbabwe

Tapiwa G Kasuso[1]
Faculty of Law
Midlands State University

Gift Manyatera[2]
Faculty of Law
Midlands State University

Abstract

The administration of workplace discipline for employees of higher education institutions (HEIs) has always provided a key indicator of HEIs' respect for and promotion of fundamental rights. Corollary to this, the mechanisms for disciplining employees at state universities necessarily impact directly or indirectly on academic freedom. Consequently, fairness of the disciplinary process appears to be the key to guaranteeing academic freedom in state universities in Zimbabwe. In recognition of the challenges associated with employer-employee relations, Zimbabwe enacted the Amendment of State Universities Statutes Act 4 of 2022. The Amendment Act seeks to align with the Constitution all the 14 Acts of parliament establishing state universities in Zimbabwe. Further, the Amendment Act provides

1 LLBS, LLM, LLD. Lecturer, Midland State University, Zimbabwe.
2 LLBS, LLM, MSc. CLEF, LLD. Executive Dean, Faculty of Law, Midlands State University, Zimbabwe.

a homogeneous mechanism for the appointment of university councils and the regulation of conditions of employment of university employees. Importantly, the Amendment Act provides for the discipline of members of state universities by providing a new composition of Staff Disciplinary Committees (SDCs) for HEIs. These legislative changes directly impact the right of HEIs' employees not to be unfairly dismissed. This chapter critically examines the composition of SDCs in HEIs in Zimbabwe and its impact on the labour rights of employees of state universities and in particular the right against unfair dismissal. The chapter commences with an overview of the Zimbabwean labour law framework and its applicability to HEIs. This is followed by a discussion of the right not to be unfairly dismissed in the Zimbabwean context. The concept of procedural fairness of a dismissal and the effect of improperly constituted SDCs is also examined. Thereafter, an overview of the composition of SDCs in HEIs is given. Critical is the relationship between the composition of SDCs provided for in statutes establishing HEIs and the SDCs provided for in codes of conduct of such HEIs. The aim is to ascertain the extent to which the legal framework on the composition of SDCs fully gives effect the right not to be unfairly dismissed and academic freedom. The adequacy or otherwise of the current framework is considered. The chapter concludes with insightful proposals for law reform and general recommendations aimed at enhancing the enjoyment and realisation of academic freedom and labour rights of employees of HEIs in Zimbabwe.

1. Introduction

Zimbabwe promulgated an amendment to the state universities statutes in 2022. The effect of this amendment, among other objectives, was to align the composition of disciplinary committees in all state universities. Zimbabwe has 14 state universities which are constituted as body corporates in terms of enabling acts of parliament.[3] The main object of these

3 These include the following: Bindura University of Science and Technology (BUSE), Chinhoyi University of Technology (CUT); Gwanda State University (GSU), Harare Institute of Technology (HIT), Lupane State University (LSU), Manicaland State University

higher education institutions (HEIs) is the advancement of knowledge through teaching and learning, research, community engagement, innovation, and industrialisation.[4] HEIs play a critical role in the development of a constitutional state. HEIs contribute as knowledge fountains through the production of knowledge, which forms the core business and primary function of universities.[5] Furthermore, HEIs contribute to the nation's human capital development at large as employers and managers of human resources and students in their fold.[6]

The administration of workplace discipline for employees of HEIs has always provided a key indicator of HEIs' respect for and promotion of fundamental rights. Corollary to this, the mechanisms for disciplining employees at state universities necessarily impact – directly or indirectly – academic freedom. Thus, the scope of academic freedom encompasses the ability of an employee to express their ideas without fear of reprisals from the employer. Consequently, fairness of the disciplinary process appears to be the key to guaranteeing academic freedom in state universities in Zimbabwe.

In recognition of the challenges associated with employer-employee relations, Zimbabwe enacted the Amendment of State Universities Statutes (hereafter the Amendment Act).[7] The Amendment Act sought to align with the constitution of all the 14 acts of parliament establishing state universities in Zimbabwe.[8]

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of Applied Sciences (MSUAS), Marondera University of Agricultural Sciences and Technology (MUAST), Great Zimbabwe University (GZU), Midlands State University (MSU), National University of Science and Technology (NUST), Pan African Minerals University of Science and Technology (PAMUST), University of Zimbabwe (UZ) and Zimbabwe Open University (ZOU).

4 For example, see s 4(1)(a) of the Great Zimbabwe University Act [chp 25:24], which establishes the GZU, s 4(1) of the National University of Science and Technology Act [chp 25:13], and s 4 (1) of the Midlands State University Act [chp 25:21].

5 Mupangavanhu and Mupangavanhu "Alignment of student discipline design and administration to constitutional and national law imperatives in South Africa" 2011 *PER/PELJ* 125 125-146.

6 Mupangavanhu and Mupangavanhu (n 3) 125.

7 the Amendment of State Universities Statutes Act 4 of 2022 (hereafter "the Amendment Act").

8 Constitution of Zimbabwe Amendment 20 of 2013 (hereafter "the Constitution").

Further, the Amendment Act provides a uniform mechanism for the appointment of university councils and the regulation of conditions of employment of university employees.[9] Importantly, the Amendment Act provides for the discipline of members of state universities by providing a new composition of Staff Disciplinary Committees (SDCs) for HEIs.[10] These legislative changes directly impact the right of HEI employees not to be unfairly dismissed.

This chapter critically examines the composition of SDCs in HEIs in Zimbabwe and its impact on the labour rights of employees of state universities and, particularly, the right against unfair dismissal. The contribution commences with an overview of the Zimbabwean labour law framework and its applicability to HEIs. This is followed by a discussion of the right not to be unfairly dismissed in the Zimbabwean context. The concept of procedural fairness of a dismissal and the effect of improperly constituted SDCs is also examined. Thereafter, an overview of the composition of SDCs in HEIs is given. Critical is the relationship between the composition of SDCs provided for in statutes establishing HEIs and the SDCs provided for in codes of conduct of such HEIs. The aim is to ascertain the extent to which the legal framework on the composition of SDCs fully gives effect the right not to be unfairly dismissed. The adequacy or otherwise of the current framework is considered. The chapter concludes with proposals for law reform and general recommendations aimed at improving the administration of staff discipline in HEIs in Zimbabwe.

2. Applicability of labour legislation to HEIs

The principal labour legislation in Zimbabwe is the Labour Act.[11] This Act applies to "all employers and employees except those whose conditions of employment are otherwise provided for in the Constitution".[12] Employees whose conditions of employment are provided for in the Constitution are members of the civil service.[13]

9 See preamble of the Amendment Act.
10 *Ibid.*
11 chp 28:01. Act 16 of 1985 (hereafter "the Labour Act").
12 s 3 (1) of the Labour Act.
13 These are governed by the Public Service Act [chp 16:04] and the Health Services Act [chp 15:16].

Also excluded from the application of the Labour Act are members of the disciplined forces and any other employees designated by the president in a statutory instrument.[14] In essence, section 3(1) of the Labour Act sets the tone for the establishment of a two-tiered labour law system in Zimbabwe:[15] on one hand, the Labour Act applies to the private sector and, on the other hand, labour legislation that also applies to state employees. The Labour Act also applies to parastatals, local authorities, and – importantly – state universities. The conditions of employment of these institutions are not provided for in the Constitution. Therefore, despite state universities being state-aided institutions, their employees are not members of the Civil Service, thus, the Labour Act applies to all state universities in Zimbabwe.[16] This has implications for the conditions of employment and the discipline of employees of state-funded HEIs. The current dual labour law system was once abolished in 2002,[17] only to be reintroduced in 2005.[18]

Section 2A(3) of the Labour Act also affirms the supremacy of the Act by providing that "the Act shall prevail over any other enactment inconsistent with it". The import of this is simple: in the event of any conflict between a provision in the Labour Act and any other statutory provision, the Labour Act takes precedence. It has been argued that section 2A(3) does not, by implication, repeal provisions of other statutes inconsistent with the Labour Act, since its provisions remain valid and applicable in all circumstances not subject to the application of the Labour Act.[19] For example, if a provision in the Midlands State University Act – which establishes the Midlands State University – is inconsistent with the Labour Act, it follows that the Labour Act

14 See s 3(2) and (3) of the Labour Act. Members of the disciplined force are defined in s 2 of the Labour Act to include a military, air or naval force; a police force; a prison service, and members of the intelligence services.
15 Madhuku *Labour Law in Zimbabwe* (2015) 5.
16 *Midlands State University Council v MSU Lecturers Association* SC 42/05; *Rutunga & Others v Chiredzi Town Council & Another* 2003 (1) ZLR 197 (S).
17 the Labour (Amendment) Act 17 of 2002.
18 the Labour (Amendment) Act 7 of 2005.
19 Gwisai *Labour and Employment Law in Zimbabwe: Relations of Work under Neo-Colonial Capitalism* (2006) 47.

trumps the inconsistent section in the Midlands State University Act. Therefore, section 2A(3) of the Labour Act puts to rest the controversy on whether or not the Labour Act is superior to any other enactment inconsistent with it.[20]

3. Zimbabwean legal framework on unfair dismissal

The Zimbabwean legal framework on dismissal law is largely influenced by international labour standards made under the auspices of the International Labour Organisation (ILO).[21] Zimbabwe joined the ILO on 6 June 1980 and since then it has ratified several ILO Conventions, including the core or fundamental conventions. Zimbabwe incurs particular obligations insofar as domestic laws and policies must be adopted to conform to those ILO Conventions that have been ratified.[22] The Labour Act states in its preamble that one of its purposes is to give effect to the obligations incurred by Zimbabwe as a member state of the ILO.[23] Although ratification of international standards is key to their relevance in Zimbabwe, it does not follow that an unratified convention is irrelevant. It remains an important source of labour law in more ways than one. Firstly, it can be used as a basis to resolve labour disputes where domestic law is found wanting.[24] Secondly, it can be used as a guide in interpreting domestic law, thus giving content to domestic law.[25] Thirdly, it can be the basis for developing the common law and the establishment of a labour

20 See *Mombeshora v Institute of Administration and Commerce* SC 72/17; *City of Gweru v Masinire* SC 56/18; and *Chingombe & Another v City of Harare* SC 177/20.

21 International Labour Organization n.d. https://www.ilo.org (02-09-2024).

22 In Zimbabwe, international labour standards are not automatically part of Zimbabwean labour law. To be part of Zimbabwean law, there must be a voluntary assumption of the obligation by the executive through ratification as provided for in s 327(2)*(b)* of the Constitution. See *Magodora & Others v Care International Zimbabwe* SC 24/14; *Simbi (Steelmakers) (Pvt) Ltd v Shamu & Others* SC 71/15.

23 This implies that the interpretation of the Labour Act must comply with Zimbabwe's international obligations.

24 the Constitution.

25 See ss 46(1), 326 (2) and 327 (6) of the Constitution.

law jurisprudence grounded in international best practices.[26] Lastly, international labour standards reinforce domestic labour law jurisprudence.[27]

In 1982, the ILO adopted the Termination of Employment at the Initiative of the Employer Convention.[28] Convention C158 is complemented by the ILO Termination of Employment at the Initiative of the Employer Recommendation.[29] Convention C158 makes provisions for substantive fairness and procedural fairness of a dismissal.[30] Article 4 of the Convention sets the tone for substantive fairness of dismissal by providing that:

> the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on operational requirements of the undertaking, establishment or service.

Therefore, for a dismissal to be substantively fair, it must be based on a valid reason, that is, those related to misconduct, incapacity, or the employers' operational requirements.[31] The second principle that can be extracted from Convention C158 is that of procedural fairness of a dismissal. Article 7 provides that a worker must be afforded an opportunity to defend themselves against the allegations made by the employer. This is the embodiment of

26 s 165(7) of the Constitution implores members of the judiciary to keep themselves abreast of developments in international law and s 176 of the Constitution gives superior courts inherent powers to develop the common law.

27 Madhuku (n 13) 508.

28 Convention 158 of 1982.

29 the ILO Termination of Employment at the Initiative of the Employer Recommendation 166 of 1982.

30 A detailed discussion of this Convention is beyond the scope of this contribution, however for its comprehensive discussion see Smit and Van Eck "International perspectives on South Africa's unfair dismissal law" 2010 *XLIII CILSA* 46 46-67; ILO *Protection Against Unfair Dismissal* (1995).

31 Art 5 of Convention C158 provides reasons that do not constitute valid grounds for termination and these include: union membership, appointment as a workers' representative, race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, and national extraction or social origin.

the right to be heard. Although Article 7 does not provide details of the right, it is generally accepted that the right encompasses all processes relating to disciplining an employee. This would include notification periods, personal appearance, disclosure of documents and evidence, the right to call witnesses, cross-examination, the composition of the disciplinary committee, issues of bias, entitlement to legal representation, and right to reasons.[32] The last principle in Convention C158 is that every worker must be entitled to an opportunity to appeal to an impartial tribunal or court against a decision to dismiss him or her.[33]

It is significant to note that Zimbabwe has not ratified Convention C158. Notwithstanding this non-ratification, Convention C158 has had profound effects on the Zimbabwean dismissal law framework in that its framework gives effect to the above three core principles of Convention C158. Section 65(1) of the Zimbabwean Constitution entrenches the right to fair and safe labour practices and standards. It is accepted that the broad right to fair labour practices also incorporates the right against unfair dismissal, that is the right to a substantively and procedurally fair dismissal.[34] The right is given effect in section 12B(1) of the Labour Act, which provides that every employee has the right not to be unfairly dismissed. Madhuku submits that section 12B(1) makes provision for generic unfair dismissals and automatically unfair dismissals.[35] The Labour Act does not define the concept of generic unfair dismissal. As such, guidelines must be drawn from international labour standards, namely Convention C158 and Recommendation R166. Unfair dismissal under Convention C158 has two dimensions. First, the employer must have a fair reason to terminate employment, which is substantive fairness.

32 Gwisai *Labour and Employment Law in Zimbabwe: Relations of Work under Neo- Colonial Capitalism* (2006) 162.

33 art 8 of Convention C158.

34 For a discussion of the constitutional right to fair labour practices in Zimbabwe, see Kasuso "Revisiting the Zimbabwean unfair labour practice concept" 2021 PER/PELJ 1-27; Tsabora and Kasuso "Reflections on the constitutionalising of individual labour law and labour rights in Zimbabwe" 2017 *ILJ* 43 43-62.

35 The concept of unfair dismissal was introduced in Zimbabwean labour law by the Labour (Amendment) Act 17 of 2002.

Second, in terminating employment, the employer must follow fair pre-dismissal procedures, that is, procedural fairness.[36] In the Zimbabwean context, a dismissal must be substantively fair in that there must be a valid reason for the dismissal. The second aspect of substantive fairness arises after the establishment of a valid reason. It is critical to determine whether it was reasonable to dismiss for that reason.[37] As for procedural fairness, it covers principles of natural justice, namely the *audi alteram partem* rule,[38] and the *nemo iudex in sua causa* rule.[39]

The second group of dismissals specified in section 12B of the Labour Act is that of automatic unfair dismissals. Sections 12B(2) and (3) of the Labour Act specify four circumstances in which a dismissal is not automatically unfair. The first circumstance is if there is a registered code of conduct and the dismissal for misconduct is not done in terms of that code of conduct.[40] The second circumstance is if, in the absence of a registered code of conduct, the dismissal for misconduct is not in terms of the model code made in terms of section 101(9) of the Labour Act.[41] Whether the dismissal is in terms of a registered code of conduct (or, in its absence, of the model code), such dismissal must still pass the fairness test, that is, it must be substantively and procedurally fair. This is because the Labour Act does not state that compliance with the code of conduct is automatically fair.[42] It states that non-compliance with the code is automatically unfair, thus leaving the issue of compliance with the code subject to the fairness test in section 12B(1) of the Labour Act. The third circumstance in which a dismissal is not automatically unfair

36 Madhuku (n 13) 103.
37 Madhuku (n 13) 104.
38 An employee must be given an opportunity to be heard before the dismissal.
39 No one should be a judge in his or her case. The rule demands that a person, authority, or committee that makes the decision to dismiss must be impartial and unbiased.
40 s 12B(2)(a) of the Labour Act. See *Medical Investments Ltd t/a Avenues Clinic v Chingwena* SC 2/12; *Tirivangana v University of Zimbabwe* SC 21/13.
41 s 12B(2)(b) of the Labour Act. See *Hurungwe RDC v Moyo & Others* SC 37/21; *Chikomba Rural District Council v Pasipanodya* 2012 (1) ZLR 577 (S).
42 Madhuku (n 13) 110.

is in section 12B(3)(a) of the Labour Act which provides for constructive dismissal arising from an employee terminating the contract of employment because of the employer's conduct.[43]

The final circumstance relates to dismissal arising from the non-renewal of a fixed-term contract where the employee had a legitimate expectation of being re-engaged, and another person was engaged instead of the employee.[44] Of interest to this discourse is the dismissal of employees of HEIs for misconduct in terms of a registered code of conduct or, in its absence, the model code. This is particularly relevant to the procedural fairness of the dismissal in so far as the composition of Staff Disciplinary Committees (SDCs) is concerned.

4. Dismissal of employees of state-funded HEIs in Zimbabwe

The dismissal of employees for misconduct in Zimbabwe must be done in terms of a registered code of conduct and, in its absence, the model code made in terms of section 101(9) of the Labour Act.[45] The model code is provided for in the Labour (National Employment Code of Conduct) Regulations.[46] It makes provision for acts of misconduct, disciplinary procedure, the composition of disciplinary authorities and committees, rights of employees, as well as penalties and procedures for appeals. It is similar to any other registered code which covers dismissals arising from misconduct. Most state universities in Zimbabwe have registered codes of conduct. For example, the Zimbabwe Open University has a code of conduct which was registered in August 2015.

43 See *Astra Holdings v Kohwa* SC 97/04; *Thomas Miekles Stores v Mwaita & Another* 2007 (2) ZLR 185 (S); and *Mudakureva v GMB* 1998 (1) ZLR 145 (H).

44 s 12B(3) *(b)(i)-(ii)* of the Labour Act. See *UZ-UCSF Collaborative Research Programme in Women's Health v Shamuyarira* 2010 (1) ZLR 127 (S); *Magodora & Others v Care International Zimbabwe* SC 24/14, *Kenyan Airways v Musarurwa* SC 67/14.

45 s 12B(2)*(a)-(b)* of the Labour Act.

46 Statutory Instrument 15 of 2006.

The Midlands State University has a registered code of conduct registered in 2014.[47]

In terms of section 101(3) of the Labour Act, a registered employment code of conduct provides for the following issues: disciplinary rules to be observed by employees; acts or omissions which constitute misconduct; procedures for disciplinary processes; penalties for breach of the employment code; provision of the person, committee, or authority responsible for implementing and enforcing rules, procedures and penalties; the procedure for notifying an employee on commencement of disciplinary processes; the right of an employee to be heard before any decision is made; and the production of the record of proceedings and appeals. Significantly, any disciplinary proceedings conducted in terms of an unregistered code of conduct are null and void.[48]

In light of the foregoing, state universities without codes of conduct or with unregistered codes of conduct must rely on the model code, Statutory Instrument 15 of 2006, in disciplining staff.[49] Section 12B(2) of the Labour Act read with sections 5(a) and (b) of Statutory Instrument 15 of 2006 is clear that the model code can only be invoked where there is no registered code of conduct. Where there is a registered code of conduct, the parties cannot agree to use the model code. Such an agreement is contrary to the law and a nullity.[50] However, Zimbabwean authorities are in agreement that the expression "in the absence of an employment code" must be interpreted purposively to also cover situations where a registered code is in existence but is rendered inapplicable by circumstances or when it is impracticable to use it, or it is dwarfed by circumstances.[51] Put differently, the mere existence of

47 The registration of codes of conduct with the Registrar in the Ministry of Labour is done in terms of s 101 of the Labour Act.

48 *Zimbabwe Newspapers (1980) Ltd v Ndlovu* 2000 (1) ZLR 127 (S).

49 For example, Chinhoyi University of Technology and Bindura University of Science and Technology do not have registered codes of conduct. They rely on the Model Code, Statutory Instrument 15 of 2006.

50 *Chikomba Rural District Council v Pasipanodya 2012* (1) ZLR 577 (S); *Hurungwe Rural District Council v Moyo & Others* SC 37/21.

51 Mucheche "Can an employer discipline an employee in terms of the Labour (National Employment Code of Conduct) SI 15 of 2006

a registered code of conduct is not sufficient to oust resort to the model code. As succinctly summarised by Madhuku:

> There must be in existence a registered code of conduct applicable to the case in question. Where there is a registered code which is inapplicable to the circumstances of the case, there is 'the absence of an employment code' for purposes of section 12B(2) of the Labour Act.[52]

For example, in *Samuriwo v Zimbabwe United Passenger Co. Ltd*,[53] the registered code of conduct applied to all employees, regardless of rank. The managing director was charged with acts of misconduct in terms of Statutory Instrument 371 of 1985, the predecessor to Statutory Instrument 15 of 2006. The court held that the registered code of conduct did not apply to the managing director, but rather Statutory Instrument 371 of 1985, given the circumstances of the case.[54] In *Zimpost (Pvt) Ltd v Communications and Allied Workers Union*,[55] it was held that, if a registered code of conduct does not provide for some of the serious acts of misconduct covered by the model code, an employer is entitled to resort to the model code in respect of those acts of misconduct not covered by its registered code of conduct.[56] It therefore follows that, if a registered code of conduct of a state university has no provision for serious misconduct specified in the model code, there is an "absence of an employment code" for the purposes of section 12B(2) of the Labour Act, and the university can invoke the model code.

It has since been established that, apart from being governed by the Labour Act, employees of state universities in Zimbabwe are also governed by acts of parliament establishing

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where a registered code of conduct exists?" in Mucheche *A Practical guide to labour law in Zimbabwe* (2013) 16-25.

52 Madhuku (n 13) 117.

53 *Samuriwo v Zimbabwe United Passenger Co. Ltd* 2000 (1) ZLR 647 (S).

54 See also *Cargo Carriers (Pvt) Ltd v Zambezi & Others* 1996 (1) ZLR 613 (S).

55 *Zimpost (Pvt) Ltd v Communications and Allied Workers Union* 2009 (1) ZLR 334 (S).

56 *Net One Cellular (Pvt) Ltd v Communications and Allied Services Workers Union of Zimbabwe* SC 89/05.

the universities. These Acts provide specific disciplinary rules and procedures. For example, section 25 of the Midlands State University Act as amended provides for the composition of and functions of a SDC, the right of an employee charged with misconduct to be heard, and penalties.[57] In *Marume v Chinhoyi University of Technology*,[58] it was held that the Chinhoyi University of Technology Act (and particularly section 26 of the Act) are not a registered code of conduct. Therefore, in the absence of a registered code of conduct, the peremptory provisions of section 12B(2)(a) and (b) of the Labour Act mandated the university to resort to the model law, Statutory Instrument 15 of 2006.[59] Furthermore, the conduct of disciplinary proceedings in terms of a registered code of conduct of a state university or the model code must also be substantively and procedurally fair. At this juncture, we move on to a discussion of procedural fairness broadly.

5. Procedural fairness and composition of SDCs

Traditionally, codes of conduct provide for the composition of SDCs. The code of conduct usually indicates the number of persons who would constitute the SDC and the designation of such persons stipulated.[60] For substantive and procedural fairness, a disciplinary hearing ought to be properly constituted in that it must be comprised of individuals prescribed by a code of conduct. In *Madoda v Tanganda Tea Company Ltd*,[61] it was held that any deviation from the composition of a SDC provided for in a code of conduct constitutes a procedural irregularity. Any proceedings conducted by the improperly constituted SDC are rendered null and void.[62] Whilst the general rule is that the effect of an improperly constituted SDC is to render the proceedings null

57 s 26(1)-(6) of the Midlands State University Act as amended by the Amendment Act. The Acts establishing the other thirteen state universities in Zimbabwe have similar provisions.
58 *Marume v Chinhoyi University of Technology* SC 120/22.
59 *Tamanikwa & Others v Zimbabwe Manpower Development Fund* SC 33/12; *Tirivangana v University of Zimbabwe* SC 21/13.
60 *Chataira v ZESA* HH 9/00.
61 *Madoda v Tanganda Tea Company Ltd* 1998 (1) ZLR 374 (S).
62 *Sable Chemical Industries Ltd v Easterbrook* 2010 (1) ZLR 342 (S); *Medical Investments Ltd t/a Avenues Clinic v Chingwena* SC 2/12.

and void, it was held in *MMCZ v Mazvimavi*[63] that it must be shown that the employee concerned was prejudiced by the procedural irregularity.[64] The basis of this position has been that an employee must not escape the consequences of their misdeeds simply because of a failure to conduct proceedings properly.[65]

It is submitted that this position is flawed. The composition of an SDC impacts the employee's right to be heard, the right to present a defence, and the right to be fairly judged. Therefore, the position consistent with the constitutional right to fair labour practices – and, in particular, the right not to be unfairly dismissed – is that a failure to comply with the code of conduct is sufficient to render the proceedings voidable, regardless of whether or not prejudice has been proved.[66] The registration of a code of conduct shields an employer from any charge of an automatically unfair dismissal if there is compliance with the code of conduct.[67] As such, it must have been the intention that only strict compliance with the code warrants exemption from protective legislation.[68] This is the position that was adopted by the court in *Madoda v Tanganda Tea Co. Ltd*.[69] Two workers' committee representatives required by the code to constitute a SDC were not on the committee. The court did not hesitate to set aside the disciplinary proceedings. The hearing was null and void for failure to comply with the provisions of the code on the composition of the disciplinary committee.[70] In this regard, we can do no better than repeat the MacFoy phraseology as quoted in *Mugwebi v Seed Co Ltd*:[71]

63 *MMCZ v Mazvimavi* 1995 (2) ZLR 353 (S).
64 See also *Nyahuma v Barclays Bank (Pvt) Ltd* 2005 (2) ZLR 435 9S); *Chipangura v Environmental Management Agency* SC 35/12; and *Cold Storage Company v Ndlovu & Others* SC 67/07.
65 *Ramana v NSSA* SC 38/03; *Pangeti v GMB* 2002 (1) ZLR 454 (S); *Air Zimbabwe (Pvt) Ltd v Mensa* SC 89/04.
66 Madhuku (n 13) 173.
67 Madhuku (n 13) 174.
68 Madhuku (n 13) 175.
69 *Madoda v Tanganda Tea Co. Ltd* 1999 (1) ZLR 374 (S).
70 See also similar findings in *Pangeti v Grain Marketing Board* 2002 (1) ZLR 454 (H); *Sable Chemical Industries Ltd v Easterbrook* 2010 (1) ZLR 342 (S).
71 *Mugwebi v Seed Co Ltd* 2000 (1) ZLR 93 (SC).

> If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.

6. Composition of SDCs in state-funded HEIs

SDCs are constituted by the employer in terms of a registered code of conduct or, in its absence, the model code, Statutory Instrument 15 of 2006. Acts of parliament establishing HEIs provide for the composition of SDCs and the designation of the individuals to be appointed to the SDCs. The functions of the SDCs are to investigate any breach of a statute, regulation, or ordinance or other misconduct on the part of any member of staff of the university and recommend to the vice-chancellor the penalty to be imposed for the misconduct.[72] Before the promulgation of the Amendment Act, the composition of SDCs for universities included the following members: a retired judge, who was the chairperson; a senior member of the academic or administrative staff; a member of the academic, technical, or administrative staff of similar status to the person charged; a registered legal practitioner of at least ten years' standing who did not hold any post at the university; and one member appointed by the council from among its members who was not a member of the university.

Such composition was bloated, and it did not balance the representation of workers' representatives and employer representatives. Furthermore, the SDC was chaired by a retired judge and not an academic. A judge does not have knowledge and experience of academia and administration of academic institutions. The participation of a retired judge and a legal practitioner also led to the over-proceduralism and technicalisation of disciplinary hearings for university employees.

72 See s 25(4) of the State University Act.

They were perceived to be obtrusive because their interests were in billable hours. This inhibited the expeditious resolution of disciplinary matters and it also made the process expensive not only to the employee but also to the university. The composition had the potential of violating employees' rights to a substantively and procedurally fair dismissal. In light of these weaknesses, the Amendment Act has introduced a new composition of SDCs for HEIs that consists of the following: a pro vice-chancellor, who shall be the chairperson; a senior member of the academic or administrative staff; a member of the university council; and a member of the academic or administrative staff of similar status to the person charged.[73] Two members of the SDC form a quorum.[74] The streamlined composition is manned by individuals well-versed in academic institutions. Nevertheless, serious misgivings arise in relation to the quorum of the SDC. Two members – that is, the pro vice-chancellor and the council member – apparently may be termed employer representatives. In terms of procedural fairness, this necessarily creates an unacceptable situation whereby an employee is disciplined in an unfair manner. Justice must not only be done, but it must be seen to be done especially in the context of safeguarding jealously academic freedom in HEIs in Zimbabwe. A right balance must be struck in the quorum so that the disciplinary processes are beyond reproach.

Some codes of conduct of HEIs reflect the composition of SDCs as provided for in the enabling State University Act.[75] However, other HEIs have registered codes of conduct which are at odds with what is provided for in the enabling Act. For instance, clause 10.3 of the Zimbabwe Open University Act provides for a SDC which comprises: a dean from a faculty other than the employee's faculty, who shall be the chairperson of the committee; a representative from the Human Resources Unit; and two representatives from the academic staff association as nominated by the staff association. Other State universities such as Chinhoyi University of Technology (CUT), Great Zimbabwe

73 s 25(1) of the State Universities Act 4 of 2022.
74 s 25(2) of the State Universities Act.
75 For example, cl 6.14 of the Midlands State University Act provides for the composition of the SDC which is consistent with that in s 25(1) of the Midlands State University Act.

University (GZU), and Bindura University of Science Education (BUSE) do not have registered codes of conduct. They rely on the model code, Statutory Instrument 15 of 2006, which gives the employer power to constitute a disciplinary authority or a disciplinary committee.

A disciplinary committee in terms of the model code is a committee set up at the workplace or establishment composed of employer and employee representatives, to preside over and decide disciplinary cases and/or worker grievances.[76] As for a disciplinary authority, the employer has the discretion to choose the size of – and specific people to sit on – such disciplinary authority. The designation of such persons is not stipulated; it can even be external members of the university. It is all left to the employer's discretion.[77] The question which therefore arises is: What is the effect of a code of conduct which provides for a SDC which is inconsistent with the SDC provided for in the State Universities Act?

This question was answered by the Supreme Court in the case of *Marume v Chinhoyi University of Technology*.[78] The appellant was employed by the university as a secretary. Allegations of misconduct were raised against her in terms of section 4(a) of the model code, Statutory Instrument 15 of 2006. A disciplinary committee was constituted by the employer and consisted of three members. The authority found the appellant guilty as charged and she was dismissed from employment. She challenged the dismissal on review on the grounds of procedural irregularity. Specifically, she alleged that the disciplinary committee was improperly constituted as it did not follow the composition of the SDC provided for in the Chinhoyi University of Technology Act.[79] Section 26(1) of the Chinhoyi University of Technology Act (hereafter the CUT Act) provided that there shall be a SDC which shall consist of the following: "a distinguished legal person,

76 s 2 of the Statutory Instrument Act 15 of 2006.
77 For an overview of the differences between a disciplinary authority and disciplinary committee in terms of the model code, see *National Engineering Workers Union v Dube* SC 1/16; *Mandizvidza v ZFC Limited & Another* SC 73/15.
78 *Marume v Chinhoyi University of Technology* SC 120/22.
79 The Chinhoyi University of Technology Act [chp 25:23].

who shall be chairman; a senior member of the academic and administrative staff; a member of the academic, administrative, and technical staff of similar status to the person charged; and a registered legal practitioner of at least five years standing who does not hold any post at the university". She argued that, although the Labour Act (through the model code, Statutory Instrument 15 of 2006) allowed the employer to set up a disciplinary authority at its discretion, the CUT Act required a specific composition of the disciplinary panel. Section 26(1) of the CUT Act ought to be read together with the model code, and the university was bound by the CUT Act.

The court held that in terms of section 12B(2)(a)-(b) of the Labour Act, the dismissal of an employee must be done in terms of a registered code of conduct or, in its absence, the model code. The court accepted that the CUT Act – and, in particular, section 26(1) of the CUT Act – was not a registered code of conduct. Therefore, the disciplinary proceedings had to be held in terms of the model code, Statutory Instrument Act 15 of 2006. As such, the composition of the disciplinary authority would be dictated by the provisions of the model code and not the CUT Act. The court further held that the CUT Act could not take precedence over the model code made in terms of the Labour Act. The basis of this reasoning was that section 2A(3) of the Labour Act made it clear that the Act prevails over any other enactment inconsistent with it.[80] The CUT Act not being a registered code of conduct and not providing for mechanisms for conducting hearings could not override the Labour Act. The appeal was therefore dismissed.

A similar finding was made by the Labour Court in *Damison v Atukwa NO and Another*.[81] It was held that the law did not provide for a two-pronged approach where provisions of the model code (Statutory Instrument 15 of 2006) and the Bindura University of Science Education (BUSE) Act[82] could be used in the same proceedings. It was improper to charge an employee in terms of

80 *City of Gweru v Masinire* SC 56/18.
81 *Damison v Atukwa N.O and Another* LC/H/07/21. See also *Hapanyengwi v Nyambo N.O & Zimbabwe Open University* LC/H/20/22.
82 chp 25:22 of the Bindura University of Science Education (BUSE) Act.

the model code, appoint a SDC in terms of the BUSE Act and then conduct disciplinary proceedings in terms of the model code. The BUSE Act was not a code of conduct.

It is apparent that Zimbabwe's courts have accepted that the composition of a SDC provided for in a registered code of conduct or the model law takes precedence over the one provided in the State Universities Acts. This narrow interpretation renders the composition of SDCs for HEIs prescribed by the State Universities Acts nugatory. This would not have been the intention of the legislature. It is submitted that a purposive approach is required. Whilst Acts establishing state-funded HEIs are not codes of conduct, they provide for the composition of SDCs suited for such institutions, especially if one looks at the designation of individuals who constitute these SDCs. They have knowledge and experience in academia. It is suggested that codes of conduct or the model code must not be read in isolation, but read with the relevant sections of Acts establishing state universities and especially sections of SDCs.

A registered code of conduct is merely an agreement between an employer and employee representatives. Should such an agreement be allowed to override the provisions of a statute? Any agreement entered into between employers and employees – even if it is made in terms of the Labour Act – must comply with specific provisions of the law, including the enabling Acts that establish HEIs in Zimbabwe. Similarly, the model code is a subsidiary legislation; it cannot take precedence over an act of parliament. That acts of parliament override the common law and subsidiary legislation need not be overemphasised.[83] Therefore, any disciplinary proceedings conducted by a SDC not consistent with the composition prescribed in the applicable state university act are afflicted with procedural irregularities that render the proceedings null and void. Any interpretation to the contrary has the potential of stripping HEIs' employees of their right not to be unfairly dismissed. Invariably, there is no legally sound point in creating specialised SDCs in terms of the Acts of HEIs when the

83 *Chikomba Rural District Council v Pasipanodya* SC 26/12; *Chikera & Another v AL Sham's Global BVI Limited* SC 17/17.

employer can invoke the model code and uses its discretion to appoint a SDC.

7. Conclusion

Zimbabwe's legal framework on unfair dismissal is largely consistent with international labour standards such as Convention C158 and Recommendation R166. This chapter established that employees in the private sector, local authorities, parastatals, and state-funded HEIs are entitled to the right not to be unfairly dismissed. This requires dismissal to be substantively and procedurally fair. It was demonstrated that a dismissal would be procedurally unfair if it is not conducted in accordance with a fair pre-dismissal enquiry, with the fairness being measured against guidelines in a registered code of conduct or, in its absence, the model code, Statutory Instrument 15 of 2006. A key component of procedural fairness that was discussed is that disciplinary proceedings must be conducted by a properly constituted SDC. Allowing persons other than those specified in the code of conduct to sit and participate in the deliberations of an SDC is a procedural irregularity which renders the proceedings, at the very least, voidable at the instance of the employee concerned. It was further established that enabling Acts of state-funded HEIs provide a tailor-made composition of SDCs for these academic institutions. Whilst other HEIs follow the composition of SDCs in the enabling Acts, others have in their codes of conduct compositions which are inconsistent with the Acts.

Further, it was also established that other HEIs do not have registered codes of conduct. They rely on the model code, Statutory Instrument 15 of 2006, which gives the employer the discretion to appoint a disciplinary authority or disciplinary committee. In most cases, the disciplinary authority or committee so appointed is at variance with the composition prescribed in the enabling Acts. This mismatch between the composition of SDCs in the enabling Acts of HEIs and their codes of conduct has the potential of violating the right not to be unfairly dismissed. The situation has not been made easy by the Zimbabwean courts which have adopted a restrictive interpretation of the relationship between labour legislation and enabling state universities Acts.

The approach renders SDCs established in terms of enabling state universities Acts inconsequential. It greatly undermines the purpose of establishing specialised SDCs for HEIs. One of the purposes of prescribing a specific composition of SDCs is to enhance fairness and promote academic freedom. The current composition and quorum of SDCs have the potential of violating these principles. The current quorum of SDCs is two. If the pro-vice chancellor and a council member alone avail themselves for the hearing, it would mean that the disciplinary action would be handled by employer representatives only. There is a need to include equal membership of employer and employee representatives and increase the quorum.

A number of recommendations are necessary in order to enhance academic freedom and the enjoyment of the right against unfair dismissal in HEIs. The current composition of SDCs must be amended so that it reflects equal representation of employer and employee representatives. The participation of representatives of academic staff associations will ensure that the scales of fairness are not tilted in favour of employers, given the institutional bias inherent in disciplinary processes. This also demands increasing the quorum of members of the SDCs. Whilst this chapter only addresses the composition of SDCs as provided for in the state universities Acts, there is a need to align HEIs' codes of conduct with the enabling Acts. In this regard, a policy directive from the Minister of Higher and Tertiary Education, Innovation, Science and Technology Development[84] and the Zimbabwe Council for Higher Education[85] directing all HEIs to align their codes of conduct with their enabling Acts is necessary.

Alternatively, the Labour Act must be amended so that it formally recognises the disciplinary procedures – and particularly the composition of SDCs – for HEIs in the enabling Acts. The current framework, in which the Labour Act and codes of conduct

84 All state-funded HEIs in Zimbabwe fall under the Ministry of Higher and Tertiary Education, Innovation, Science and Technology Development. The enabling Acts of state universities provide that the Minister is responsible for administering the Acts.

85 It is the regulatory authority of HEIs in Zimbabwe established in terms of the Zimbabwe Council for Higher Education Act [chp 25:27].

made in terms of that Act trump provisions on the composition of SDCs in enabling Acts of HEIs, poses a threat to the enjoyment and realisation of academic freedom and the right to fair labour practices. In the interim, the judiciary must take the lead in interpreting labour legislation purposively and in a manner consistent with the enabling state universities Acts, especially provisions on the composition of SDCs.

Part 3:

Impact on Students and that of Teaching and Learning

Chapter 8

The Stone Left Unturned: An Assessment of the Impact of Marketisation on the Higher Education Experience of Students with Disabilities

Leoni van der Merwe[1]
Faculty of Law,
University of Johannesburg

Abstract

The marginalisation of persons with disabilities (PWDs) in South Africa and the world over is not a novel concept; this is evidenced by such persons experiencing poorer health outcomes, higher rates of poverty, economic exclusion, and lower educational achievements. Although general inroads have been made in the realisation of equality in South Africa, the Commission for Employment Equity's Annual Report for 2021–2022 notes that PWDs comprise 1.2% of the total workforce. Disability is viewed as both the proverbial seed and fruit of poverty and is regarded as a contributory factor to societal exclusion. Higher education institutions (HEIs) play a pivotal role in promoting lifelong learning in addition to the provision of skills, competencies, and expertise to the labour market. In conjunction with various societal stakeholders, HEIs are instrumental in eliminating barriers to entry experienced by students with disabilities (SWDs). In 2018, the Department of Higher Education and Training

1 LLB, LLM. At the time of writing this chapter, the author was a lecturer in the Department of Practical Business Law, at the University of Johannesburg.

(DHET) published the Strategic Policy Framework on Disability for the Post-School Education and Training System. The Strategic Policy Framework is the first of its kind in the higher education sector and aims to advance the access of SWDs to HEIs. Access to the higher education sector does not only refer to the provision of assistive or technological devices, but is also intrinsically linked to prospects of success in the labour market as well as in the broader community. HEIs are placed at the epicentre of implementing the Strategic Policy Framework in addition to various other policies, legislation, and regulations that are generally applicable within the higher education sector. Moreover, HEIs play an indispensable role in establishing and transforming a co-ordinated higher education sector, as envisaged by the Higher Education Act 101 of 1997. The aforementioned role cannot be interpreted in isolation and must be observed through the lens of constitutional, legislative, policy, and societal obligations on the one hand, and commercial obligations on the other hand. In recent years, it has become apparent that the "traditional" perceptions of the role of higher education in South Africa have been imbued with commercial objectives, with specific emphasis on the principle of marketisation. Marketisation is a global occurrence that positions education as a commodity, utilised by students regarded as consumers. With the aforementioned in mind, this chapter assesses the impact of marketisation on SWDs as consumers in HEIs. As a point of departure, the chapter investigates the precarious position of SWDs generally in society as well as in HEIs. A two-fold legal framework is then introduced regarding SWDs and HEIs respectively. The principle of marketisation is discussed by taking into account its global origins and, specifically, in South Africa, where cultural, socio-economic, and language aspects play an important role in the consumption of the knowledge created by HEIs. The chapter then concludes by proposing guidelines to advance the higher education experience of SWDs as a result of marketisation, whilst taking into account their distinctly South African realities.

1. Introduction

> Every person born (with a disability) holds two citizenships, (the first) in the kingdom of healthy and (the other) in the kingdom of the diseased. There is a third kingdom, and that is the land of the crippled. This is not a democratic land, but rather a dictatorship. Here the ordinary rights of privileged citizens do not apply. The kingdom is surrounded by a large wall, and most everything that takes place between the walls is unfamiliar and unknown to those outside.[2]

The marginalisation of persons with disabilities (PWDs) in South Africa and the world over is not a novel concept, as is evidenced by such persons experiencing poorer health outcomes, higher rates of poverty, economic exclusion, and lower educational achievements.[3] The lives of PWDs are no different to living in Gallagher's proverbial "land of the cripple". Although general inroads have been made in realising equality in South Africa, the Commission for Employment Equity's Annual Report for 2021-2022 notes that PWDs comprise 1.2% of the total workforce. Disability is viewed as both the proverbial seed and fruit of poverty and is regarded as a contributory factor to societal exclusion. Higher education institutions (HEIs) play a pivotal role in promoting lifelong learning in addition to the provision of skills, competencies, and expertise to the labour market.[4] In conjunction with various societal stakeholders, HEIs are instrumental in eliminating barriers to entry experienced by students with disabilities (SWDs).[5]

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2 Reiter *Disability from a Humanistic Perspective: Towards a Better Quality of Life* (2008) 34. This symbolic and literal separation of PWDs and the broader society persists to the current day in South Africa. See Government of the Republic of South Africa "White Paper on Rights of Persons with Disabilities" 2016 8. See also Government of the Republic of South Africa "Integrated National Disability Strategy White Paper" 1997 4.

3 World Health Organisation "WHO Global disability action plan 2014-2021" 2015 1. See also World Health Organisation "World Report on Disability" 2011.

4 Council on Higher Education *Kagisano Number 9: The aims of higher education* (2013) 5.

5 Mutanga "Inclusion of students with disabilities in South African Higher Education" 2018 *International Journal of Disability*,

In 2018, the Department of Higher Education and Training (DHET) published the Strategic Policy Framework on Disability for the Post-School Education and Training System (hereafter "the Strategic Policy Framework"). The Strategic Policy Framework is the first of its kind in the higher education sector and aims to advance the access of SWDs to HEIs.[6]

Access to the higher education sector does not only refer to the provision of assistive or technological devices, but is also intrinsically linked to prospects of success in the labour market as well as in the broader community. HEIs are placed at the epicentre of implementing the Strategic Policy Framework in addition to various other policies, legislation, and regulations that are generally applicable within the higher education sector. HEIs play an indispensable role in establishing and transforming a co-ordinated higher education sector, as envisaged by the Higher Education Act 101 of 1997.[7] The aforementioned role cannot be interpreted in isolation, and must be observed through the lens of constitutional, legislative, policy, and societal obligations on the one hand, and commercial obligations on the other hand. In recent years, it has become apparent that the "traditional" perceptions of the role of higher education in South Africa have been imbued with commercial objectives, with specific emphasis on the principle of marketisation.[8]

With the aforementioned in mind, this chapter assesses the impact of marketisation on SWDs as consumers in HEIs. As a point of departure, the chapter investigates the precarious position of PWDs and a brief history of disability. Understanding the foundations of disability fosters a greater understanding of the classification of PWDs and their needs. In the interest of brevity, this chapter does not focus on the technicalities surrounding

Development and Education 229-242.

6 Mutanga (n 4) 231.

7 The preamble to the Higher Education Act 101 of 1997 makes reference to the redress that is required insofar as discrimination, equality, and issues of access are concerned.

8 Kruss "Distinct pathways: tracing the origins and history of private higher education in South Africa" 2006 *Globalisation, Societies and Education* 261-273. See also Cloete *et al Transformation in higher education: global pressures and local realities in South Africa* (2002) 9.

the definition of disability and it is assumed that SWDs have been adequately diagnosed. A two-fold legal framework is then introduced regarding SWDs and HEIs respectively. The principle of marketisation is discussed by utilising anecdotal evidence of the student experience on campus. The approach to marketisation is also discussed in the context of Covid-19 and socio-economic aspects that play an important role in the consumption of the knowledge created by HEIs. The chapter then concludes by making recommendations to advance the higher education experience of SWDs as a result of marketisation, whilst taking into account their distinctly South African realities.

2. A brief history of disability

2.1 Introductory comments

The etymology of the term "disabled" requires consideration. Prior to the use of this term, the use of the word "handicapped" was commonplace. The origin of the term "handicap" is traced back to betting games played between the 14th and 17th centuries, where two players would place their hands in a cap to pick articles placed in the cap simultaneously and to compare the values of the chosen articles. The players would then add a particular value to the lesser valued item to create equality between the value of both items chosen from the cap.[9] This principle of creating equality between unequal items was then extended to horseracing and golfing. Various sources erroneously indicate that the word "handicap" has its origins in persons with impairments having to beg with 'a cap in hand' due to their being unable to make a living.[10] It was only during the early 1900s that the concept was associated with having an impairment in a poster entitled "The Handicapped Child".[11] The term "handicapped" was utilised in favour of words such as "cripple", "retard", "dumb", "afflicted", or "invalid", which were deemed to be offensive at the time.

9 Admundson Handicap in Albrecht *et al* (eds) *Encyclopaedia of disability* (2006) 816.

10 Admundson (n 8) 816. See also Shapiro *Everybody belongs: Changing negative attitudes toward classmates with disabilities* (2003) 64.

11 Shapiro (n 9) 65.

2.2 Meaning of the term "disability"

The term "disabled" was predominantly used before the 19th century to describe how individuals were prevented from participating in various political, economic, or social spheres of the community due to certain laws.[12] Francis and Silvers make use of the example of the management and alienation of property being reserved for men exclusively, as a means to demonstrate how the principle of legal disability was applied in a different context.[13] By the late 19th century, the use of the term "handicap" was gradually uprooted in favour of the term "disabled".[14] One of the reasons for the shift was attributed to the progression of medical science that brought with it different ways to classify people according to their ailments or illnesses as well as what was regarded as being "normal".[15]

In the same manner that perceptions regarding disability were centred around the idea of normalcy in the 19th century, PWDs are still faced with various perceptions to date. This apposition of disability and normalcy gave rise to the term "normate" in the context of disability studies. Garland-Thompson coined the term to denote those in society whose bodily configurations and cultural capital allowed them to exert a certain level of power.[16] In simpler terms, the normate is perceived as everything that the PWD is not. While Garland-Thompson's contribution to disability studies, through the introduction of the concept of the normate, cannot be denied, it is also acknowledged that perceptions regarding normalcy shift depending on a particular type of society.[17] Considering the aforementioned, it then becomes understandable that it may be challenging to define the term "disability" in a universally understood manner that encompasses the actual lived experiences of PWDs, considering

12 Francis and Silvers "Perspectives on the meaning of 'disability'" 2016 *AMA J Ethics* 1025-1033. See Dolmage *Disability rhetoric* (2014) 9.
13 Francis and Silvers (n 11) 1026.
14 Davis *Beginning with disability: A primer* (2018) 10.
15 Baynton "Disability in history" 2006 *Perspectives* 44 5-7. See Francis and Silvers (n 11) 1027.
16 Dolmage (n 11) 10.
17 *Ibid.*

territorial borders, cultural considerations, socio-economic factors, and language.

2.3 Disability models

The language used in disability studies, as well as the use of various models of disability, are paramount in framing society's understanding of and response to disability. An understanding of the various models of disability creates the foundation for the awareness of the obstacles facing PWDs. Disability models serve as frameworks for interpreting disability in society and can provide awareness as to why certain perceptions exist and are pervasive. While the types of disability models identified in society are vast and range from a focus on economics to diversity, this study focuses on the religious or moral, medical, social, and socio-political models of disability. It is also important to note that in earlier days of civilisation, many stipulated models were widely applied without actually being classified as such. Additionally, it is important to remember that the implementation of models of disability would be dissimilar in developed as compared to developing states, particularly in Africa.[18] The identification of disability models is an important contribution to disability studies. According to Smart, disability models serve numerous important purposes. They:

- provide definitions of disability;
- provide explanations of causal attribution and responsibility attributions;
- are based on (perceived) needs;
- guide the formulation and implementation of policy;
- are not value-neutral;
- determine which academic disciplines study and learn about PWDs;

18 Van Staden "A strategy for the employment of persons with disabilities" 2011 thesis, South Africa 57.

- shape the self-identity of PWDs; and
- can cause prejudice and discrimination.[19]

2.3.1 The religious or moral model

This model is, arguably, the oldest of all models identified, and is premised on the belief that disability is an act of God or an omnipotent source in response to not complying with societal morals or religious decrees. Disability, in this instance, is then viewed as either punishment, a curse, or a blessing meted out in respect of the PWD or their relative(s).

Disability was perceived in one of two ways: either evil (relating to the devil or from witchcraft) on the one hand, or angelic on the other.[20] This dichotomy of approaches to PWDs often resulted in community members either caring for the said persons, seeking cures or treatments for disabilities, or wanting to engage in rituals to remove disabilities.[21]

It is interesting to note that certain definitions differentiate between the religious and moral models as distinct theories; however, this author believes these models are interwoven due to the impact of morality on religion and *vice versa.* Consideration of the religious or moral model of disability sheds light on our current approach to disability as well as the pluralistic nature of disability and religion alike. The relationship between religion and disability is complex and can be viewed from different vantage points, especially against the backdrop of Abrahamic religions.

In Judaism, Leviticus 19:14 provides as follows: "Thou shalt not curse the deaf, nor put a stumbling block before the blind".[22] While this particular verse has been interpreted numerous times to imply that PWDs should be treated like able-bodied persons

19 Smart "Models of disability: The juxtaposition of biology and social construction" in Rigger and Maki (eds) *Handbook of rehabilitation counselling* (2004) 25.

20 Clapton and Fitzgerald "The history of disability: A history of 'otherness'" 1997 *New Renaissance Magazine* http://www.ru.org/index.php/human-rights/315-the-history-of-disability-a-history-of-Otherness (09-11-2022).

21 Clapton and Fitzgerald (n 19).

22 Jewish Publication Society *Tanakh* (1917) 168.

and should be included in society, there are other instances where PWDs are perceived negatively. In Isaiah 56:10, the prophet Isaiah uses disability metaphorically to express his disdain for Israel's leadership at the time. He states: "His watchmen are blind: they are ignorant, they are all mute dogs, they cannot bark ".[23] In utilising the above metaphor, Isaiah frames disability in a harmful manner, albeit possibly unintentionally.

In Christianity, the Bible is dotted with references to persons who were blind, deaf, paralysed, mute, or had leprosy through the depiction of Isaac, Eli, Jacob, Ahijah and numerous others. Disability is linked to punishment for disobedience or sin, as is evidenced by God's infliction of paralysis and leprosy upon Jeroboam and Uzziah, respectively. Conversely, we are also introduced to a more inclusive approach to PWDs in the Christian Bible. In Jeremiah 31:8, God assures His remaining Israelite followers that they will return to Jerusalem, and endorses the status of PWDs as equals, as follows: "See, I will bring them from the land of the north, and gather them from the ends of the earth, among them the blind and lame".[24]

In Islam, the Qur'an does not specifically refer to the term "disability" but does refer to those who are disadvantaged.[25] The Qur'an 24:62 states: "There is no harm for the blind and there is no harm for the lame, and there is no harm for the sick".[26] This particular verse could be interpreted to display the manner in which PWDs and abled-bodied persons were regarded as being equal. Similarly, as with Christianity and Judaism, the Qur'an includes various references to being blind. The word "blind" (as well as derivatives thereof) is located in 32 places in the Qur'an and, in most instances, is utilised to convey instances

23 Jewish Publication Society (n 21) 646.

24 *King James Bible* (2017) 903 http://triggs.djvu.org/djvu-editions.com/BIBLES/KJV/Download.pdf (10-09-2022). The Jewish Bible also contains a similar reference disability in Jeremiah 31:8.

25 Bazna and Hatab "Disability in the Quran: The Islamic alternative to defining, viewing and relating disability" 2005 *Journal of Religion, Disability and Health* 5-12.

26 *The Qur'an* (translated by Maulawi Sher Ali) (2015) Part 18 https://www.alislam.org/quran/Holy-Quran-English.pdf (10-09-2022).

that describe persons as being blind in the divine sense, which unintentionally creates a negative connotation relating to PWDs.

While the religious or moral model enjoys very limited application in our current society, the remnants of this model are still found in certain sects of society where disability is viewed as a challenge or obstacle introduced by a higher power to test the faith or spiritual tenacity of the PWD. Over the years, and as a result of an evolution in the concepts of religion and morality, as well as the progressions in medicine and science, the medical model of disability gained global prominence.

2.3.2 The medical model

The medical model presupposes that disability is mainly a health and welfare matter, with an individualistic and dependency-based approach at its nucleus. This model regards disability as a medical conundrum that resides or lives solely in the body of the PWD and is sometimes referred to as the individual model. By use of an analogy, if one were to apply the medical model to a person who is wheelchair-bound, it would then mean that their disability would be limited to their medical diagnosis and that the all-encompassing solution to their disability would be a wheelchair or similar assistive device. This model's fissures become apparent when the person who is wheelchair-bound then encounters accessibility and inclusivity challenges that cannot be addressed from a medical perspective or with the use of the wheelchair.

According to Strax: "From the beginning of time, humankind has wrestled with the paradox of what to do with persons with disabilities. In ancient times, they were simply put to death. They were a burden to the tribe".[27] In the same vein, the medical model of disability is impairment-centred and ascribes the obstacles encountered by the PWD directly to their problems and not to society's failure to accommodate them. The medical model typifies PWDs as ailing, feeble, and incapable of securing employment.[28] It has also been argued that the medical model is

27 Strax "Consumer, advocate, provider: A paradox requiring a new identity paradigm" 2003 *Archives of Physical Medical Rehabilitation* 943-944.

28 Smart (n 18) 29.

the first formal disability model in the field of disability studies. Central to the medical model is the artificial contrast between one's impairment and what is viewed as conventional by society. This contrast is attributed to the notion that PWDs are fragile, debilitated, and unable to work.[29] The application of the medical model in HEIs could prove detrimental, as focusing on impairment alone could perpetuate numerous stigmas.

While an array of research and accompanying perspectives exists regarding the models of disability, there is a general consensus regarding the onset of the medical model in society. The eminence of the role of medical doctors and the development of modern medicine during the late 18th and 19th centuries gave rise to the medical model of disability.[30] While there has been a wealth of research to support the detrimental effects of a narrow application of the medical model of disability in society over the years, this particular model should perhaps be considered in a greater context.

2.3.3 The social model

The social model of disability was developed in direct response to the medical model and regards disability as being the result of the attitudes and perceptions of broader society and rather than a physical impairment. The social model introduced an adjustment of how PWDs were perceived after the medical model. Moreover, the social model has led to numerous advancements in altering perceptions surrounding disability, thus improving the day-to-day existence of PWDs.[31] In utilising the previously mentioned analogy of a person who is wheelchair-bound to explain the medical model, the social model would focus on the barriers that are prevalent in society that prevent the PWD from participating freely in society and not just the medical diagnosis that has led

29 Sullivan "The prevalence of the medical model of disability" 2011 *AHS Capstone Projects* Paper 13.

30 Council on Higher Education (n 3) 61; Also see Sullivan (n 28) 3; Wiita "What is the medical model? And why do people seem to hate it so much?" 2018 https://www.byhappenchance.com/blogroll/what-is-the-medical-model (04-09-2022).

31 Oliver "Defining impairment and disability: Issues at stake" in Barnes and Mercer (eds) *Exploring the divide* (1996) 29.

to the disability. In the context of HEIs, many SWDs are given support away from their able-bodied peers. The construct that could develop in this instance may be very narrow, further supporting the view that greater inclusion is required for SWDs in HEIs.

In stark contrast to the medical model, the social model considers elements such as inclusivity, access, and participation of PWDs in society as central to eliminating disability discrimination. The social model gained prominence as a result of the voices of PWDs who, outside of their medical diagnoses of disability, requested that they be accommodated more in society with regard to access to buildings and facilities at first. PWDs called for changes to the attitudes and ideologies that have, over the years, negatively impacted their treatment and acceptance by society. Such a call to action by PWDs is also one factor that distinguishes the medical and social models. The former was created by professionals to the exclusion of PWDs and to "fix" or cure those who were not regarded as normal, whereas the latter model was a result of the activism of PWDs themselves.

It is contended that the medical model has played an important role in the diagnosis and treatments of certain disabilities. It is argued by Shakespeare that caution should be exercised prior to disregarding the medical model in its entirety and that a balance should be struck when considering each of the disability models.[32] Shakespeare further argues that disability should be regarded from both the medical and social models, but that caution should be exercised so as not to place too much emphasis on individual or surrounding factors when considering disability models.[33]

While this chapter highlights three particular disability models that, arguably, form the foundation for other models, it is important to acknowledge the vastness of this particular area of disability studies and the concept of "disability". Various schools of thought have also developed regarding the approach to the various disability models. On one hand, there is a view that

32 Shakespeare *Disability Rights and Wrongs* (2006) 12.
33 Shakespeare (n 32) 12.

increased research in the field of disability studies would lead to greater understanding of PWDs. Several calls for research have been made by numerous parties with the aim of eliminating participation barriers that PWDs encounter in society.[34] On the other hand, there is also the view that if one gives too much attention to theorising about the various disability models, it may detract from the actual plight of PWDs insofar as equality, accessibility, inclusivity, and anti-discrimination are concerned.[35]

3. Applicable frameworks

3.1 Introductory comments

For purposes of this study, it is important to consider the legal frameworks surrounding SWDs as both members of the disability community as well as consumers in the higher education sector. This dichotomous approach allows for the identification of intersections as well as gaps in our approach to SWDs.

3.2 The conceptual framework for SWDs as members of the disability community

The dawn of South Africa's new democratic and constitutional dispensation (specifically driven by section 9 of the Constitution of the Republic of South Africa, 1996) culminated in the introduction of legislation such as the Employment Equity Act (EEA)[36] and the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)[37] to promote substantive equality in relation to PWDs. While formal equality aims to treat everyone equally regardless of context, substantive equality seeks to atone for disadvantage. It is even argued that the current perceptions

34 World Health Organization. "World Disability Report" 2011 13 http://int/disabilities/world_report/2011/report.pdf (16-09-2022). Also see Department of Women, Children and People with Disabilities "Baseline Country Report to the United Nations on Implementation of the CRPD in South Africa 2008-2012" 2013 77.
35 Oliver *The Politics of Disablement* (1990) 10.
36 the Employment Equity Act (EEA)55 of 1998.
37 the Equality and Prevention of Unfair Discrimination Act (PEPUDA)4 of 2000. This legislation is applicable to SWD in any context outside of the Employment Equity Act 55 of 1998.

of substantive equality are too linear, as they often do not include issues such as addressing stereotypes, stigma, violence, and inclusivity.[38]

Section 9 of the Constitution provides that:

> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.[39]

To this end, the EEA was implemented in 1998 to eliminate unfair discrimination and to implement affirmative action measures in respect of previously disadvantaged groups. The EEA introduced the concept of "designated groups" (comprising black people, women, and PWDS) as the intended beneficiaries of affirmative action measures. Those who are classified as "designated employers" in the Act are mandated to implement affirmative action measures as defined by section 15.[40] In addition to the

38 See Fredman "Substantive equality revisited" 2016 *IJCL* 712-727.
39 Constitution of the Republic of South Africa, 1996 (hereafter "the Constitution").
40 The affirmative action measures identified in s 15 of the Employment Equity Act 55 of 1998 must include mechanisms to identify and eliminate barriers experienced by PWDs in the workplace. Additionally, designated employers are required to promote diversity, equitable representation, retention and

affirmative action measures contained in the EEA, SWDs may, as prospective employees, be impacted by the provisions of the EEA that prohibit unfair discrimination.

While it is useful to consider the prospective position of SWDs in the workplace, it is also important to consider the position of SWDs in their daily lives outside of employment. PEPUDA was promulgated in 2000 to also give effect to section 9 of the Constitution.[41] This Act also seeks to promote equality by preventing and prohibiting unfair discrimination as well as preventing and prohibiting hate speech. Insofar as possible intersections between the EEA and PEPUDA are concerned, section 5 of PEPUDA provides that the aforementioned legislation does not apply to persons and matters falling within the ambit of the EEA.[42]

3.3 The conceptual framework for higher education

The term "higher education" is used to identify the period of education that follows secondary education. Due to the impact of the legacy of apartheid on the South African educational landscape, it is vital to consider a brief history of higher education. In 1916, the Union of South Africa passed the University of South Africa Act.[43] This legislation led to the establishment of the University of South Africa. The year of 1916 also gave rise to the Joint Matriculation Board for purposes of curriculum design and regulating examinations and, ultimately, entrance to universities.[44] These events are to be viewed against the

development of suitably qualified individuals forming part of the designated groups. Designated employers are also required to reasonably accommodate PWDs within the ambit of the EEA and the ancillary Code of Good Practice on Employment of Persons with Disabilities of 2015.

41 the Constitution (n 39).

42 The EEA is applicable to certain employees as well as designated groups and employers, whereas the PEPUDA binds the State and all persons. It is also important to note that legal proceedings in terms of the EEA are, generally, instituted in the High or Labour Court and matters that fall within the ambit of the PEPUDA are instituted in the Equality Court.

43 the University of South Africa Act12 of 1916.

44 Herman "School-leaving examinations, selection and equity in Higher Education in South Africa" 1995 *Comparative Education*

backdrop an increase of British residents entering South Africa after winning the South African War. The urge of the British to introduce Anglicisation throughout South Africa had numerous effects. An increase in British foreign nationals entering South Africa, with varying qualifications, was observed, which was then countered by Afrikaner nationals who wanted to introduce their own educational programme, focused on Christianity.[45]

Over the next four decades, the number of higher education institutions in South Africa increased by the time the National Party came into power in 1948.[46] During its tenure, the National Party introduced various segregation-focused policies and legislation – such as the Group Areas Act[47] and the Bantu Education Act[48] – that would impact the higher education sector. The Group Areas Act forced physical segregation between races, which meant that persons of colour would not have access to the same HEIs as their white counterparts. The Group Areas Act is often referred to as the keystone of the National Party's segregation policies.[49] The Bantu Education Act was promulgated to create a distinct education system for black students, further promoting segregation and white supremacy.[50] This legislation placed the education of persons of colour under the control of the government and was aimed at limiting their education to unskilled labour. The role that the Bantu Education Act continues to play in HEIs cannot be oversimplified. Many graduates, including SWDs, remain financially responsible for numerous ascendants and descendants due to the lower education levels and incomes pervasive in some black homes across generational lines.[51]

261265.

45 Raju "The historical evolution of university and technikon education and training in South Africa: implications for articulation of LIS programmes" 2004 *Innovation* 1-12.

46 MacMillan "Christian National Education" 1967 *Theoria* 43-45.

47 the Group Areas Act 41 of 1950.

48 the Bantu Education Act 47 of 1953.

49 See Schoombee "An evaluation of aspects of group areas legislation in South Africa" 1987 thesis, South Africa 1.

50 See Anderson "To save a soul: Catholic mission schools, apartheid, and the 1953 Bantu Education Act" 2020 *JRH* 149-155.

51 Whitelaw and Branson "Black tax: Do graduates face higher remittance responsibilities?" 2020 *SALDRU* 1-5. https://www.opensaldru.uct.ac.za/bitstream/handle/11090/1000/2020-black-

After democracy prevailed in South African in 1994, the Higher Education Act[52] was promulgated to regulate higher education, create the Council on Higher Education, elect various office bearers, provide for the creation of private education institutions and to deal with matters incidental to establishing and funding public universities. In its preamble, the Act states as follows:

> Whereas it is desirable to: ...
>
> Redress past discrimination and ensure representivity and equal access;
>
> Provide optimal opportunities for learning and creation of knowledge;
>
> Promote the values which underlie an open and democratic society based on human dignity, equality and freedom;
>
> Pursue excellence, promote the full realization of the potential of every student and employee, tolerance of ideas and appreciation of diversity...[53]

Taking the above into consideration, various intersections can observed between the preamble of the Higher Education Act of 1997 and section 9 of the Constitution.[54] In 2018, the Department of Higher Education and Training (DHET) published the Strategic Policy Framework on Disability for the Post-school Education System. This policy framework is lauded as being the first policy document to indicate the government's stance insofar as SWDs in HEIs are concerned.[55] The Strategic Policy Framework was created as a result of the White Paper for Post-School Education and Training that was launched in 2014. At the launch of this White

tax-siyaphambili.pdf?sequence=1 (27-09-2022). The term "black tax" ordinarily refers to the financial contributions made by black professionals to family members who are in need of financial assistance.

52 the Higher Education Act 101 of 1997.

53 *Ibid.*

54 The themes created in the preamble of the Higher Education Act are congruent with s 9 of the Constitution and the legislation that has been enacted to give effect to the principle of equality.

55 Government of the Republic of South Africa "Strategic Policy Framework on Disability for the Post-school Education and Training System" 2018 2.

Paper, Minister of Higher Education, Science and Technology Blade Nzimande acknowledged that, despite the existence of international conventions, legislation, policies, and guidelines, the management of disability in HEIs was disjointed.[56] The scattered approach to disability by HEIs necessitated the creation of the strategic framework. Nzimande also noted that current programmes for SWDs operate in isolation from "mainstream" programmes to bring about diversity and transformation.[57] This particular approach by HEIs can again be understood by way of Gallagher's analogy of the "land of the cripple", discussed earlier. In operating separately from other programmes, the structures within HEIs place more reliance on the medical model of disability without consideration of the social context of disability in HEIs and communities surrounding SWDs. The Strategic Policy Framework is divided into four parts that provide context regarding the document's purpose, approaches to disability, and the strategic intent implementation of the policy. At its core, the framework identifies various ways that HEIs can standardise their approaches to SWDs. The framework suggests the standardisation of models and approaches[58] to a disability, support services, data reporting, and institutional policies. Regarding teaching and learning, the framework calls for pedagogical practices that consider inclusivity and the social context.[59]

Physical access to HEIs plays an important role in the day-to-day lived experiences of SWDs. To this end, the framework suggests audits to assess accessibility. The way institutions address their budgeting process should also be considered, as there is a misconception that all assistive devices are expensive.[60] While the framework's intent is understood, this document has not escaped criticism. Mutanga questions why the policy framework places the responsibility for SWDs solely on the

56 Government of the Republic of South Africa (n 56) 13.
57 *Ibid.*
58 The models of disability influence how disability is classified and approached. Standardisation could be helpful in the case of psycho-social disabilities that cannot be seen with the naked eye.
59 Government of the Republic of South Africa (n 56) 57.
60 *Ibid.*

shoulders of the DHET and[61] ultimately HEIs, with no mention of other government departments, the private sector, or the SWDs themselves. Creating an inclusive and diverse HEI for SWDs necessitates support and input from various stakeholders to ensure that proposed solutions are robust, useful, and cost-effective. Another crucial oversight noted by Mutanga is that all SWDs were regarded as the same, as if with similar needs. To illustrate, the level and frequency of support required by a student who is wheelchair-bound and another student who has a mental disability are distinct. A failure to recognise this aspect would edge SWDs away from substantive equality.

4. Marketisation and SWDs

"Marketisation" refers to a global phenomenon that regards the HEI as a business that offers education as a commodity to students, who are identified as consumers.[62] Marketisation implies that HEIs are constantly evolving to meet the needs of the market. Marketisation has several advantages, such as improving HEIs through competition, being responsive to the labour market's needs, and creating "non-traditional" mechanisms to generate revenue.

The impact of marketisation in South Africa was, perhaps, more evident during the Coronavirus-induced lockdown that commenced on 30 March 2020. Students and academics had to augment their teaching, learning, and assessment approaches which, for many, meant that lectures and assessments migrated to a virtual campus. Marketisation has additional benefits, such as increased private investment in education and greater university access.[63] Conversely, it is argued that, in certain instances, marketised HEIs may yield to students' demands on account of the

61 Mutanga *et al* "South Africa's new higher education disability policy is important, but flawed" *The Conversation* 2022 https://theconversation.com/south-africas-new-higher-education-disability-policy-is-important-but-flawed-99703 (20-09-2022).

62 Bolsmann and Uys "Pre-empting the challenges of transformation and marketisation of higher education: A case study of the Rand Afrikaans University" 2012 *Society in Transition* 173-179.

63 Brown "The marketisation of higher education: issues and ironies" 2015 *New Vistas* 1-6.

adage that "the customer is always right". During the COVID-19 pandemic, HEIs were impacted by governmental regulations, cost constraints, and revising their pedagogical approaches, all while remaining competitive within the South African higher education sector. Students – particularly those who resided on campus prior to the COVID-19-induced lockdown and who subsequently were forced to leave campus – were faced with various socio-economic realities at home, such as lack of electricity and running water, hunger, the cost of data, no access to laptops or devices, and managing their mental health while attending classes remotely.[64] During a student housing conference hosted by the University of Cape Town, the importance of cultivating a safe space for students to address their mental health issues was highlighted.[65] HEIs throughout South Africa were now faced with marketisation viewed through the lens of various socio-economic factors faced by students and lecturers.

The position of SWDs in the context of marketisation is even more ominous. SWDs are faced with a double-edged sword. SWDs experience conventional issues faced by students daily (such as those highlighted above), and then these are then compounded by challenges experienced at HEIs that are specifically linked to their particular disability. These issues include, but are not limited to, approaches to disability, access, discrimination, stigma, violence, and their particular mode of learning in certain instances. In some instances, SWDs deal with accessibility issues in their respective lecture halls and then again at their campus residence. In a study conducted in 2021 that interviewed ten University of South Africa SWDs,[66] various themes were identified. Digital literacy, loss of human dignity, duration of online assessments,

64 Whitelaw *et al* "Learning in lockdown: University students' academic performance during COVID-19 closures" 2022 *SALDRU Working Paper Series* 1-3.

65 UCT News "Emphasis on mental health at student housing conference" 2021 https://www.news.uct.ac.za/article/-2021-11-18-emphasis-on-mental-health-at-student-housing-conference (23-10-2022).

66 Ngubane "Online learning can be hard for students with disabilities: how to help" 2021 *UNISA News* https://theconversation.com/online-learning-can-be-hard-for-students-with-disabilities-how-to-help-158650 (23-10-2022).

assistive devices, and logistical problems were highlighted. Issues pertaining to lecturers that were ill-prepared to work with SWDs and difficulties pursuing qualifications in fields of science, technology, engineering, and mathematics also came to the fore.[67] According to Ntombela:

> When all HEI operations were moved online due to lockdown protocols, it exposed how under-prepared we were in supporting students with disabilities. The transfer of academic programs to online spaces brought various challenges to the teaching and learning process, and all students suffered in one way or the other.[68]

5. Conclusion

Taking the above into consideration, it is apparent that marketisation affects students in HEIs throughout South Africa and globally. This chapter highlights a fragmented approach to SWDs, and PWDs in general. Firstly, SWDs are sometimes given support in HEIs through structures that are removed from "mainstream" services used by able-bodied students. This approach infers a greater focus on the medical model of disability and not the social context surrounding each SWD. At a governmental level, South Africa has promulgated various pieces of legislation, in addition to policy frameworks and white papers, to address the needs of PWDs. The absence of a single document to address the gamut of issues faced by PWDs further obscures their attainment of substantive equality.

While marketisation has brought about many positive results, it seems counterproductive that HEIs have improved their global footprints, revenue, technological approaches and infrastructure, without vigorously addressing the unturned stone – SWDs. Greater awareness is required amongst lecturers about disabilities to allow SWDs a fair opportunity at success.

67 Ngubane (n 68).
68 Ntombela "Reimagining South African higher education in response to COVID-19 and ongoing exclusion of SWDs" 2020 *Disability & Society* 534-536.

Support structures for SWDs often operate in the periphery of higher education activities. It is suggested that HEIs augment their marketisation approaches to introduce uniform rules for the treatment of SWDs in the higher education sector, broadly.

A co-ordinated approach to SWDs is aligned to the co-ordinated approach envisaged by the Higher Education Act.[69] Such uniformity may assist in identifying and entwining disability issues throughout HEIs. Once issues are identified, HEIs would then be tasked with highlighting the role that each member of the HEI community plays in their particular interaction with SWDs. An identification of each stakeholder's role deviates from the approach in Strategic Policy Framework on Disability for the Post-School Education and Training System[70] and considers disability within its particular social context. Regardless of the fragmented approach to disability in South Africa, it remains crucial to observe disability as an "us" and not a "them" matter as this perspective assists in, arduously, removing the bricks surrounding disregarded inhabitants of Gallagher's "land of the cripple".

69 See Government of the Republic of South Africa (n 56).
70 *Ibid.*

Chapter 9

Infusing Decoloniality into the Pedagogy of International Law at South African Tertiary Institutions

Swikani Ncube[1]
Faculty of Law,
University of Johannesburg

Jentley Lenong[2]
Faculty of Law,
University of Johannesburg

Abstract

The complicity of the regime of international law and the Global North in legally justifying and sustaining colonial projects is patent. Decoloniality – as the new logic and milieu of power composed and comprehended in the aftermath of colonialism – challenges the benevolence of contemporary international law pedagogy. A plethora of research occupies this theme, although the resultant findings have not found their way into the teaching of international law at South African universities. This chapter proposes a framework that informs the necessary pedagogical transformation for the incorporation and teaching of decoloniality in the international law curriculum at tertiary institutions in South Africa. To achieve this objective, the chapter poses questions, answers to which we hope will contribute

1 LLB, LLM, LLD. Senior lecturer in the Department of Practical Business Law at the University of Johannesburg.
2 LLB, LLM. Lecturer in the Department of Practical Business Law at the University of Johannesburg.

to the process of conceptualising an "African University appropriate" pedagogy of international law. The overarching question is: Does decolonisation in the teaching of international law involve infusing African philosophies such as *Ubuntu* into the process of teaching, or does it call for a reconfiguration of the very foundations upon which the teaching material is based? A secondary question to this is: Can the pedagogy be decolonialised without first decolonising the stratified nature of international law and international relations? The assertion that, in teaching international law, "deciding where to begin is as difficult as deciding where to end" suggests that there are multiple perspectives to international law and the presentation of "universal" cornerstones must be questioned, if not resisted. Indeed, the "universality" of international law has not only been challenged but has been proven to be a fallacy. In assessing this layered conclusion, the presentation of Europe's preferences as "universal" has been the easiest bias to call out. Beyond that, critical questions on, for example, grounding international law in global history, localised and sub-regional approaches, and the production of knowledge continue to invite debate. To this end, the chapter also asks if the focus on overlooked histories of international law as the approach of Third World Approach to International Law (TWAIL) scholarship has been instructive in conceptualising a decolonised pedagogy.

1. Introduction

The "universality" of international law has not only been challenged but has been proven to be a fallacy. However, in this layered conclusion, the presentation of Europe's preferences as "universal" has been the easiest bias to call out. Beyond that, critical questions such as grounding international law in global history, localised and sub-regional approaches, and the production of knowledge continue to invite debate. The assertion that, in teaching international law, "deciding where to begin is as difficult as deciding where to end",[3] contextualises the

3 Attar and Abdelkarim "Decolonising the curriculum in international law: Entrapments in praxis and critical thought" 2021 Law and Critique 42-42.

multiplicity of the "international" in international law. However, because the Eurocentrism and imperialistic nature of international law can no longer be ignored, there is a pressing obligation on South African universities to revisit their pedagogical approaches to the discipline. As a contribution to that discourse, this chapter proposes a framework that informs the necessary pedagogical transformation for incorporating and teaching decoloniality in the international law curriculum at tertiary institutions in the country. To achieve this objective, the chapter poses questions, answers to which we hope will contribute to the process of conceptualising a "South African university appropriate" pedagogy of international law. The overarching question is: Does decolonisation in teaching international law involve infusing African philosophies such as *Ubuntu* into the teaching process, or does it call for a reconfiguration of the very foundations upon which the teaching material is based?

The chapter is presented in five parts. After the introduction, Part 2 sketches the current South African discourse on decoloniality. To achieve this, we draw on national debates on the decolonisation and deracialisation of land ownership patterns in the country, decolonising the judiciary and finally, the #RhodesMustFall and #FeesMustFall movements that engulfed South African public universities in 2015-2016. Part 3 discusses the fallacy of universalism in international law and further turns to the question of rationality in vindicating the discipline. Part 4 responds to the question: Why a decolonised pedagogy of international law? Part 5 outlines proposed approaches to teaching international law at South African universities that can potentially aid the decolonisation agenda. Part 6 is the conclusion.

2. Decolonisation: The South African discourse

2.1 The Fallist movements

As centres of knowledge production, universities serve as spaces of ideological contestation as well as mirrors of society's – and a country's – politics, systems, and progression or regression in the pursuit of excellence. In this matrix, academics and students

combine – not by choice, but by virtue of their positions – to shape conversations and influence outcomes. Such was the case with the Fallist movements that engulfed public universities in South Africa in 2015 and 2016. The genesis of these movements is traced to an incident at the University of Cape Town (UCT) in March 2015, where a student threw human excrement at the statue of Cecil John Rhodes, which stood on the university's grounds.[4] This act, framed as a rejection of racism and colonialism, drew significance from the history of the man whose statue was being defiled.[5] And so, the #RhodesMustFall (#RMF) movement was born – and, with-it, numerous demands that struck at the core of these higher education institutions' (HEIs) management, policies, and content and methods of teaching. Later in 2015, an offshoot movement gained prominence under the name #FeesMustFall (#FMF). Unlike the former, this movement, as the name suggests, had a singular objective: implementing free education across all public universities. Inevitably, these Fallist movements sparked an academic stampede, as various perspectives anchored on demands articulated by student activists made their way into published work. Our understanding of that period and the students' demands is enhanced by the publication of several first-hand accounts by student leaders at different universities.[6] Even more, we have perspectives from "the other side", as two of the vice-chancellors at the time have also penned their views.[7]

The #RMF movement forced the country to confront issues of race, exclusion, decolonisation, and the influence of class on

4 Maylam "Student 'Fallism' in South Africa, 2015–16: Some diverging analyses" 2020 *Journal of Southern African Studies* 1237 1238-1239.

5 Cecil John Rhodes was an ardent believer in British imperialism. See generally Thomson *Cecil John Rhodes* (1947).

6 Godsell and Chikane "The roots of the revolution" in Booysen (ed) *Fees Must Fall: Student revolt, decolonisation and governance in South Africa* (2018) 68; Ramaru "Black Feminist reflections on the Rhodes must fall Movement at UCT" in Kwoba, Chantiluke, and Nkopo (eds) *Rhodes Must Fall: The struggle to decolonise the racist Heart Empire* (2018); and Nkopo "Of. Air. Running. Out" in Kwoba, Chantiluke, and Nkopo (eds) *Rhodes Must Fall: The struggle to decolonise the racist Heart Empire* (2018) 159.

7 Jansen *As by Fire: The End of the South African University* (2017); Habib *Rebels and Rage: Reflecting on #FeesMustFall* (2019).

both students and staff. For Ramaru, a student activist at UCT, they wanted, amongst other things, the ditching of a Eurocentric curriculum as well as the perception that white academics are superior.[8] For Athinangomso Nkopo, whose account captures events at the University of the Witwatersrand (Wits), amongst their demands were "some Biko in the curriculum" and equality between staff of different races.[9] In a volume edited by Malose Langa, contributors zoom in on protests at nine universities and record student demands as well as incidental developments.[10] From these, we gain invaluable insights into how students framed their demands. More importantly, the chapter by Vilakazi reminds us that these movements were by no means homogenous across HEIs.[11]

What is clear, however, is that these protests were not a sudden event. At UCT, for example, questions surrounding the institution's questionable relationship with racist tendencies were already part of the institutional transformation discourse before March 2015. Significantly, the question "If UCT is not racist, why is Cecil John Rhodes's statue still there?" had been posed three years earlier.[12] However, the significance of this observation does not lie in its potential to correct a factual error. Instead, it lies in what it tells us about the future. If the protests – to the scale seen during 2015 and 2016 – had been simmering since the dawn of democracy, they equally did not disappear with the fizzling out of the protests. Consequently, the question of decolonisation within HEIs remains as topical today as it was in 2015. What this means is that there is an obligation on all stakeholders to continuously inquire into what decolonisation means to their clients, the students, and further craft plans to achieve that decolonisation – as defined. One student activist tells us that although they had differing ideas about what decolonisation is, the movement enabled them to have conversations about what it meant to them

8 Ramaru (n 4) 151.
9 Nkopo (n 4) 159.
10 Langa (ed) *#Hashtag: An analysis of the #FeesMustFall Movement at South African universities* (2017).
11 Vilakazi "Tshwane University of Technology: Soshanguve Campus protests cannot be reduced to #FeesMustFall" in Langa (n 8) 49.
12 Godsell and Chikane (n 4) 57.

and how they could achieve it.[13] This admission tells us that the conversation on decolonisation is an ongoing one, and as HEIs attempt to respond to student demands – while at the same time remaining loyal to their core business – a localised meaning of a decolonised university will have to be found.

2.2 The land question

Land ownership patterns, and the occupancies of land-based spaces in South Africa, are steeped in colonialism, and by extension its concomitants, like racism. As McCusker, Mosely and Ramutsindela observe, "[t]he trajectory of land policy and group dynamics is embedded in the broader political history of the country".[14] Part of that history is vividly captured by Tembeka Ngcukaitobi's *The Land is Ours*.[15] In it, he narrates the dispossession of natives, particularly the Xhosa in the Eastern Cape and the San in the Cape, and further demonstrates the close correlation between the coloniser's appetite for the land, as well as that which lay beneath it – the minerals.[16] Consequently, the fight for independence hinged on two claims: political independence and the legal entitlement to determine the land ownership policies of the country. In its African Bill Of Rights in 1923, the African National Congress (ANC) pronounced as one of its five principles, the entitlement of Africans to their land as "children of the soil" who "have a God-given right to unrestricted ownership of the land".[17] It is for this reason that at independence, the ANC (led by Nelson Mandela) sought to move on addressing land ownership disparities through a Reconstruction and Development Programme (RDP)[18], which identified land redistribution, land restitution, and land tenure reform as strategies to address the injustices of the past. Three years later, in 1997, the Department

13 Ramaru (n 4) 150.
14 McCusker, Mosely and Ramutsindela *Land reform in South Africa: An uneven transformation* (2015) 40.
15 Ngcukaitobi *The land is Ours: Black Lawyers and the Birth of Constitutionalism in South Africa* (2017).
16 Ngcukaitobi (n 13) 11-38.
17 Ngcukaitobi (n 13) 4.
18 The African National Congress (ANC) "The Reconstruction and Development Programme – RDP" 1994.

of Land Affairs published the White Paper on Land Reform, which adopted the same strategies as those outlined in the RDP.[19]

The conversation on decolonising land ownership patterns in the country is necessary. In her review of Ngcukaitobi's *The Land is Ours*, Brown notes that "[i]n the context of current debates surrounding land reform and land redistribution," the book "provides a timely evidentiary record of the deliberate and violative removal and dispossession of black South Africans from the land".[20] For Madlingozi, the book "is a timely and valuable contribution…to discussions about the role of law in the 'radical trans-formation' or 'decolonisation' of society".[21] Indeed, at independence, black South Africans occupied only 13% of the national land.[22] While this was not alarming at the time, Yanou comments that it presented the new government with a pressing and potentially explosive problem.[23] However, the fact that this pattern still persists more than 25 years after independence has induced a sense of disappointment, despondency, and anger amongst black South Africans. When the Department of Rural Development and Land Reform released its Land Audit Report in 2018 – which showed that whites occupy 72% of all agricultural land, while blacks have a mere 4%[24] – proponents of land expropriation without compensation were invigorated and accusations of dereliction of duty were levelled against the ANC. Fearful of losing political capital, the ANC had, at its policy conference the previous year in 2017, adopted a resolution to

19 Department of Land Affairs (DLA) "Department of Land Affairs White paper on Land Policy" 1997 (hereafter "White Paper on Land Reform").

20 Brown "Tracing the origins of South African constitutionalism" 2019 *South African Journal of Science* 115 115.

21 Madlingozi "South Africa's first black lawyers, amaRespectables and the birth of evolutionary constitution – a review of Tembeka Ngcukaitobi's *The land is ours: South Africa's first black lawyers and the birth of constitutionalism"* 2018 *South African Journal on Human Rights* 517 517.

22 Department of Rural Development and Land Reform *Land Audit* (2013) 8.

23 Yanou *Dispossession and Access to Land in South Africa: An African Perspective* (2009) 49.

24 Department of Rural Development and Land Reform *Land Audit Report 2017: Phase II: Private Ownership by race, gender and nationality* (2018).

pursue the amendment of the property clause and to make provision for land expropriation without compensation.[25] In February 2018, an Economic Freedom Fighters (EFF) motion calling for Parliament's Constitutional Review Committee to consider possible amendments to section 25 was adopted with the support of the ANC, as attempts are made to redress the land ownership imbalance. A thorough account of developments since is beyond the scope of this chapter; suffice to say that a bill for the 18th amendment to the country's constitution has been drafted.

Iyer and Calvino are kind when they say that land reform has stagnated.[26] Rather, the dominant conclusion is that the ANC has failed dismally, and the question of land reform has been politicised.[27] While we agree with the observation that the government has failed, we are not persuaded that the issue has suddenly become politicised. In our view, land ownership has always been political and until such a time that the patterns reflect the demographics of the country, what began with the "original sin" (the initial dispossession) will remain political and polarising. As noted in the White Paper, "a sound land policy is one of South Africa's preconditions for the attainment of peace, reconciliation and stability".[28]

3. The politico-judicial standoff

Over the years, the doctrine of separation of powers has taken centre stage in South Africa as the judiciary has increasingly been called upon to adjudicate matters that present a delicate balance

25 Mkokeli "The EFF is in Charge – The ANC follows us: Malema has Ramaphosa 'where he wants him'" 2018 *Timeslive* https://www.timeslive.co.za/sunday-times/business/2018-08-20-eff-is-in-charge-anc-follows-us-malema-has-ramaphosa-where-he-wants-him/ (10-11-2022). See also Ntsholo "Mainstream Media's shockingly antagonistic attitude to the EFF" 2018 Daily Maverick https://www.dailymaverick.co.za/opinionista/2018-03-29-mainstream-medias-shockingly-antagonistic-attitude-to-the-eff/ (10-11-2022).

26 Iyer and Calvino "Expropriation as an effective tool for land reform: a legislative perspective" in Akinola, Kaseeram and Jili (eds) *The new political economy of land reform in South Africa* (2020) 26.

27 Akinola, Kaseeram and Jili (n 24) 2.

28 White paper on Land Reform (n 17) 22.

between law and politics. In exercising their judicial review mandate, the country's courts have made pronouncements that have elicited strong disapproval from the legislature and the executive, and with it, a charge of judicial overreach. Initially, only the ANC complained that their mandate to govern was being impeded. As then-President Jacob Zuma put it, the opposition was using the courts to "co-govern" without a mandate.[29] As more and more politicians expressed displeasure with the judiciary, an unprecedented meeting between the president and the country's then-chief justice was called.[30]

However, the charge of judicial overreach against the judges of the apex court soon came from one of their own. In *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another*, the chief justice, in a dissenting judgment, labelled the position adopted by his colleagues a "textbook case of judicial overreach – a constitutionally impermissible intrusion by the Judiciary into the exclusive domain of Parliament".[31] Predictably, this aroused much debate, both political and legal. Although the dissenting judgment had no practical consequences at law, it played into the hands of those who had for a long time accused the courts of encroaching into spaces constitutionally reserved for other arms of government.

While the charge of judicial overreach is significant, it pales in comparison when pitted against claims that, in fact, above all else, what the judiciary needs is decolonisation. It must be noted in this context that because of the history of the country, judicial transformation is a constitutional imperative. In its guidelines on the appointment of judicial officers, section 174(2) provides that the "racial and gender composition of South Africa must be considered". That said, the call for decolonising the judiciary looks beyond transformation, and suggests that

29 Gallens "Zuma slates opposition for challenging 'majority' decisions in courts" 2017 News24 https://www.news24.com/News24/zuma-slates-opposition-for-challenging-majority-decisions-in-courts-20170630 (10-11-2022).

30 O'Reilly "Meeting between the President and Chief Justice" 2015 September *De Rebus* 12.

31 *Economic Freedom Fighters v Speaker of the National Assembly* 2018 (2) SA 571 (CC) par 223.

structural challenges demand more than just racial changes to how the judiciary is constituted. Writing in 2008, Wesson and Du Plessis argued that in addition to racial considerations, "judicial transformation must incorporate changes in the manner in which judges are appointed...[and] the underlying attitudes of the judiciary must change".[32] Their reference to attitudes leans towards decolonisation. While the racial distribution is easy to ascertain and perhaps correct, the attitude element is impossible to measure and, therefore, not easy to address.

In January 2022, the ANC's Lindiwe Sisulu penned an open letter in which she directed serious accusations at the judiciary, particularly the judges of the apex court. However, unlike in previous accusations that centred on race, she took aim at black judges, questioning their allegiances and making reference to colonised mindsets.[33] The gravity of the allegations prompted a response from then-Acting Chief Justice Raymond Zondo, who, at a press briefing, accused her of making statements that were devoid of facts but pregnant with insults.[34] Despite pressure from the president to apologise, Sisulu stood her ground and refused to apologise.[35] Her party's then-secretary general, Jessie Duarte, defended her, asserting that Sisulu had a right to freedom of expression.[36] The same Duarte had in 2021 been forced to apologise to Judge Zondo for penning an opinion piece in which she questioned the value of the inquiry that he chaired and its role

32 Wesson and Plessis "Fifteen years on: Central issues relating to the transformation of the South African judiciary" 2008 *SAJHR* 187-192.

33 Sisulu "Lindiwe Sisulu: Whose law is it anyway?" 2022 *Mail and Guardian* https://mg.co.za/opinion/2022-01-08-lindiwe-sisulu-whose-law-is-it-anyway/ (08-11-2022).

34 Ferreira "Sisulu 'crossed line' and must withdraw 'insult' to judiciary – Zondo" 2022 *Mail and Guardian* https://mg.co.za/politics/2022-01-12-sisulu-crossed-line-and-must-withdraw-insult-to-judiciary-zondo/ (08-11-2022).

35 Ferreira "Sisulu rejects Ramaphosa's apology in her name" 2022 *Mail and Guardian* https://mg.co.za/politics/2022-01-20-sisulu-rejects-ramaphosas-apology-in-her-name/ (08-11-2022).

36 *The South African* "More Sisulu drama! Jessie Duarte Slams 'attacks' on Lindiwe Sisulu" 2022 https://www.thesouthafrican.com/news/lindiwe-sisulu-jessie-duarte-anc/ (08-11-2022).

in a democratic system.[37] In addition, she was recorded expressing reservations about former President Jacob Zuma appearing before Judge Zondo at the same inquiry, remarking that "it's not like we can't see what's wrong with Zondo".[38] Similarly, the ANC in KwaZulu-Natal has accused judges of being influenced by factors outside the environment of the courts, adding that "the judiciary seems not to have transformed beyond employment equity".[39] The South African Communist Party's (SACP) Blade Nzimande has also weighed in, warning that the country is at the risk of becoming a judicial dictatorship.[40]

A call for a transformed judiciary has also come from within. In 2021, embattled Western Cape Judge President John Hlophe said, "any judiciary which is still white male-dominated can never be construed as legitimate. It will continue to be regarded as a judiciary which was imposed to serve the interests of the white minority government".[41] This criticism towards his colleagues added to the debate on the state of the judiciary and its contribution to the broader transformation of the country. Although his troubles with the Judicial Services Commission (JSC) have been used to discredit him,[42] that a judge had previously

37 Khoza "Jessie Duarte apologises to Zondo for her comments in opinion piece" 2021 *TimesLive* https://www.timeslive.co.za/sunday-times/news/2021-02-14-jessie-duarte-apologises-to-zondo-for-her-comments-in-opinion-piece/ (08-11-2022).

38 Madisa "Leaked audio reveals how Jessie Duarte advised Jacob Zuma not to appear before state capture inquiry" 2021 *Sowetan Live* https://www.sowetanlive.co.za/news/south-africa/2021-04-13-listen-leaked-audio-reveals-how-jessie-duarte-advised-jacob-zuma-not-to-appear-before-state-capture-inquiry/ (11-11-2022).

39 Tandwa "ANC KwaZulu Natal slams Zondo, NEC and judiciary in organisational report, defends Zuma" 2021 *Mail and Guardian* https://mg.co.za/politics/2022-07-24-anc-kwazulu-natal-slams-zondo-and-judiciary-in-organisational-report-defends-zuma/ (10-11-2022).

40 Du Plessis "Nzimande slams judicial dictatorship" 2011 *News24* https://www.news24.com/News24/Nzimande-slams-judicial-dictatorship-20111217-2 (11-11-2022).

41 Mchunu "Judiciary is white male dominated says John Hlophe" 2021 *IOL* https://www.iol.co.za/mercury/news/judiciary-is-white-male-dominated-says-john-hlophe-79b41a2e-1883-4bcc-ab13-62c999b28a25 (10-11-2022).

42 Thamm "The rise and (slow) fall of John Hlophe the judge who almost took the judiciary down with him" 2022 *Daily Maverick*

resigned for making racist remarks meant that his views could not just be dismissed with contempt. Three years earlier, in 2017, Judge Mabel Jansen resigned from the bench after racist remarks made in a private conversation were shared on social media, prompting widespread condemnation.[43] This chapter does not attempt an appraisal of the judges in whose direction an accusatorial finger has been wagged. Instead, we simply acknowledge that those accusations have been made and that the decolonisation of the judiciary is part of the broader national conversation on ridding the country of pre-independence systems, cultures, privileges, and prejudices.

4. International law and the fallacy of universality

4.1 The rationality of decoloniality of international law

International law as a discipline has not embraced rationality. Some scholars have even argued that rational choice analysis has been resisted in the field.[44] How, then, does decoloniality impact rationality within international law and consequently as a legitimate scientific endeavour? Some see its normativity as sufficient to legitimise its existence, while others believe it can only be rationally underpinned within a legal positivist paradigm. For Green, international law's very existence and force depend on its immanent rationality.[45] Such an approach firmly attaches it to the state and negates elements of universal humanity. Consequently, the approach is utilitarian in nature, but only for the utility of the state. It would be challenging to elevate concepts such as human rights into such an approach as it would depend

https://www.dailymaverick.co.za/article/2021-09-08-the-rise-and-slow-fall-of-john-hlophe-the-judge-who-almost-took-the-judiciary-down-with-him/ (11-11-2022).

43 SA Government "Justice and constitutional development on Judge Mabel Jansen resignation" 2017 https://www.gov.za/nr/speeches/justice-and-constitutional-development-judge-mabel-jansen-resignation-5-may-2017-0000 (09-11-2022).

44 Keohane "Rational choice theory and international law: Insights and limitations" 2002 *The Journal of Legal Studies* 307-307.

45 Green "The precarious rationality of international law: Critiquing the international rule of recognition" 2021 *German Law Journal* 1613 1613-1634.

largely on a perfect union amongst all nation states for it to exist within international law legitimately. A further challenge, as observed by Orford, is how international law has aligned with the shifting ideals of the scientific method.[46] We argue, in this regard, that universal principles in international law should form the basis for comprehending the field's scientific rationality. Theoretical international law would then be the vehicle that ultimately leads to the production of universally applicable law. Through such an understanding, the scientific body of knowledge produced by international law as universal laws should not be *ad hoc.* Instead, it should be just, rigid, and lasting in addressing the complexities underlying human-international law relations.

However, the relationship that previously colonised societies have with international law is arguably schizophrenic. On the one hand, international law evidences reform, democratisation, and the introduction of human rights; on the other, it maintains global hegemony in its application and institutions. Consequently, teaching international law in previously repressed societies denotes voiding it of the lived experiences and localised cultural and contextual reason and thought. For example, in reflecting on Descartes's separation between reason or subject and body, Quijano and Ennis postulate that "... in Eurocentric rationality, the body was fixed as the object of knowledge, outside of the environment of subject/reason".[47] Thus, to argue for rationality in the way we perceive and conceptualise decoloniality of international law cannot be premised on producing a singular manner by which this process should be understood.

4.2 A new rationality of a decolonised pedagogy of international law

In exploring the value of a decolonised pedagogy of international law, the focus is to analyse one of the primary research questions: Can the pedagogy be decolonised without first decolonising

46 Orford "Scientific Reason and the discipline of international law" 2014 *European Journal of International Law* 369-370.

47 Quijano and Ennis "Coloniality of Power, Eurocentrism, and Latin America" 2000 *Nepantla: Views from South* 533 533-580.

the stratified nature of international law and international relations? Implicit in this question is the hegemonic nature of international law. Third World Approach to International Law (TWAIL) scholarship developed as an approach to deconstruct and introduce Third World value systems into the reasoning of international law. On the question of whether it truly offers a viable alternative within mainstream Western legal studies of international law, the answer is complicated.[48]

However, this prompts another question: Does this constitute a legal development or just the accommodation of a novel perspective on the teaching of international law? A frequently overlooked aspect of the decolonisation debate common to both international law and other disciplines is the question of legal development. Should the decolonisation pedagogy not be considered as natural on the path of enlightenment in the progressive development of the discipline? That a lacuna exists within the experiences and practices of previously colonised societies should naturally be the impetus for legal development which should include the notions of law and justice. Consequently, one would consider that the inclusion of a decolonised pedagogy of international law is a natural concomitant of legal developments in international law.

Concurrent to this is the dual nature or shared responsibility to develop the law both by the previous colonisers and the colonised. In reflecting on the American legal perspective of law and development, Friedman aptly takes the stance that "[i]gnorance about the relationship between law and development is not solely a problem of law in Third World countries".[49] He argues that a shared ignorance exists about the general relationship between legal systems and social systems. Legal development in international law, particularly, is in a constant state of distilling aspects germane to the legal norm and those touching on social norms. Friedman concedes that "[t]he legal missionaries abroad are merely exotic versions of legal missionaries inside our own country, reforming, arranging, codifying, and revamping the law

48 Attar and Tava "TWAIL Pedagogy – Legal Education for Emancipation" 2009 *Palestine Yearbook of International Law* 7-10.
49 Friedman "On legal development" 1969 *Rutgers Law Review* 11-13.

in a vacuum of theory".[50] Consequently, the need to appreciate the dual nature or shared responsibility is necessary and unavoidable for international law. One can assert that not considering decoloniality would remain a constant limitation in teaching international law, leading to distrust and legal uncertainty.

5. Why a decolonised pedagogy of international law?

The idea of formally interrogating the teaching of international law globally was first proposed at a regional meeting of the International Law Association (ILA) in Taiwan in 1998 by Professor Fred Soons, who was the ILA Director of Studies.[51] Consequently, the Committee on Teaching of International Law (CTIL) was established as a result of the positive outcomes of the deliberations during that session. In the following years, the work of the CTIL focused on seven themes, amongst them the *raison d'etre* of the international law course, new teaching techniques, and the place of international law in curricula: How do we ensure adequate attention to international law in university curricula?[52]

The work of the CTIL exposes that the teaching of international law has generally been overlooked, and a *laissez-faire* approach was followed, where the expert dictated the orientation of teaching and learning. This approach was further justified by a need to proliferate the presence of international law beyond academia. Different universities and institutions approach the teaching of international law in a variety of ways. The immediate consequence of this reveals the differences in outcomes flowing from this approach, and at the same time it produces challenges that are primarily similar.

50 Friedman (n 47) 13.
51 Botha and Gamble "Report of the International Law Association Committee on the Teaching of International: Hague Conference" 2010 1-2.
52 See Charesworth "Circular to ILA Members" 1999 *International Law Association*. See also Gamble "Preliminary Report of the Committee on the Teaching of International Law" ILA *Report of the Sixty-ninth Conference, London* 2000 1 208.

One of the challenges to moving away from the *laissez-faire* approach to teaching international law is the impact broadly on academic freedom. The differences in ideological and philosophical grounding between experts and different contexts do not lend themselves to normative rules or the objective advancement of theoretical frameworks. In the context of communities with a history of repression, the teaching of international law might be more focused on it being a mechanism of socio-political change, whereas in the Global North, the emphasis might be more on the procedural and practical application of international law within its institutions and other relevant forums. The ILA Committee on the Teaching of International Law, for instance, concluded in its 2010 report that although diverging views exist around establishing guidelines and best practices, it remains paramount that "[w]e must teach".[53]

In South Africa, the constitutional imperative to apply international law attaches practical consequences to the call for decolonised international law. In section 33, the country's Constitution[54] obligates our courts to interpret legislation in a manner consistent with international law.[55] For this reason, Botha argues that "[w]here international law is an integral/important part of the municipal legal system...a teacher has a positive duty to equip students for the use of international law in general practice".[56] However, a simple response to the question of why a decolonised pedagogy of international law would be valuable is that African universities and the contents and methods of teaching were established by Europeans to further their own interests, hence there is a need to create an Afrocentric

53 Botha and Gamble (n 49) 4.
54 Act 108 of 1996.
55 Indirect recognition of international law is further entrenched within the South African Constitution under s 231, which relates to international agreements, and s 232, that makes customary international law part of the law of the republic and notes the supremacy of the constitution or an act of parliament in relation to customary international that is inconsistent with it.
56 Botha "Teaching international law in South Africa ten years into democracy: Notes and comments" 2004 *South African Yearbook of International Law* 243-249.

university.[57] As Asante puts it, colonisation was not only about physical territory, but intellectual territory as well. Consequently, the process of decolonisation is incomplete if the centres of knowledge production and ideological contestation remain steeped in Eurocentrism.[58]

6. Conceptualising a decolonised pedagogy of international law at South African universities

6.1 Introductory comments

The #RMF movement, as well as other calls for decolonisation, are unique in that they only present demands, and do not prescribe, with sufficient clarity, how the said decolonisation can or should be undertaken. The second leg of decolonisation strategies is important, as it directly links to the outcomes of attempts at decolonialisation. In this section, we identify and develop three approaches to the teaching of international law that can contribute to its decolonisation. The first is the regionalisation or sub-regionalisation of content, the second is the infusion of an *Ubuntu* approach in making sense of concepts and their application, and the last is the infusion of a decolonisation scholarship in the teaching of the module.

6.2 Regionalising and sub-regionalising the substance of international law

In one of her contributions to the decolonisation discourse, Bhambra credits the foundations of postcolonial studies to Said, Bhabha, Spivak, Quijano, Mignolo, and Lugones.[59] Crucially, these are drawn from the Middle East, South Asia, and South America. Latching onto this disregard of African scholars, Ndlovu-Gatsheni challenges Bhambra's outlook and argues that contributions

57 Asante "Reconstituting curricula in African universities: In search of an Afrocentric design" in Alvares and Faruqi (eds) *Decolonising the University: The Emerging Quest for Non-Eurocentric Paradigms* (2011) 44.

58 Asante (n 55) 45.

59 Bhambra "Postcolonial and decolonial dialogues" 2014 *Decoloniality, Knowledges and Aesthetics* 115 115-120.

by black African scholars such as Cheikh Anta Diop, Edward Blyden, Leopold Sedar Senghor, Kwame Nkrumah, and Ngugi wa Thiong'o deserve recognition for their scholarship on various aspects of decoloniality.[60] The irony in Bhambra's contribution is that, while she is a proponent of decolonisation, she disregards African voices, proving, in the process, that the stratification of knowledge still places Africa and Africanness at the bottom of the pyramid. Similarly, that Ndlovu-Gatsheni felt compelled to highlight this anomaly is no doubt a result of his positionality as a black African scholar with an interest (bias) in seeing his continent and that which it produces accorded some recognition and, above all, respect.

Having demonstrated the Eurocentric and Americanised nature of international law, we argue that, for South African Universities, regionalising and sub-regionalising the substance of international law may aid in the decolonisation of the subject. This we borrow from Burgis-Kasthala and Schwöbel-Patel, who refer to it as the "localisation" strategy.[61] In implementing this localisation strategy, the rationale is to defer to locally relevant scholarship as well as historical events with which students can relate. As Burgis-Kasthala and Schwöbel-Patel tell us, because place matters, "the first step must entail a consciousness about history, particularly histories of repression and resistance".[62] Amaya-Castro is of a similar persuasion. In his view, one's cultural, socio-economic, and ideological-political characteristics matter because "it contributes to how you perceive 'the international' and its relevance in general as well as in concrete situations".[63] Take, for example, a lecture on international organisations. While reference to the United

60 Ndlovu-Gatsheni "The cognitive empire, politics of knowledge and African intellectual productions: reflections on struggles for epistemic freedom and resurgence of decolonisation in the twenty-first century" 2021 *Third World Quarterly* 882 882-883.

61 Burgis-Kasthala and Schwöbel-Patel "Against coloniality in the international law curriculum: Examining decoloniality" 2022 *The Law Teacher* 485-502.

62 Burgis-Kasthala and Schwöbel-Patel (n 59) 500.

63 Amaya-Castro "Teaching international law: Both everywhere and somewhere" in Sainz-Borgo *et al* (eds) *Liber Amicorum in Honour of a Modern Renaissance Man His Excellency Gudmundur Eiríkson* (2017) 522.

Nations system as well as regional organisations such as the European Union (EU), the Organisation of American States (OAS), the Association of Southeast Asian Nations (ASEAN) and the League of Arab States (LAS) is necessary, greater emphasis must be placed on the African Union (AU) and the Southern African Development Community (SADC) as attempts at creating forums for addressing mutual interests for African and Southern African states. That way, a South African student of international law can relate to SADC's deployment of troops to Mozambique's Cabo Delgado region in 2021 to quell an Islamic terrorist insurgency or South Africa's active participation in conflict prevention efforts on the continent and the region. The argument here is not that presenting international solidarity through the lens of the UN (United Nations) system would prejudice the students; instead, it is that students can recognise themselves and their surroundings in the taught material and are able to move beyond abstract constructions.

Commenting on the teaching of international law in Latin America, Restrepo and Prieto-Ríos point to the lack of local content as well as relevance as factors perpetuating a Eurocentric disposition and thereafter question the role of international law scholars in the region.[64] If one were to respond to their question, the answer would be that the role of scholars in that region is to look closer to home when planning lectures and prescribing sources. For example, Burgis-Kasthala and Schwöbel-Patel suggest that when lecturing on self-determination and statehood, "one could consider a contextual entry into the topic, beginning with struggles for statehood, including, but without being limited to, the case studies of the Kurds, Biafra, and Palestine as well as the struggle for indigenous sovereignty in Australia".[65] On this point, they point to Ardill, who adopts a First Australian Scholarship approach in his analysis and deconstruction of

64 Restrepo and Prieto-Ríos "*Educación del derecho internacional en Bogotá: un primer diagnóstico a partir del análisis de los programas de clase y su relación con las epistemologías de no conocimiento*" 2017 *Revista Drecho Del Estado* 53 53, as quoted in Burgis-Kasthala and Schwöbel-Patel (n 59) 500.

65 Burgis-Kasthala and Schwöbel-Patel (n 59) 501.

Australian sovereignty.[66] For a South African scholar considering a contextual entry into the topic of statehood, examples abound. In addition to external examples on the continent, one can begin with the Bantustans policy under apartheid and the legal implications of legal instruments such as the Bantu Homelands Citizenship Act.[67] Even more, one can use the Afrikaner separatist town of Orania in the Northern Cape as an entry point. The desire for a "Volkstaat", an Afrikaner ethno-state, presents a perfect platform for interrogating issues of population, territory, and self-determination. Needless to say, there is also ample scholarship on the town, motivations behind its existence, and its future in an independent South Africa.[68]

In an assessment of the #RMF movements at UCT and Oxford University, Sunnemark and Thörn observe that, as the "movement became dispersed from one locality to another, demands…were by necessity rearticulated and transformed in relation to new local, national, and global contexts".[69] This observation underscores the centrality of localised perceptions and interpretations of phenomena that may, from the outside, seem homogeneous. However, the wisdom in exalting local processes is best illustrated in international peace and security studies. The scholarship on conflict prevention and resolution reflects a settled consensus that, in responding to armed conflicts and situations of heightened political tensions, the broader international community must, where possible, defer to regional and sub-regional organisations. This preference is justified by the reasoning that because of their proximity to conflict areas, regional and sub-regional organisations enjoy a better appreciation of structural causes of conflict in that

66 Ardill "Australian sovereignty, indigenous standpoint theory and feminist standpoint theory" 2013 *Griff L Rev* 315 315.

67 the Bantu Homelands Citizenship Act 26 of 1970.

68 See, for example, Veracini "Afterword: Orania as settler self-transfer" 2011 *Settler Colonial Studies* 190 190-196; De Beer "Exercise in futility or dawn of Afrikaner self-determination: an exploratory ethno-historical investigation of Orania" 2006 *Anthropology Southern Africa* 105 105-114; and Jooste *Afrikaner self-determination: A current appraisal* (1994) 1 1-139.

69 Sunnemark and Thörn "Decolonizing higher education in a global post-colonial era: #RhodesMustFall from Cape Town to Oxford" 2021 *Review of Education, Pedagogy, and Cultural Studies* 53-54.

locality and are, therefore, better placed to craft a response. If the regionalisation of responses to conflict is acceptable in that context, this should be reflected in the content of international law at South African HEIs.

Localising international law is central to the identity of South African HEIs and the students that they produce. For example, if a well-travelled African living somewhere outside the continent is blindfolded and flown around for days and thereafter taken to a religious gathering where Zulu hymns are being sung, they would assume that they are in KwaZulu-Natal, or at the very least somewhere in South Africa. Similarly, if that individual was taken to a gathering where, instead of Zulu, the hymns are in Swahili, they would be forgiven for thinking they are somewhere in East Africa. Similarly, the character of the international law curriculum in our universities must suggest not only that they are African HEIs but that they are Southern African and, above all, South African HEIs.

The inclusion of regional and sub-regional perspectives is a task that rests on academics who teach international law at our local HEIs. As Gutto remarked in 2011, "...but we continue saying our curriculum has not changed. Who is going to change it if we do not?"[70] Because prescribed textbooks and other material on international law seldom (if ever) include sub-regional and regional occurrences in sufficient detail, it is incumbent upon these academics to supplement their sources with scholarship from other fields of study such as history, international relations, geography, and economics.

6.3 Infusing African philosophies in the teaching of international law: An *Ubuntu* perspective

As an African philosophy, *Ubuntu* embodies an aggregate of values. At the core of its existence is the Nguni phrase "*umuntu ngumuntu ngabantu*", a secondary formulation which has been loosely translated to mean "I am because you are". As Ramose explains,

70 Gutto "Decolonising the law: Do we have a choice?" in Alvares and Faruqi (eds) *Decolonising the University: The Emerging Quest for Non-Eurocentric Paradigms* (2011) 212.

Ubuntu literally means humanness, with the latter embodying communal harmony and an entrenched sense of belonging.[71] Because of its versatility, *Ubuntu* has found application in diverse contexts, from jurisprudence[72] to philosophy.[73] Applying the concept to decolonising research, Seehawer states that, as a research paradigm, *Ubuntu* comprises "philosophical assumptions about the nature of social reality (ontology), ways of knowing (epistemology), and ethics and value systems (axiology)".[74] However, *Ubuntu*'s strength lies in its close equivalence to human rights, particularly human dignity, equality, freedom, and access to socio-economic rights. In this context, however, *Ubuntu* is seen as superior and a true reflection of an African conception of right and wrong. On this basis, Murithi has proposed the "*Ubuntufication*" of human rights, a departure from our current understanding and interpretation of human rights towards a paradigm dominated by Africanness.[75] Accepting that *Ubuntu* is distinct from the body of universal human rights as presently codified, Mathabane proposes it as a solution to America's racial troubles,[76] a proposal which suggests that this would be an adoption of "something" currently not practised in the American society.

However, despite its seemingly virtuous character, *Ubuntu* is not without its critics. *Ubuntu* scholar Metz identifies three common objections to its characterisation as a viable African philosophy, namely that it is vague, over-emphasises group thinking or collectivism, and that because of its pastoral societies'

71 Ramose *African philosophy through Ubuntu* (1999) 67.
72 Mokgoro "Ubuntu and the law in South Africa" 1998 *Buffalo Human Rights Law Review* 15 15–23
73 Ramose (n 69).
74 Seehawer "Decolonising research in a Sub-Saharan African context: exploring Ubuntu as a foundation for research methodology, ethics and agenda" 2018 *International Journal of Social Research Methodology* 453 453-466.
75 Murithi "A local response to the global human rights standard: the *ubuntu* perspective on human dignity" 2007 *Globalisation, Societies and Education* 277-278.
76 Mathabane *The Lessons of Ubuntu: How an African philosophy can inspire racial healing in America* (2018) 7-22.

roots, it is unsuited for a modern state.[77] On ambiguity, Mboti asks, "What exactly is *Ubuntu*?",[78] a question which builds on Matolino and Kwindingwi's argument that, in truth, *Ubuntu* "has become anything to anyone who so wishes to deploy it",[79] with the result that it has lost relevance. They argue that the project of *Ubuntu* simply ought to reach its end.[80] Their view prompted a response from Metz, who, in defence of a philosophy that he has propagated for a while, asserts that, on the contrary, *Ubuntu* has just gotten started.[81] For Allais, Metz romanticises *Ubuntu* and presents it as something it is not.[82] She says this in response to his suggestion that *Ubuntu* presents an African single value ethical theory.[83]

The relevance of *Ubuntu* to decolonisation is, therefore, twofold. The first is as an African single value ethical theory as espoused by Metz,[84] and the second is as an epistemology as suggested by Seehawer.[85] As an ethical theory, *Ubuntu* finds application in, for example, rationalising the proscription of so-called international crimes. There are arguments that human rights are a Western imposition, an assertion defended with reference to the composition of delegates who drafted the Universal Declaration of Human Rights, an instrument that has attained customary international law status.[86] Mutua even proceeds to propose what he terms "a more extended understanding of human rights, one that takes into account alternative ways of thinking about and articulating human

77 Metz "Ubuntu as a moral theory and human rights in South Africa." 2011 *African Human Rights Law Journal* 532 532-559.
78 Mboti "May the real *Ubuntu* please stand up?" 2015 *Journal of Media Ethics* 125 125-147.
79 Matolino and Kwindingwi "The end of ubuntu" 2013 *South African Journal of Philosophy* 197 197–205.
80 Matolino and Kwindingwi (n 77) 197-205.
81 Metz "Just the beginning for Ubuntu: Reply to Matolino and Kwindingwi" 2014 *South African Journal of Philosophy* 65 65-72.
82 Allais "Humanness and Harmony: Thad Metz on *Ubuntu*" 2022 *Philosophical Papers* 203 203-237.
83 Allais (n 80).
84 Metz "The motivation for 'Toward an African moral theory'" 2007 *South African Journal of Philosophy* 331 331–335.
85 Seehawer (n 72) 453-466.
86 An-Na'im *Universal rights, local remedies: implementing human rights in the legal systems of Africa* (1999) 24.

dignity".[87] Because of these limitations on the concept of human rights, we argue that a South African student, or any African for that matter, is likely to comprehend the concept of entitlements (rights) better if these are wrapped in *Ubuntu* as opposed to the Western language of human rights. As presently understood and taught, human rights are a Western concept. Their application in, for example, slavery and colonialism pit one foreign concept again another. Similarly, definitions of and epistemological approaches to international crimes have their foundations in the concept of human rights. To Africanise these concepts, how about explaining genocide, war crimes, aggression, and crimes against humanity through the prism of *Ubuntu*? Without digressing from the conclusion that these are abhorrent crimes, the need for their prevention as well as the prosecution of perpetrators can be grounded in African philosophies: "I am because you are", therefore, "I will not exterminate", "I will not discriminate", and "I will not destabilise communal harmony". Similarly, an *Ubuntu* entry point would perfectly explain the twin concepts of *jus cogens* and obligations *erga omnes*. The latter, as obligations owed to the broader international community, embodies the essence of *Ubuntu* – communal harmony.

In his views on reconstituting the curricula in African universities, Asante proposes questioning inherited myths as well as basing knowledge "on those values and virtues that have sustained African societies through the ages".[88] *Ubuntu* is one such embodiment of African values and virtues. Further, because indigenous concepts have traditionally featured as examples of barbaric and repugnant practices inconsistent with civilisation,[89] infusing *Ubuntu* into the teaching of international law presents an alternative view, showcasing indigenous philosophies as consistent with natural justice and good conscience. Apart from explaining these Western concepts through *Ubuntu*, South African

87 Wa Mutua *Human rights: a political and cultural critique* (2002) 3.
88 Asante (n 55) 46.
89 Anwana "Decolonising the law curricula at universities of technology: Students' perspective on content" 2022 *South African Journal of Higher Education* 59-62. See also Hewitt "Decolonizing and indigenizing: Some considerations for law schools" 2016 *Windsor Yearbook of Access to Justice* 65-70.

universities can also see how an *Ubuntu* approach to issues such as foreign policy, refugee protection, and international peacebuilding can contribute to making the world a better place. Qobo and Nyathi have already suggested an *Ubuntu* approach to foreign relations,[90] while Richmond has advanced a similar argument about reconstructing post-conflict societies.[91]

6.4 Infusing decoloniality scholarship in the teaching of international law

In addition to using Africa and Southern Africa as specific entry points into international law lectures, the teaching of international law must include debates and discussions on the decolonisation scholarship that focuses on the field. The passive approach of localising content must be augmented with a pro-active approach, which places the Eurocentric nature of international law on the table and invites debate. As outlined above, African universities were created by the colonisers to further an agenda,[92] and that agenda was anti-African. This historical reality must be made known to students enrolling at South African universities. For students of international law, the role of international law in undoing or perpetuating this fact must be dissected.

7. Conclusion

This chapter sought to propose a "South African university appropriate" approach to teaching international law. To do this, it demonstrated the relevance of the decolonisation debate at institutions of higher learning. Further, it drew on other national conversations on land ownership and the decolonisation of the

90 Qobo and Nyathi "Ubuntu, public policy ethics and tensions in South Africa's foreign policy" 2016 *South African Journal of International Affairs* 421 421–436.

91 Richmond *The Transformation of Peace* (2005) 127-148; Richmond and Franks *Liberal Peace Transitions: Between Statebuilding and Peacebuilding* (2009) 181-215; Paris "Saving liberal peacebuilding" 2010 *Review of International Studies* 337 337-365; and Ginty *No War, No Peace: The Rejuvenation of Stalled Peace Processes and Peace Accords* (2006) 108-131.

92 Asante (n 55).

judiciary. In the main, the contribution is not a call for the demise of international law as we understand it, nor is it an endorsement of TWAIL as an appropriate remedy to the Eurocentrism of international law. The proposed approach outlined above proceeds from an understanding that a shift in the pedagogy of international law is necessary. This shift must go beyond a seat at the table or considering perspectives from the Global South and other excluded jurisdictions. Our view, therefore, is that merely continuing on a path of inclusivity is inadequate.

For this reason, we have argued for three pedagogical changes that may aid in Africanising the international law curriculum at South African HEIs. In arguing for the localisation of the content and contextual entry points, we noted that this would enable students to identify with the discipline and to see their world in the taught material. On the question of African philosophies, we have demonstrated that an *Ubuntu* approach to deconstructing concepts and explaining terms would be a fitting decolonisation strategy, as *Ubuntu* is widely accepted as an African philosophy, and the values it espouses can be a substitute for notions of human rights generally. Finally, the chapter argued for the inclusion of decolonisation scholarship in the teaching of international law – not to replace Eurocentrism entirely, but to unequivocally challenge its characterisation as universal and to expose students to racist foundations on which universities, as spaces of knowledge production, are anchored.

Chapter 10

Pedagogical Approaches and Lived Experience of Teaching and Learning a First-Year Law Subject During the Covid-19 Lockdown in South Africa

Amanda Boniface[1]
Faculty of Law,
University of Johannesburg

Abstract

The lockdown due to Covid-19 in South Africa resulted in rapid forced changes to the teaching approach of universities. This chapter will focus on the experiences of lecturing to first-year Law of Persons and the Family students during the pandemic. It will also compare the difference in pedagogical approaches pre- and post-Covid-19 lockdown, drawing on almost a decade of lecturing the subject at the University of Johannesburg. A question that will be explored is: To what extent did the change in the pedagogical approach due to the Covid-19 pandemic work for first year students? To examine this question, literature from education experts will be briefly examined, as well as the lived experience of lecturers and students with regard to the subject Law of Persons and the Family as presented at the University of Johannesburg during the Covid-19 lockdown. Possible aspects to explore include firstly the support of first-year students; secondly, the use of technology in the learning sphere during the Covid-19 pandemic; thirdly, the opinions of education specialists about

1 BLC, LLB, LLM, LLD. Associate professor in the Department of Private Law at the University of Johannesburg.

the pedagogical approaches used during the Covid-19 lockdown; and, lastly, the challenges faced by lecturers and students during the change in pedagogical approaches during the lockdown. The focus here will be on the subject Law of Persons and the Family and will not be overly comparative in nature. Under the first aspect, the supportive role played by the lecturers and tutors in the Law of Persons and the Family course will be examined. This will also link with the role played by technology to some extent; for example, the role that WhatsApp groups played in supporting our first-year students will be dealt with. The support system traditionally offered to first-year Law of Persons and the Family students was predominantly in person, with a smaller measure of online resources. This included an in-person orientation for all first-year students (across subjects). The change in the method of presenting the First Year Seminar will be explored, as well as the fact that students were not able to see their tutors or lecturers in person and use was made of online communication systems. The challenges experienced by the students and lecturers – such as data availability and access – will also be briefly mentioned. Additionally, the successes of pedagogical approaches and measures used during the lockdown period will also be discussed. For example, WhatsApp groups have been carried through to post-lockdown operations and are now used for each tutorial group. Aspects such as frequent online chat groups, messaging via WhatsApp groups, online tutorials and lectures, and the posting of recordings of lectures as well as online tests and examinations will be dealt with.

1. Introduction

The lockdown due to Covid-19 in South Africa resulted in rapid forced changes to the teaching approach of higher education institutions (HEIs). This chapter will focus on the seminars of lecturing to first-year Law of Persons and Family students during the pandemic. The difference in pedagogical approaches in the subject pre- and post-Covid-19 lockdown, drawing on a decade of lecturing the Law of Persons and the Family at the University of Johannesburg, will be discussed. A question that is explored is: To what extent did the change in the pedagogical approach,

due to the Covid-19 pandemic, work for first-year students? To examine this question, literature from education experts will be briefly examined as well as the lived experience of lecturers and students with regards to the subject Law of Persons and the Family, as presented at the University of Johannesburg during the Covid-19 lockdown and before such lockdown. Additional aspects that will be explored include the support provided to first-year students, the use of technology in the learning sphere during the Covid-19 pandemic, the opinions of education specialists about the pedagogical approaches used during the Covid-19 lockdown, and lastly the challenges faced by lecturers and students during the change in pedagogical approaches during the lockdown. The focus here will be on the subject Law of Persons and the Family as presented at the University of Johannesburg, and it will not be overly comparative in nature. Under the first aspect, the supportive role played by the lecturers and tutors in the Law of Persons and the Family will be examined. This will also link with the role played by technology to some extent, for example the role that WhatsApp groups played in supporting first-year students in the Law of Persons and the Family will be dealt with.

The Covid-19 lockdown affected the running of HEIs worldwide and had an impact on students' lives.[2] Students were concerned about whether they would be able to complete their degrees.[3] Many students had to self-isolate when ill or had to undergo quarantine when entering the country where they were studying.[4] When students returned to campus, measures were in place such as the use of face coverings in public, the use of sanitising hand gel, and more frequent cleaning of HEIs,[5] as was the case at the University of Johannesburg. Students who started studying during lockdown found it harder to meet new

2 Lakhotnik, Volkava, Jiang and Yahiaoui *et al* "The perceived impact of covid-19 on student well-being and the mediating role of the university support: evidence from France, Germany, Russia and the UK" 2021 *Frontiers in Psyhcology* www.frontiersin.org/articles/10.3389/fpsyg.2021.642689/f (13-10-2022).

3 Lakhotnik, Volkava, Jiang, Yahiaoui *et al* (n 1).

4 See Lane "Life as a First Year Student During COVID-19" 2022 www.topuniversities.com/student-info/health-support/life-first-year-student-during-covid-19 (13-10-2022).

5 Lane (n 3).

people while at university and they experienced challenges to their mental health and found it more difficult to access support services than when being on campus.[6] Student wellbeing has been found to be of vital importance to the success of students at tertiary institutions.[7]

The Covid-19 lockdown created a crisis in education, not only at the primary and high school level but also at the tertiary level.[8] Krull and De Klerk refer to the period from 2020 to 2021 as "emergency remote teaching and learning".[9] It was estimated in 2020 that there was a possibility of 23.8 million learners – from primary education level to tertiary education level – dropping out of school or not accessing education and that closing in-person education affected the ability of parents to work, the availability of food for children and youth, and the increased possibility of children or youth being exposed to violence.[10] Additionally, due to the lockdown, girls in particular had increased responsibility for domestic chores.[11]

6 See further Lane (n 3) for a discussion of these challenges and Jin, Lee and Shium "First-year college student life seminars during Covid-19 in South Korea" 2021 *International Journal of Environmental Research and Public Health* 9895 www.nobinlm.nih.gov/pmc/articles/PMC8471781/ (13-10-2022), where students expressed that they experienced difficulties but that they tried to cope, and 15.57% of students indicated that they were giving up on college life being as they had imagined.

7 Lakhotnik, Volkava, Jiang and Yahiaoui *et al* (n 1).

8 The United Nations "Policy Brief: Education During Covid-19 and Beyond" 2020 2 notes that "[t]he crisis is exacerbating pre-existing education disparities by reducing the opportunities for many of the most vulnerable children, youth, and adults – those living in poor or rural areas, girls, refugees, persons with disabilities and forcibly displaced persons – to continue their learning".

9 Krull and De Klerk "Online Teaching and Learning: Towards a Realistic View of the Future" 2021 https://www.wits.ac.za/covid19/covid19news/latest/online-teaching-and-learning-towards-a-realistic-view-of-the-future.htm (14-03-2023).

10 United Nations Policy Brief (n 7) 2. For a discussion of domestic violence during Covid-19, see Boniface "The impact of Covid-19 on domestic violence in South Africa" in Watney (ed) *The Impact of Covid-19 on Domestic Violence in South Africa* (2022) 199.

11 United Nations Policy Brief (n 7) 8. Some of the female students in my Law of Persons and the Family class reported that they had to take care of their siblings and perform household chores, so they could only study at night. See also n 24 (below).

2. Comparison between pre- and post-Covid-19 pedagogical approaches

During the Covid-19 lockdown, there was a changeover from in-person learning to online-only (remote or distance) learning. This situation was similar at many tertiary institutions around the world where this rapid transition to remote learning took place.[12] Most academics at HEIs were trained or had already been trained in the technology of online teaching systems used for distance learning, however not all students at all HEIs were properly trained in such systems before the Covid-19 lockdown occurred.[13] At the University of Johannesburg, academic staff had already been using the online learning system for some learning activities and had previously received training on operating the system and additional training was also provided shortly before the lockdown occurred.[14] A challenge experienced during this rapid change from in-person learning to remote learning was that lecturers had to "encourage and shepherd students through these very difficult transitions and help them persevere through the pandemic".[15] Even with in-person learning, first-year students require guidance and encouragement to complete their course, and they need the tenacity to keep going and finish their studies. Support for this increased need for shepherding was required during the lockdown period. The support system traditionally offered to first-year Law of Persons and the Family students was predominantly in person, with a smaller measure of online resources. This included an in-person orientation for all first-year students (across subjects).

There were some successes of pedagogical approaches and measures used during the lockdown period; for example, WhatsApp groups were carried through to the subsequent post-lockdown year (2023) and are now used for each tutorial group. Aspects such as frequent online chat forums, messaging via

12 Neuwirth, Jovic' and Mukherji "Reimagining higher education during and post Covid-19: Challenges and opportunities" 2021 *Journal of Adult and Continuing Education* 141 141.
13 Neuwirth *et al* (n 11) 141.
14 This is known as Blackboard, found on Ulink.
15 Neuwirth *et al* (n 11) 155.

WhatsApp groups, online tutorials and lectures, and the posting of recordings of lectures and tutorials as well as online tests, assignments, and examinations were used to present the subject Law of Persons and the Family during the lockdown. Legal information researching, the use of technology, legal writing, argumentation and factual analysis skills as well as team-building skills are all important skills for students learning law and still needed to be incorporated into the presentation of the subject during lockdown.[16] During the Law of Persons and the Family class students researched online, making use of the library[17] at the university as well as other online resources, and wrote assignments based on this research. The skills acquired while doing so included information researching, the use of technology, legal writing, factual analysis, and team-building skills. Due to the pandemic, students could not undertake in-person group work assignments as they had in the past; thus that method of team-building was not available for learning and teaching purposes. Instead, the students were formed into online groups for tutorials, had small video tutorials together, attended the larger lectures, and were part of a WhatsApp group for each tutorial group. We also made use of online chat forums where all students could participate and feel that they were part of the group and where students who read the questions and answers on the forums could benefit by acquiring knowledge of the answers to questions that other students posted. These methods of learning were not perfect methods of teamwork or team-building, but they did assist in trying to make students part of a group in the smaller sense of a tutorial group and in the larger sense of the class subject group.

16 Srichaiyarat and Lao-Amata "Legal Education During COVID-19 Pandemic: A Seminar of a Thai Law School" 2020 *Asian Journal of Legal Education* 228 228–230. https://doi.org/10.1177/2322005820935753 (15-10-2022).

17 University of Johannesburg "Annual Report on Academic Teaching and Learning" 2021 284 notes that the Law Library appointed ten library assistants and a library law mentor to assist undergraduate law students in 2021.

Some teaching practices – relying on Kolb's learning theory,[18] John Dewey's theory,[19] Jack Mezirow's transformative learning theory,[20] and Jean Piaget's theory[21] – were effective for success during the Covid-19 pandemic.[22] Some of these teaching practices[23] included reframing virtual spaces through an online repository of knowledge, using reflective thinking as a pedagogical approach, reinforcing resilience by means of conflict resolution and meaningful participation, using inquiry-based and purposeful learning, and having useful apps to reach out to the community involved in the learning. Many of these methods were included in the pedagogical approach taken in presenting

18 See Raschick, Maypole and Day "Improving field education through Kolb learning theory" 1998 (2014) *Journal of Social Work Education* https://www.tandfonline.com/doi/abs/10/1080/10437797.1998.10778903 (15-10-2022) and Chan "Exploring an experiential learning project through Kolb's learning theory using a qualitative research method" 2012 *European Journal of Engineering Education* 1-24.

19 Teach Thought Staff "John Dewey's pedagogy: A summary" n.d. www.teachthought.com/learning/pedagogy-jphn-dewey-summary/#:-:tex=Put%20briefly%2C%20Dewey?%20believed%20that,that520is2C [URL inactive] (15-10-2022) notes that learning is socially constructed and that students – rather than curriculum – should be at the centre of learning. See further Alexander *John Dewey's theory of art, seminar and nature: The Horizon of feeling* (2012).

20 Western Governors University "What is the transformative learning theory" 2020 https://www.wgdu.edu/blog/what-transfromative-learning-theory2007.html#openSubscriberModal (15-10-2022) notes that this theory focuses on instrumental and communicative learning. Instrumental learning consists of task-oriented problem-solving and communicative learning focuses on how people communicate their needs and feelings. See further Mezirow "Transformative learning theory" in Illeris (ed) *Contemporary theories of learning* (2018).

21 McLeod "Piaget's stages of cognitive development: background and concepts of Piaget's theory" 2022 www.simplypsychology.org/piaget.html#:-:+Jean%20Piaget's%20theory%20of%20cognive,mental%20model%20of%20the%20world (15-10-2022). This theory focuses more on children and that intelligence will change as a child grows and that a child has to develop a mental model of the world.

22 Chaturvedi, Purohit and Verma "Effective teaching practices for success during Covid 19 pandemic: towards phygital learning" *Frontiers of Education* 2021 https://www.frontiersin.org/articles/10.3389/feduc.2021.646557/full (16-10-2022).

23 This study was performed in a business school in India, but the methods can be used in other HEIs as well.

the Law of Persons and the Family course online during the lockdown period. Students of the course had a comprehensive study guide and an e-textbook available online for the subject as well as access to the University library in digital format. Students thus not only had the required repository of knowledge for studying the course material, but also had access to materials for assignments and further learning. Students were encouraged to make use of reflective thinking in discussion forums, during tutorials, and during online lectures. For example, a question was asked about one of the topics dealt with in class and then students were given time to research and think about the answer and give feedback. Meaningful participation of students was encouraged and facilitated through discussion forums, WhatsApp groups, and online lectures and tutorials, despite the restrictions due to the lockdown.

The learning philosophy of the University of Johannesburg, "Learning to be", includes preparing students for a world of technology,[24] so the university enabled students to use technology through the provision of data, and students could apply for assistance to purchase electronic devices if needed. The Department of Higher Education and Training reported that 77% of students in South Africa had modules that moved to remote learning and that 96% of respondents owned an electronic device and of these 89% owned a smartphone that they used for remote learning.[25]

The "Learning to be" teaching philosophy is of particular importance when teaching future lawyers. In the teaching of first-year law students, we teach them how to approach and study the subject Law of Persons and the Family, and we teach them skills such as research, writing, and the reading and summarising of case law. These skills are also taught in a first-semester course, Legal Skills, but need to be applied to each law subject that the law student encounters during their studies. The Law of Persons and the Family is the first proper theoretical law subject that law students encounter during their studies. Thus, it provides the

24 See further University of Johannesburg "Learning to be" 2011 https://news.uj.ac.za/news/learning-to-be-2/(13-10-2022).

25

perfect opportunity to combine the theory learnt in the Law of Persons and the Family with practical skills such as researching and writing.

The success of the measures implemented during the lockdown is reflected in the good success rate for the subject Law of Persons and the Family.[26] The use of WhatsApp groups, chat forums, online lecturers and tutorials all contributed to students mastering the subject despite the distance of online learning. The success of the methodology used in the subject will be discussed below.[27]

3. Lived experience of the lecturer

Having only taught in-person classes, using tools such as slide shows and information posted online before the Covid-19 lockdown, lecturers had to transition from in-person lectures to online lectures. Although the classes provided prior to the lockdown were a far cry from the "chalk and talk" lectures of many years prior, they still contained a significant in-class component and in-class interactive element. Prior to the lockdown, we had taught all classes in person; these classes were often interactive and included group activities, where the tutors[28] assisted in class when needed, and class discussions. Students also sometimes made presentations in class based on their assignments. All of these in-person classes were large classes with on average 400 to 500 students per class. A large number of students would prove challenging when moving to an online-only environment during the lockdown. Previously, students could consult in person with their lecturers and tutors, but in-person consultation was

26 87% overall success rate in 2021.

27 At para 3 and para 4 below.

28 "The University of Johannesburg's Tutor Training Programme has received international accreditation from the College Reading and Learning Association (CRLA) for 2021-2024. The University of Johannesburg is the first institution in South Africa to receive CRLA accreditation and accreditation for all three levels of training in one year". University of Johannesburg *Annual Report Academic Teaching and Learning* (2021) 198. Tutors for the Law of Persons and the Family attend the yearly tutor training at the University of Johannesburg.

no longer possible during the lockdown.[29] Students also could no longer consult with their lecturers in person before or after class. To alleviate this problem, we made use of the chat forums that we monitored after every online class, in addition to email. Tutors also had Zoom tutorials so students could see their tutors, although online.

During the Covid-19 lockdown, consultations with students took place online via internet chat forums and emails. Classes were offered in video format,[30] and were recorded in case the students were not able to attend so that they could watch them later. Due to students not being able to see me before or after class during the lockdown, we used a chat forum for each topic dealt with during the lectures that students could access before and after classes. These forums were manned by the lecturers and tutors for the subject. The importance of having a team that could collaborate on efforts to support the students became increasingly evident during the lockdown.[31] Due to having to use the large class video lecture format meant that we could not see students during lectures, and students had to make use of the in-lecture chat function if wanting to ask questions during the lecture. To

29 Potra, Pugna, Pop, Negrea and Dungan "Facing Covid-19 challenges: 1st-Year students' Seminar within the Romanian Higher Educational System" 2021 www.ncbi.nlm.nih.gov.pmc/articles/PMC800192/ (13-10-2022). Face-to-face lectures help students be more attentive during lectures, and the lack of face-to-face lectures can leave students feeling isolated.

30 These videos were one-way only; due to the larger class mode having to be enabled so that students could all enter the virtual room together, only the lecturer was visible. A study by Bashir, Bashir, Rana, Lambert and Vernallis "Post-Covid-19 adaptations the shifts towards online learning, hybrid course delivery and the implications for biosciences courses in the higher education setting" 2021 *Frontiers in Education* frontiersin.org/articles/10.3389/feduc.2021.7116191f (11-10-2022) found that only half of the students were comfortable using video cameras, although they wanted interaction with lecturers.

31 Du Plessis, Jansen Van Vuuren, Simons, Frantz, Roman and Andipation "South African higher education institutions at the beginning of the Covid-19 pandemic: sense-making and lessons learnt" 2022 *Frontiers in Education* 1 fronteirsin.org/articles.10.3389/feduc.2021.740016/fu (11-10-2022) make it clear that one of the lessons learnt from the Covid-19 lockdown is the significance of collaboration and team efforts in education.

encourage students to use the function, we would ask questions in class or give small things to research during class, and that got more students involved and using the chat function. It was difficult to gauge whether students were keeping up with the lecture as we could not see their faces for immediate feedback and had to use text communication. We also could not see students at the office for consultations; in the past in-person consultation was used for individual questions from students and feedback to students when they had queries. Students also would at times ask for guidance regarding personal issues and then the opportunity could be used to refer students to the relevant support services. During the Covid-19 lockdown, text-based communication with students could feel impersonal and distanced at times. In order to get students to participate in communication more often, we also implemented WhatsApp chat groups with the tutors, where each tutor had a group for their tutorial class. Tutorials also took place over Zoom, where interaction could occur within a small class environment. The discussion forums were also used on Blackboard on Ulink; for each section of work, a discussion forum was opened where students could leave questions and have discussions with the lecturers. These forums were utilised regularly by the students, and the advantage was that users of the forums could access questions that were asked by other users as well as the answers to those questions.

Assessments that took place during the Covid-19 lockdown were open-book assessments. These assessments took the form of small online tests, larger semester tests, an exam, as well as weekly tutorial activities. Additionally, students received a written assignment for each semester that they needed to complete based on their individual research. Prior to the lockdown, one assignment per year was a group work assignment and one assignment was an individual written assignment, but during the lockdown, this was replaced with individual assignments.

The feedback that we received from the students as well as the tutors was positive with regard to the tutorials and WhatsApp chat groups. The positives we experienced with remote teaching were that we did not have to spend time to get to the office or lecture venue, and that the time saved could be used to

communicate with students, perform administrative tasks, and conduct research. Some of the negatives experienced during the switch to online teaching – particularly during the initial phases of the lockdown – were the difficulties that some students felt when they had to transition from in-person lecturing to online lectures. Students also had connectivity issues, and the lack of sufficient data was a problem.[32] The University of Johannesburg arranged to provide students with data. Still, some students did report to the lecturers or tutors that, due to living in very remote areas, they had to travel to be able to use the data and connect to a network. We needed to consider student demographics and whether there was digital equity when deciding to use online teaching approaches,[33] so we recorded lectures and tutorials so that students could access these at a later time if they were unable to attend the live tutorial or lectures, and tutorial marks were given based on the tutorial assignments that were sent to the tutors – not on whether students attended the live online tutorial in person.

4. Student evaluation of the subject and the first-year seminar

The First Year Seminar (FYS) plays an important role in orientating first-year law students to university life,[34] the support services offered at the University of Johannesburg, and the functioning and support offered by the Law Faculty to first-year students.[35] During the FYS, the tutors also play a large role in helping orientate the students and are supported by First-Year lecturers who are

32 See the discussion below on the undergraduate student survey at the University of Johannesburg in par 4.

33 See further Bashir *et al* (n 28) 1, 3 for a discussion of this aspect, and Dlamini and Naidoo "First-year student Seminar – using digital media for teaching and learning amid Covid-19 pandemic at a rural-based campus" 2022 *Universal Journal of Educational Research* 195 195 for a discussion of the seminar of first-year students during the Covid-19 pandemic at the University of Zululand and an exploration of the disparities caused by the move to digital learning.

34 Also known as the First Year Seminar (FYE). Different names have been used for this programme throughout the years.

35 The author has been the chairperson of the FYE at the Faculty of Law for several years.

involved in the year-long organisation of the FYS. The FYS was originally in-person but moved to an online-only format during the lockdown period. The online orientation was not limited to only a few days; instead, resources were kept up and added to online for students throughout the year. At the time of writing this chapter, we are planning the FYS for 2023 to be in-person, but we are also to have a large online component to support students in their journey to campus life. In order to get students to engage with the online materials, small tests were put online, and students were asked questions about the materials.[36] The online orientation materials supported students throughout the year. The FYS is very important as it helps students to transition from school to their first year of studying at a tertiary level.[37] The effective design of the content of the FYS is important.[38] Access to resources is important to help students transition to university and the FYS provides this access. Still, students indicate that face-to-face interaction helps them transition better to university.[39]

In this section, the results of the undergraduate seminar survey for the Faculty of Law will be explored, and the student evaluation module and teaching evaluation reports will be examined. The University of Johannesburg Undergraduate Student Survey – Faculty of Law,[40] was conducted for all year groups of undergraduate students across the Faculty of Law. Of the students who took part in this voluntary survey for the Faculty of Law, the greatest response rate received was 46% for the first-year students.[41] The majority of overall undergraduate respondents (92.1%) indicated that the learning content was

36 These were arranged by the assistant lecturer Louis Koen at the Faculty of Law. He is also an active committee member of the FYE organising committee.

37 Herkulaars and Oosthuizen "First-Year student transition at the University of the Free State during Covid 19: Challenges and Insights" 2021 *Journal of Student Affairs in Africa* 31 31 www.ajol.info/index.php/jssa/article/view/206131/ (13-10-2022).

38 *Ibid*.

39 *Ibid*.

40 University of Johannesburg "Division for Institutional Planning, Evaluation and Monitoring" 2021 (hereafter "UJ's DIPEM").

41 UJ's DIPEM (n 38) 6.

easily accessible on Blackboard.[42] A large proportion (91.2%) of the students who responded indicated that the learning content was well structured and 89.3% stated that the learning content for all their undergraduate modules was up to date.[43] Many (87.5%)of students who responded concluded that the recording of their online lectures was accessible and 78.7% indicated that it was easy to join their live online lectures, whereas 21.3% of respondents said they did not find it easy to join online lectures.[44] Some students felt that they did not have enough online contact with their lecturers.[45] Overall, students who responded were satisfied with how the online learning took place, 84.5% of whom stated that their lecturers were good at explaining things via the online platform, and 83.7% of whom noted that the lecturers used different online methods to engage with them.[46] The motivation that students received from lecturers was also indicated as being good, in that 83.7% of respondents reported that their lecturers motivated them to do their best.[47] Some students (37.5%) indicated that they preferred recorded lectures as they could replay these and that they studied after midnight so that they could use night-time data (which is cheaper) and so that they could take notes easily.[48] When students in 2021 who took part in the survey were asked what teaching and learning methods they would prefer for the future, 15.2% indicated that they would prefer purely online teaching and learning methods, 20% indicated that they would prefer purely contact lectures, and 64.8% stated that they would prefer a mixture of contact and online lectures.[49] When questioned about assessments, 82.7% of the undergraduate respondents indicated that the number of assessments was adequate.[50]

42 UJ's DIPEM (n 38) 8. Blackboard is the online learning platform found on Ulink at the University of Johannesburg.
43 UJ's DIPEM (n 38) 8.
44 *Ibid.*
45 31.5%, according to UJ's DIPEM (n 38) 9.
46 *Ibid.*
47 *Ibid.*
48 UJ's DIPEM (n 38) 10.
49 *Ibid.*
50 UJ's DIPEM (n 38) 11.

The University of Johannesburg's Annual Report on Academic Teaching and Learning[51] indicated that the overall quality of teaching and learning improved and the module success rate for 2020 was 89.2% and the module success rate for 2021 was 87.5%. Data indicated that 83% of first-year students had accessed the First Year Experience (previously the First Year Seminar) modules that were online during the Covid pandemic, from January to April 2021.[52] Preparation for the FYS for 2022 started already in 2021 and was co-ordinated by the FYS Office at the University of Johannesburg, and the author was the chairperson of the Law Faculties First-Year Seminar Committee during this time.[53] In 2021, the Centre for Academic Technologies (CAT) at the University of Johannesburg prepared first-year students for the online learning that was going to take place during the year. This was done by providing a University of Johannesburg Online Toolkit module and a Learning with Technology module for the first-year students.[54] The 2021 year was also successful academically for the Faculty of Law at the University of Johannesburg as the success rate in the undergraduate law modules was reported as 90% and in 2020 it was 86%, and the undergraduate satisfaction rate in the Faculty of Law was 90%.[55]

5. Conclusion

The upheaval caused to the academic learning process by the Covid-19 lockdown and the rapid transition to online learning was challenging to both students and staff; however, some positive lessons were learnt from this challenge. The importance of having a good team to support first-year students was made even clearer during the change to online learning. Providing support to first-year students has always been important and helped students achieve success in their studies, and the University of Johannesburg has provided this support to first-year law

51 University of Johannesburg "Annual Report on Academic Teaching and Learning" 2021 197 (hereafter "UJ Annual Report").
52 UJ Annual Report (n 49) 184.
53 *Ibid.*
54 *Ibid.*
55 UJ Annual Report (n 49) 278, 280.

students both before and during the Covid-19 lockdown. The role of the FYS in orientating and supporting students can also not be underestimated. Support provided to students helps them succeed in their first-year studies and complete their degrees. HEIsshould see the student as a whole being needing not only academic support but also emotional and psychological support as well as physical support (such as housing, food, and medical care), contribute to the student succeeding in their studies. Students studying the Law of Persons and the Family at the University of Johannesburg during the Covid-19 lockdown benefited from the online discussion forums, tutorial WhatsApp groups, as well as video lectures and tutorials. The approach to learning a subject online can never be the same as learning a subject in-person, but due to the dedication and teamwork of the academic staff for the Law of Persons and the Family, students were successful in their online studies and many of the initiatives – such as WhatsApp groups – have been carried over to post-lockdown, in-person learning. This chapter has shown that the lived approach of teaching a first-year law subject during the lockdown period was very different to in-person lecturing but that, as academics, we had the necessary skills and training to transition to online learning to the benefit of our students. The important role that support services play at a university for first-year students was also made abundantly clear. Covid-19 provided challenges to learning, but we met those challenges and shepherded our students through to the second year of their law studies.