

Introduction: a free speech code for Universities?

Recently, the University of KwaZulu-Natal has been a flashpoint for controversies around academic freedom, with disciplinary action having been taken against two academics for a number of alleged misconducts, including speaking to the media. A case has also arisen at Fort Hare University, involving a law professor who is being disciplined for criticizing the University administration in his lectures, at conferences, in private conversations and in the media. These academics are accused of bringing their respective institutions into disrepute, including by lying to the media, and defaming University managers. A member of the support staff of the Tshwane University of Technology is being charged with the apartheid era offence of immorality, for distributing sexually explicit photographs to some of his friends. A disciplinary case is also being heard at Wits University, where students are being charged for bringing the institution into disrepute for criticizing the lack of freedom of expression on campus, in the media.

These are not the only problems. Laws, rules and regulations are being developed that have a direct and potentially negative impact on academic freedom; not much attention has been paid to these as they do not originate from the Ministry of Education, but from other spheres of government.

We should be very concerned about these developments. If freedom of expression is compromised unduly, then the academic project will be compromised. Given the controversies that the above mentioned cases have generated – between University staff and managers, and even amongst academics themselves - these cases also suggest that the University community is becoming increasingly divided over what can and cannot be said in University contexts. It is necessary to debate the implications of these cases, as freedom of expression is a precondition for the academic project itself.

While I will deal with all these cases in detail, the fact that they have arisen suggest a growing disciplinary culture in Universities that places greater controls on academics and students on the basis of what they say. I believe that these disciplinaries are indications of a systemic shift in the academic freedom climate.

My thesis about the systemic nature of academic censorship – which I will argue - leads me to certain conclusions and recommendations, which I will raise upfront.

There is a need for an audit of all subsidiary legislation at University level. This audit should cover Universities' conditions of service, rules governing student activities on campus and all rules and by-laws impacting on academic freedom on campus. The purpose is to test their constitutionality, as there are growing indications that there are problems with a number of these subsidiary rules.

Student, academic and worker organisations based on campus should consider advocating for a freedom of expression code, similar to the one adopted by the American Association of University Professors in 1994.

In terms of this code:

- 'On a campus that is free and open, no idea can be banned or forbidden.
- No viewpoint or message may be deemed so hateful or disturbing that it may not be expressed'.[1]

The code then goes on to state that it may be tempting to proscribe racial or ethnic slurs, sexist epithets, or homophobic insults...., [but] this speech - however repugnant - almost always express ideas'.[2] The code goes on to state: 'Indeed, by proscribing any ideas, a University sets an example that profoundly disserves its academic mission'.[3]

The code concludes:

'Institutions should adopt and invoke a range of measures that penalize conduct and behaviour, rather than speech—such as rules against defacing property, physical intimidation or harassment, or disruption of campus activities. All members of the campus community should be made aware of such rules, and administrators should be ready to use them in preference to speech-directed sanctions'.[4]

Such a code would compliment, and elaborate on the Kampala Declaration on Intellectual Freedom and Social Responsibility[5], which sets out the procedures for disciplining of staff based on democratic means of self-government by academics, and entrenches the basic principle of free speech. The Declaration is crucial for redefining social role of intellectuals, as part of the broader struggles for freedom and social justice: after all, social relevance is the most effective bulwark against interference in academic freedom. However, the Declaration does not codify standards for the protection of free expression, including standards for dealing with what one could term 'bad speech'.

While I am wary about the effectiveness of advocating technical solutions to political problems, if developed in an open and consultative fashion, the code should become an organizing tool as well. The process of debate that leads up the development of such a code should provoke academics and students to think deeply, and challenge one another's assumptions, about what constitutes acceptable and unacceptable speech. It is important that these standards are defined by knowledge workers, and not managers, as is the case at the moment. The code should also define what administrative actions could be considered academic freedom violations. It should pronounce on whether administrators should be allowed to use University money (public funds) for instituting defamation actions against their own staff. These debates are already taking place in forums like the Change@UKZN list; so, to convert these debates into a movement towards an academic freedom code of charter is a logical progression.

However, the development of such a code should not just involve academics and students; it must involve the very communities that the University claims to serve. While not being prescriptive, it should set standards for the relationships between intellectuals and social movements, to ensure that intellectuals do not control movements, while at the same time ensuring that they have the right to critical distance. Such a code must include the voices of those who are researched, and should set expectations from that University. It should state what communities want out of that University. Why is this important in a free speech code? At the end of the day, the most effective antidotes against attacks on academic freedom are social engagement and relevance. Also, real misconduct is less likely to arise in an institution that has a purpose that everyone identifies with, an institution that is vision and mission-driven, rather than driven by the need to control. As scholars of Poststructuralist theory will tell us, disciplinary cultures tend to produce delinquency.

The development of such a code raises the tricky question of enforcement. Campus based and off-campus organizations need to debate the pros and cons of establishing an academic self-regulatory structure that takes up the challenge of Article 26 of the Kampala Declaration, which states the following:

'It is incumbent on the African intellectual community to form its own organizations to monitor and publicise violations of the rights and freedoms stipulated herein'.^[6]

This self-regulatory structure would adjudicate on violations of the code, and impose sanctions where necessary. Sanctions would include censure of institutions or individuals for failing to adhere to the principles of academic freedom.

This body would effectively become the Press Ombudsman of academia. There are real dangers in the establishment of such a structure, but there are real possibilities too. What needs to be debated is whether the dangers outweigh the possibilities.

Its establishment will mean that Universities will strip out misconduct cases on the basis of what people say, from the disciplinary process, which should be reserved for bad deeds, not bad words. This will also allow academics to engage in a process of peer review, and judge the speech of other academics on the grounds of ethical principles, rather than according to managerialist criteria concerned primarily with the reputation of their institutions. Academic institutions that do violate the academic freedom of their academics will be blacklisted, and members will be strongly discouraged from taking up positions at such institutions.

It may be argued that the above mentioned suggestion is an overreaction to recent incidents, and that the disciplinaries mentioned above are isolated incidents; therefore one should not extrapolate the emergence

of a trend from them. This is a naïve argument, for the reasons that I will set out below. There are several macro-trends in the labour, academic and general free speech environments that need to be appreciated to see why the disciplinaries mentioned above are signs of a more general shift in climate.

First trend: the managerial restructuring of labour

The upward trend of labour cases relating to the freedom of expression of staff at Universities mirrors the upward trend in freedom of expression-related labour cases generally: the first macro-trend.

The advent of democracy held out hopes that a freedom of expression-friendly labour dispensation would be introduced. In fact, one of the first cases the Constitutional Court dealt with in 1994 concerned the freedom of association and expression of members of the South African National Defence Force's (SANDF), who up to that point had been prohibited from forming their own unions and engaging in public protest. This prohibition was contained in the SANDF's Military Discipline Code. In this judgment striking down this prohibition, the Court noted that the speech of employees who criticize their employers is constitutionally protected: the Court argued that '...a culture of Constitutionality can hardly succeed if the Constitution is not applied daily in our Courts, from the highest to the lowest, as well as at the workplace'.^[7]

In spite of the Constitutional Court judgment, and in spite of other court judgments protecting the right to freedom of expression in the workplace, a growing number of employers are reviving apartheid-style tactics to silence their employees' critical voices, in a bid to protect their public reputations.

The rise of workplace censorship could be linked to what Sandile Buhlungu and Eddie Webster refer to as 'the new workplace authoritarianism' linked to the pressures on industries to become globally competitive. Workplaces are restructured, leading to core workers being shifted into the non-core zone, effectively casting them out of the formal economy.^[8] In the process, working conditions have declined for many workers, leading to worker resistance.

It is telling that some of the criticisms that employers attempt to stifle involve declining working conditions flowing from the restructuring of workplaces. Casualisation of labour has made the control of workers' voices easier, as workers may be forced to practice self-censorship fearing that their contracts may not be renewed. But there are those who speak out, in the process facing the wrath of their employers. Non-unionised workers and members of trade unions operating outside of the established federations are especially vulnerable to attack.

More and more companies are also accusing unions and employees of defamation. Some employers also claim that the contract of employment

requires the employee to honour a fiduciary duty to the employer, which includes a duty to be loyal to the company and to protect the integrity of the company brand. Employers who make this argument are, in effect, arguing that the employment contract allows them to contract the employee out of their Constitutional rights.

Employers also seem to be oblivious to the fact that political speech must receive the highest protection. Speech about working conditions all too often crosses into the terrain of political speech. Yet such speech is also under threat. With respect to freedom of expression, the conditions of service of many companies may date back to apartheid, thereby binding employees to archaic definitions of misconduct. In the process, apartheid-style repression of workers rights is reinforcing new forms of managerial repression.

Nowhere is this disciplinary culture more apparent than in the commercial and catering sector, where superexploitation abounds. On 8 November 2005, Royal Ascot Superspar employee and member of the Congress of South African Workers' Unions (Cosawu), Vusi Sibeko, was suspended for gross misconduct. The misconduct related to an article that he had written for *Izwi la Basebenzi*, a periodical published by the Democratic Socialist Movement. Sibeko had, in the article, accused the Spar store of bad labour practices and of not paying workers the minimum wage as determined by the Department of Labour. Spar argued that the article defamed the company and instilled a negative attitude in workers towards the company. He was subsequently dismissed.

Sibeko appeared before a conciliation hearing of the Commission for Conciliation Mediation and Arbitration (CCMA) on the 23 January 2006. Super Spar, however, was not present. The matter went to arbitration at the end of February 2006. The CCMA found Sibeko's dismissal to be unfair as it violated his Constitutional right to freedom of expression. In his judgement, CCMA commissioner Swaybo Flowers noted the following:

'Historically, workers had used the workplace as a battleground to fight discrimination, authoritarianism and oppression, and the workplace is the place where the culture of apartheid and racism were crushed. Workers contributed much to the labour laws as we know them today. Many lost their lives in the process. There cannot be any possible reason why now, after democracy has been obtained, that freedom of expression would be denied'.^[9]

Unfortunately, Spar has decided to appeal the case to the Labour Court.

Apart from the Sibeko case mentioned above, there are other recent cases of free speech infringements in private sector institutions. For instance, Faizel Katkodia, an employee at Standard Bank, was called to a disciplinary hearing for sending out emails critical of the state of Israel to his private mailing list using the bank's internet resources. He has been charged for using the bank's internet resources in violation

of bank policy of bringing the bank into disrepute.

In the public service, a specific set of considerations applies. In spite of the fact that it is practically impossible to defame state institutions, a growing number of employees are being disciplined for criticizing the state institutions they work for. In these cases, management is often conflated with the institution itself; so criticism of the management is, by definition, criticism of the institution, and therefore an expression of disloyalty to the institution. In reality, criticism of management could be an expression of profound loyalty to the notion of public service, in that workers are willing to risk disciplinary action to raise a debate about the state of the public service.

Many of these criticisms revolve around cutbacks to the public service, and the impact on service delivery of the commercialization or corporatisation of these services. This change in the nature of public services is leading to these services becoming 'brands', like private companies: hence workers who criticize these services, especially in the media, are accused of damaging the brand. The application of managerial practices in the public service centralizes power in the hands of a few managers, which also creates a hostile climate for free expression at the workplace.

Gags in the health and education sectors have also become increasingly commonplace. The problem has even gone right up to the highest office in South Africa. Thoko Mkhwanazi-Xaluva is a former director in the Office of the Rights of the Child (ORC), based in the presidency and reporting to Minister Essop Pahad. In June 2003, Mkhwanazi-Xaluva was dismissed by the Presidency for, she claims, having blown the whistle on sexual harassment by a consultant to the ORC who, she says, was a friend of Pahad.

The matter was referred to the General Public Service Sectoral Bargaining Council, which reinstated her in November 2003. She was dismissed again for interviews she had given to the media regarding her initial dismissal. Once again, the matter went to the General Public Service Sectoral Bargaining Council in February 2006. Mkhwanazi-Xaluva won the case in the Bargaining Council. The Presidency has since appealed to the Labour Court, and Pahad has argued in papers that her statements about him are defamatory, and that she should be disallowed from working for the state ever again.[10]

The closest parallel to what is starting to emerge in Universities is taking place at the South African Broadcasting Corporation (SABC). Possibly the most widely publicized incident of disciplinary action against an employee involved SAFM anchor John Perlman, who was given a verbal warning for bringing the South African Broadcasting Corporation (SABC) into disrepute. Perlman clashed with the SABC's spokesperson Kaizer Kganyago on air by confirming the existence of a blacklist of political commentators, despite the SABC's protestations to the contrary; in the process, he merely fulfilled his ethical obligation to

speaking the truth and debunk the SABC's 'spin' on the matter.

So, there is an emerging trend towards employers acting against employees who criticise them, which flows from the corporate managerial restructuring of labour, which intensified in the late 1990's.

Second trend: the corporatisation of academia

The second trend relates to shifts in the nature of academic institutions, as the pressures of globalisation push Universities towards full corporatisation. One of the consequences of the proletarianisation of the professoriate is that the labour relations dispensation that applies in broader society - with all its recent problems - is being imported into Universities.

Until recently, South African Universities have escaped the international trend towards full corporatisation. However, declining budgets from the late 1990's onwards forced Universities to find ways of supplementing their budgets to attract private funding, leading to an emphasis on income-generating postgraduate research (often at the expense of teaching).

When research is driven by private sector and donor power, research focussing on poor people or motivated by pressing social problems becomes marginalised. As Rhodes University Sociology Professor Jimmy Adesina has stated, 'the idea that you can sit down and write about something because it is important is becoming more and more alien'.^[11]

When a University is corporatised, power becomes 'sucked up' to the top, and is often centralized in the person of the Vice Chancellor. The University becomes a brand in the commercial sense. Substantial notions of accountability to the academic project are replaced by narrow notions of accountability to administrators and managers; in fact, in the entrepreneurial University model, management IS the University. Criticism of the management amounts to criticism of the University, and therefore damage to the brand. Disciplinary measures against those who bring the brand into disrepute becomes an essential part of brand management.

A concrete expression of this redistribution of power relates to the roles of Deans. Many Universities have replaced elected Deans with appointed Deans, often disempowering the ability of Faculty Boards to ensure accountability to the academics in the faculty. Another often-noted feature of the corporatised University is that Senate becomes marginalized in favour of an increasingly powerful executive management;^[12] Senate decisions may even be overruled without consultation, purely on financial grounds. Corporatised Universities are also hostile places for students from working class backgrounds, who are often excluded for financial reasons. As the University becomes more market-driven, it may also lose its moorings in the very community it claims to serve.

The disciplinary process also becomes increasingly technicised, and in the process is taken out of the hands of academics and placed in the hands of managers and external lawyers. As corporatised Universities are driven to protect their brands, they will be tempted to prioritise the right to reputation over their right to freedom of expression; this is an inevitable consequence of corporatisation.

In the process, the principle of peer review is thrown out the window, as articulated in the Kampala Declaration, which makes it clear that discipline should be effected by a democratically elected body of the academic community. The reason for vesting disciplinary action in the hands of academics is clear: academics are best placed to judge their peers, and are also best placed to consider the seriousness of their wrongdoings against an academic's entire record as a teacher and scholar.

These mitigating factors are important to consider, given that a narrow interpretation of misconduct will trip many academics up. As Jimmy Adesina has noted, 'If you want to find dirt on people you will find it if you look hard enough. The value of that person to society – their change agency value – recedes into the background as a consideration. What they did wrong is the issue'. However, in the affected institutions, an often-expressed sentiment amongst staff is that the standards of conduct that apply to ordinary academics simply do not apply to top management.

Third trend: state steering of academia and progressive competitiveness

This brings me to my third point: the role of government policy in bringing pressures to bear on academic freedom. It is wrong to attribute the current pressures on academic freedom to corporatisation alone, as some of the recent contributors to the debate on academic freedom have suggested.[13] This view is captured by Roger Southall and Julian Cobbing, when they state:

'Whereas previously, under apartheid, the principal threat to freedom was external to the 'liberal University' in the form of government pressure upon individual institutions and individuals to conform to state ideology and rubrics, the new threat is primarily internal, with academics becoming increasingly intolerant of robust internal dissent. We identify this as expressive of a shift away from "colonial liberalism" towards corporate authoritarianism'. [14]

This view fails to take into account the complex relationship between external and internal factors in shaping the academic freedom environment. It also fails to take into account recent government-initiated developments in higher education, as well as in the general free speech environment.

In 2001, the Ministry of Education adopted a more interventionist approach, where its earlier consultative approach was replaced by a

centralized policy of steering Universities towards certain goals. The National Plan for Higher Education in South Africa[15] is based on the acceptance that the pressures of globalization require a change in the nature of academic institutions to assist in the drive for global competitiveness; to this end, the Ministry required Universities to increase their research outputs and to encourage innovation.

To this end, the Plan involved increasing the number of enrolments in business, commerce and science, engineering and technology, and increasing enrolments in career-orientated programmes. Universities must 'deliver' graduates capable of meeting the high skill/high wage demands of the service orientated economy, while also de-racialising to address the skewed legacy of apartheid-era higher education. The Ministry stated that autonomy cannot be used as an excuse not to transform, and that it will intervene if necessary to ensure that national development goals are met.

In spite of the Ministry's protestations that Humanities must not suffer as a consequence of this shift in priorities, whole art departments have been closed down. Universities are at a loss as to how to demonstrate 'outputs' in the narrow technicist sense in music, art and drama; as a result, marginalization becomes a self-fulfilling prophecy, as these disciplines are unable to generate income.

The Plan recognizes the commercial potential of University research output, and calls for more postgraduate students to further University based research agendas. In the conclusion, the authors argue that 'if the higher education system is to become a key engine for reconstruction and development, it is imperative that it is restructured to enable it to fulfill this critical role. This requires a single minded sense of purpose and mission by all the constituencies in higher education...[italics mine]'. [16]

And therein lies the problem; there can be no single minded approach in a situation where the development model itself is contested. If this single-mindedness is imposed from above, it will be resisted by critical minds. The imposition of a single-minded purpose based on the oxymoronic notion of progressive competitiveness has generated its own contradictions, and hence its own opposition. State sanctioned managerialism dictates a single-minded response: disciplinary action. This should not be taken to mean that all staff are innocents and all managers wrong, but the disciplinary turn in Universities is a symptom of a growing crisis of legitimacy of the state's transformation project.

The Ministry's restructuring of higher education paved the way for a peculiar variation on the international corporatised model. Termed 'transformative managerialism' by Tembile Kulati and Teboho Moja[17], University managers have been strengthened to drive transformation from the top, in line with policy pressures or market principles. This brand of 'transformation' involves addressing the legacy of apartheid by

creating equity of access to higher education, while responding to the pressures of globalization to create a high skill/ high wage, globally competitive service economy. These are deeply conflicting projects, and Vice Chancellors are ultimately responsible for managing these conflict.

As different sections of the University community become conscious of these conflicts, express them, and then fight them out, the logic of corporatisation drives managers to act against those who sharpen the contradictions.

Government policy is impacting on academic freedom in even more direct ways, but because they do not come from the expected source of pressure – namely the Department of Education – they are hardly factored into the current academic freedom debate.

Fourth trend: freedom of expression and neo-conservatism

The rise of post-9/11 neo-conservatism is also starting to have an impact on the free speech of academics, marking the fourth trend affecting the academic freedom climate (although it is closely related to the third trend). In an attempt to increase control, some managers are blending still unreformed apartheid era labour regimes with new post-9/11 surveillance regimes, to produce a new post-apartheid University model: the University as panopticon. Changes in the regimes of surveillance outside the University are coinciding, and complimenting, changes to the regimes of surveillance inside the University.

Neo-conservatism is extremely hostile to controversial forms of speech, which it considers to be subversive of patriotic goals: in the United States, such thinking has also led to growing clampdowns on academics critical of how the Bush Administration is prosecuting the war against terror. The AAUP's freedom of expression code has proved to be an important bulwark against these incursions.

In South Africa, aspects of neo-conservative thinking are becoming increasingly apparent, and are impacting negatively on freedom of expression. For instance, a firm of attorneys (Richard Buys Attorneys) has developed a template for electronic communications policies[18] which bans huge swathes of internet content, using the one of the post-9/11 laws promulgated in South Africa recently, the Regulation of Interception of Communications Act (Rica), as justification. The fact that Rica is being implemented in the absence of Privacy legislation is already a problem, but already there are signs that institutions are using the gap that Rica presents them with to introduce electronic communications policies that are even more restrictive than the actual legislation.

Users are forbidden from distributing 'illegal content', which the Policy defines as e-mails that are 'pornographic, oppressive, racist, sexist, defamatory against any user or third party, offensive to any group, a violation of a User's or a third party's privacy, identity or

personality, copyright infringement, malicious codes such as viruses and Trojan Horses, and content containing any personal information of user's or third parties without their consent'.[19]

If this template was used to develop Electronic Communications Policies at academic institutions, the academic project would grind to a halt. Medical students using the internet to research sexually transmitted diseases, or a sociology lecturer researching the social effects of pornography, will be guilty of trading in 'illegal content'. So would the English lecturer e-mailing lecture notes to his students about Lady Chatterley's Lover. Campus based Palestinian student organisations should forget about distributing advocacy material on the Israeli occupation of Palestinian land. Politics lecturers researching the prevalence of racism and sexism will also fall foul of the policy.

Yet in spite of the sheer stupidity of this template, the UKZN has based its draft Electronic Communications Policy on it[20], and in March 2006 the Tshwane University of Technology developed a policy using the same template.[21] It is unclear how far this template has spread: hence the need for the audit, mentioned earlier. In terms of both policies, University e-mail users must adhere to certain rules, and will be disciplined for failing to do so. Yet the UKZN's draft policy has a particularly problematic aspect, in that students and staff are deemed to have given consent to have their e-mails monitored when they commence studies or employment[22], which violates the requirement of the Act for users to give prior written consent.

Users are referred to Schedules 1, 2, 6, 7 and 11 of the Film and Publications Act for a definition of pornographic content, in spite of the fact that Schedule 11 was repealed in 2004. Interestingly, the policy does not recognise the exemption in Schedule 5 of the Act's schedules, which exempts technical, professional, educational, scientific, documentary, literary or artistic publications. So if these policies are adopted unchanged, it will mean that the UKZN and TUT do not recognize exemptions for academic speech, in spite of their being academic institutions.

This erosion of the protected status of academic speech is taking place on another front, in the form of the controversial Film and Publications Amendment Bill. While this Bill has received much bad press lately for its attempts to subject the media to pre-publication censorship, what is not being debated is the pre- and post-publication censorship that it will subject academics to.

The Film and Publications Act of 1996 distinguished between publications and films: with the former being free for distribution unless someone complains. The latter must be submitted to the Film and Publications Board for classification, based on the premise that film is a more pervasive medium than publications and therefore must be more tightly controlled. So the written word is 'innocent until proven guilty'. As

mentioned earlier, artistic and academic speech that falls within the 'extremely naughty' XX and X18 classifications are exempted. Also, films and publications that contain forms of expression that do not receive constitutional protection in s.16(2) of the constitution – namely propaganda for war, incitement for imminent violence and hate speech – are prohibited, and offenders face up to five years in jail. However, artistic and academic speech are exempted from this offense.

However, the Amendment Bill seeks to change these arrangements. It states that:

'Any person who, for distribution or exhibition in the Republic, creates, produces, publishes or advertises any publication that contains visual presentations, descriptions or representations of or amounting to—

- (a) sexual conduct;
- (b) propaganda for war;
- (c) incitement to imminent violence; or
- (d) the advocacy of hatred based on any identifiable group characteristic,

shall submit in the prescribed manner such publication for examination and classification to the classification office before such publication is distributed, exhibited, offered or advertised for distribution or exhibition'.[23]

This means that writers will be required to police themselves and submit publications for classification to the Board if they may fall foul of the above categories. This applies to academics too. While the exemptions still stand, the grounds for exemption have been narrowed. Academics need to decide how they feel about submitting publications on controversial matters to the Board - which is controlled by the Department of Home Affairs - for the Board to decide whether to exempt these publications or not, as this is the import of the Bill. It would appear that the academic speech for exemptions for child abuse, propaganda for war and incitement to imminent violence have disappeared entirely, and the exemption now applies only to the clearly unconstitutional definition of hate speech. In addition, the scope for prohibited publications in these categories has been broadened. So now, publications that merely describe child abuse or propaganda for war will be prohibited, which is bad news for political scientists studying the invasion of Iraq, for instance, or media effects scholars studying the effects of pornography on audiences. Academic speech which falls into the XX category should now be classified as X18, which requires publishers to confine their publications to adult shops or to place them in plastic wrappers. Clearly, this is an untenable arrangement for academic journals.

The developments around interception legislation, and how it is being interpreted, and the Film and Publications Bill, strongly suggest that the spaces for controversial academic speech are being narrowed. While the government is not responsible for the restrictive way in which Rica is being interpreted, it should be noted that both Rica and the Film and Publications Act have been amended to reduce the space for controversial speech over time. Hardly had Rica been promulgated, than an amendment Bill was introduced to make it possible for the government to monitor pre-paid cell phone users. Each successive amendment may see the bar for academic speech being lowered even further. The Film and Publications Act was amended in 1999 and again in 2004, so the current Bill will be the third amendment in ten years. Each successive amended has restricted speech slightly more than the previous one, under the guise of fighting the scourge of child pornography. It should not surprise academics if the next amendment removes exemptions for academic speech entirely. Yet academics and students have been largely silent on these developments.

Case studies: TUT, Fort Hare, UKZN, Wits

As illustrations of the extent of the problem, disciplinary proceedings at four Universities will be discussed.

The season of disciplinaries has arrived at the Tshwane University of Technology (TUT), which has charged a member of the administrative staff, Moses Peo, with the apartheid-era offence of 'immorality' for allegedly distributing an e-mail containing sexually explicit photographs to some of his friends. Management has failed to take into account the fact that immorality is no longer recognized as a ground for publications control, as it is simply too subjective. This charge harks back to the since-repealed Publications Act of 1974, which censored publications on the grounds of indecency, immorality and offensiveness to public morals.

In prosecuting this disciplinary, the University is attempting to invoke the draft Electronic Communications Policy as the 'norm' for electronic communications control on the University, in spite of the fact that it is still in draft form. The context in which the disciplinary has arisen is also interesting, as Peo is a key figure in a union at the TUT, that is preparing for strike action on campus.[24]

An even more bizarre example of an attempt to revive apartheid-era disciplinary cultures involves Fort Hare law lecturer Dieter Welz. Welz is being disciplined for criticizing management in his law lectures, at conferences, in private conversations, in e-mails and in the media. These charges follow a spate of bad press about the management and administration of the University. Bizarrely, one charge accuses him of inciting the campus law student leadership in private conversations with them; a truly sinister precedent that encourages 'spy on your neighbour' type behaviour, where individuals testify against one another for what they say in private. Like Fazel Khan, he is also accused of making false statements to the media.

He is being disciplined according to a 1971 conditions of service document promulgated in terms of the 1969 Fort Hare Act, which has since been repealed. The document still categorises staff in terms of marital status, race and gender, and states that black women will be appointed to permanent positions only once they are married. It is therefore hardly surprising that Welz is being charged with – amongst other things – the apartheid era charge of incitement.

The Fort Hare conditions of service define misconduct as follows:

'An officer shall be guilty of misconduct [if he] fails to comply with

- (a) any provisions thereof with which it is his duty to comply, or
- (b) does or causes or permits to be done, or connives at, any act which is prejudicial to the administration, discipline or efficiency of the University;
- (f) publicly comments on the administration of the University;
- (g) makes use of his position in the University to promote or to prejudice the interests of a political party; or
- (h) attempts to secure intervention from political or outside sources in relation to his position and conditions of employment in the University...or
- (i) conducts himself in a disgraceful, improper or unbecoming manner...or
- (m) without first having obtained the permission of the rector discloses, otherwise than in the discharge of his official duties, information gained by or conveyed to him through his employment in the University or uses such information for any purpose other than for the discharge of his official duties, whether or not he discloses such information'.^[25]

The University has insisted that it has not used any of the 'outdated and reactionary' clauses of the Fort Hare disciplinary code, as reported in the Daily Dispatch^[26], and that references to the code had been struck out at the start of the disciplinary. o

However, in spite of the fact that the charge sheet was amended to remove references to the Disciplinary code, the charges remained essentially the same. This response to the criticisms of the code is a highly dubious attempt to sidestep the politically-loaded issue raised by Welz, as employees are required to know about a rule or standard, which are also required to be reasonable, for a misconduct to occur. The methods used to gather information for disciplinary action should also be legal, which rules out the sorts of practices that have seen staff being fingerprinted at Fort Hare, as management attempted to establish

who was responsible for circulating an internal document revealing vast salary discrepancies amongst staff.[27]

What sets Welz's case apart from the disciplinaries in other Universities, is that the University is taking issue with the content of his lectures and conference presentations. It is significant that he is not been charged with bad lecturing or poor performance at conferences, which one would expect if he used these platforms for transmitting ideas that bore no relation to their topics. When asked why he turned his administrative law lectures into a platform to criticise the University, his response was credible; he argued that - given its huge administrative problems - he used the University as an example of how not to practice administrative law.[28]

Unwittingly, management has confirmed the relevance of these criticisms in his lectures, by levelling a charge that he '[described] the UFH management as incompetent and as a management that engages in unplanned financial expenditure' in some lectures; practices that no University would want to engage in as custodians of public funds. As one commentator on the case noted, he is being disciplined for doing his job.

In a conference presentation delivered at a Fort Hare conference on law and transformative justice in October 2006, Welz prepared a powerpoint presentation entitled 'Without fear, favour or prejudice: a note on judicial independence and academic freedom in times of transition'. [29] In it, Welz drew parallels between recent events in the judiciary and in academia, and identified the concentration of power as a problem threatening both the independence of the courts and the independence of Universities. Both sectors are being subjected to increased government steering - on the basis of transformative justice and transformative education - as government attempts to correct the inequities of the past.[30]

He went on to argue that the University should rather be entrenching a form of 'self-organised' collective control, grounded in collegiality and based on the notion of a community of scholars. [31]He further argued that 'disciplinary values and cultures are critical for any effective steering of the University' [clarify what he means by this].[32] In conclusion, he argued for a shift in both the judiciary and academia 'from a culture of compliance to a culture of constitutionality',[33] which 'entrenches the notion of separation of powers and independence for both sectors'.[34]

He then identified Fort Hare as an example of a situation where false managerialism has taken root, and where crude, oversimplified notions of accountability that are hardly appropriate to academic work, are imposed. Rather than enhancing organizational effectiveness, the new managerialism is leading to a bloated beurocracy, and a constitutionally problematic concentration of power.[35]

It can be inferred that this comment stating that disciplinary leadership is preferable to false managerialism, irked Fort Hare management especially, and led to the charge against Welz of undermining the Executive Dean of Law, Professor Patrick Osode, by making disparaging remarks. The charge accuses Welz of ‘...maligning the University and its management by making disparaging remarks about the University and its management in the course of your presentation at the Law and Transformative Justice conference on 4 October 2006’.[36] Interestingly enough, Osode was not even in the room when Welz made the presentation, but was present only during question time and reportedly did not say anything to indicate his unhappiness.

Far from Welz having brought the University into disrepute, the University management is bringing itself into disrepute by acting in such a petty and intolerant manner. As was said in one of the pieces of correspondence that Welz is being disciplined for distributing, such behavior represents ‘the prevalence of authority over argument’.

The charge about distributing e-mails that were defamatory of the Dean of Law relates partly to a letter written by another Professor, Winston Nagan, on the 18 December 2006. Apparently, no action has been taken against Nagan for his supposedly defamatory statements. As Mandla Seleane has argued, if the Dean had the courage of its convictions, he would pursue the defamation claim in open court, using his own money, rather than pursuing this allegation through a disciplinary, where the standard of proof will undoubtedly be lower.[37]

UKZN academic Fazel Khan has been accused of distributing false information to the media, for supposedly lying to the media about his exclusion from an article in the University’s publication, the UKZNdaba. A report on the article appeared in the Mail and Guardian newspaper, followed by articles in the Witness and the Mercury. By doing this he was accused of bringing the UKZN into disrepute. The article concerned a film that he worked on with another UKZN staffer, Sally Giles, who was also responsible for the cropping of the photograph. In several newspaper articles, Khan implied that the UKZN management had played a role in his exclusion, as revenge for his role in a staff strike early in 2006. He was given a final written warning on this count, but was dismissed for allegedly leaking confidential information to the media. Khan has been dismissed on the second count.

His disciplinary came in the wake of a popular staff strike in February 2006. This strike led to Senate commissioning a report into the causes of the strike. The report found widespread dissatisfaction with autocratic governance, precipitated by a situation where leadership was ‘selected, not elected’.[38] The report sought to a cessation of hostilities, and to ‘reintroduce relationships based on respect, trust and good faith’. It called for a dispute resolution mechanism other than the disciplinary process, as ‘building up dossiers of transgressions does not heal’. The report also identified the creeping marginalisation

of Senate as the supreme academic voice, as the managerial project has prioritised financial considerations above all else. As one UKZN student stated, ‘...money talks, everything else walks’.[39]

Most tellingly, it tried to analyse the various forms of workplace of dissatisfaction in terms of a grid. Academic staff were grouped under ‘meaninglessness’: according to the report, this form of dissatisfaction ‘happens where the function, purpose or meaning of your work does not make sense in the context of an organisation’. It is ironic that, in the one University that claims to be the premier University of African scholarship – which should embrace the Kampala declaration’s call for academic social responsibility – that academic have lost their sense of purpose. This report provides a useful background against which to consider the merits of Khan’s utterances on the UKZNdaba article.

Bizarrely, in the finding of the disciplinary hearing, insufficient consideration was given to whether Khan’s statements were reasonable and in the public interest, even if he could not prove their factual accuracy. When asked about whether the current climate at the University had pressured Giles to crop Khan out of the photograph the University’s main witness, Professor Dasarath Chetty, stated: ‘I fail to understand how the climate can pressurise an individual to airbrush another party from a photograph’.[40] When the initiator, Professor Eitleburg, asked Chetty whether such a climate existed at the University, he responded ‘no’.[41] This shows that Chetty failed to acknowledge the significance of the context in which Khan’s exclusion had taken place; the University may have payed lip service to them, but they have not taken them into account as crucial mitigating factors. Presumably, this is because the University has implied that there was a conspiracy between Giles and Khan to bring the University into disrepute. Unless the University has evidence that was not led in the disciplinary, it is difficult to see on the basis of the disciplinary hearing how this conclusion could be arrived at.

Giles's explanation for failing to acknowledge Khan in the article was that it focused on the contribution of the technical staff of the film; an implausible argument since this focus should not have precluded his being mentioned or pictured. Also, this explanation does not address the more substantial question of why Giles decided on a story angle that effectively denied Khan his intellectual property, as the film's researcher.

The argument made in the hearing was that the UKZNdaba staff did not know about Khan's involvement in the film, is difficult to believe, given that his involvement was widely publicized on campus. As Giles herself said in the disciplinary, 'everyone knew that Fazel was part of the whole deal'.

The judgement does not speak to some crucial evidence presented in the disciplinary. In response to a question put by Khan’s representative, Richard Pithouse, about whether the author of the article, Bhekani

Dlamini knew about the involvement of Khan in the documentary, Giles responded 'People knew that Fazel was part of the whole deal'.^[42] This was not taken into account. Then later on, when Pithouse asked Giles why she decided to crop Khan out of the picture, she stated that the article focussed on the contribution of the technical staff, and that the cropped photograph was visually more appealing.^[43]

This explanation is implausible. Why would Khan be left out of an article entirely if the film was a co-production? This is the primary injustice in the situation; denying someone their intellectual property. A focus on the technical staff does not require him to be completely effaced from the article; there are less drastic measures to achieve the same aim.

Further on, Pithouse asked Dlamani whether he had spoken to Khan; she responded that she did not know. Yet, as Pithouse commented under cross-examination, how did she know to leave him out of the picture, if she did not know whether he was going to be included in the article?^[44] Also, earlier on when Giles was asked how the decision was arrived at the focus on the technical staff she stated that '...I think it was a bit of a mutual discussion between Bhekani and myself'^[45], which clashed with Dlamini's testimony that Giles decided on the focus.^[46] Yet, later, she stated that it was up to Dlamini to decide whether to focus on the technical staff by leaving Khan out entirely.^[47] Yet, Dlamini testified that he had no knowledge of Khan's involvement in the film, and that he became aware of this involvement only when the airbrushing story came out.^[48] This was in spite of the fact that Khan's involvement in the film was, reportedly, widely publicised on campus.^[49] Something does not hang together.

Then there is another crucial piece of evidence, the significance of which was ignored. Apparently a second article was written on the film, and was submitted by a freelance journalist for UKZNdaba. This journalist interviewed Khan, which suggested that he had a reasonable expectation that he would appear in the newsletter. Giles sent the photographs with Khan in to the journalist.

Then there is a famous complicity argument. When Chetty was cross-examined by Pithouse, he noted that it was probably the original intention of the University to resolve the matter amicably, but that the possibility of complicity between Giles and Khan in the airbrushing incident needed to be investigated.^[50] This is one of the most troubling incidents in the whole airbrushing episode, and what actually transpired is murky. He later repeated the allegation that Khan was complicit in the airbrushing. When he was asked what he meant by complicity, he stated that Giles had stated that Khan had seen the airbrushed photograph on her computer. When she said that she was going to send the picture for publication, he reportedly laughed. He even suggested that Khan may have instigated the airbrushing.

Giles testified that she had told Khan that the photo was going to be submitted, but did not know whether it was going to be published or not, and did not even know whether it would go into the UKZNdaba.[51] She also testified that she did not request his permission to publish the photograph. Khan testified that while he may have laughed, it masked his deep unhappiness with his excision from the photograph. He did not raise the matter, but just left.[52] For his part, Khan admitted to having seen the photograph, but claimed that he did not know that it was going to be published in UKZNdaba, and that - in any event - he did not give explicit permission for it to be published.

As Khan did not raise the matter, no evidence was canvassed in the hearing about whether he thought that Giles had removed him of her own volition. Yet the finding states that Khan knew before speaking to the M&G that Giles alone was responsible for the alteration: a deduction that is not supported by the testimony. Also, Khan testified that he and Giles had a good relationship, and therefore it was not rational for her the airbrush Khan out of her own volition; so it was rational for him to assume that there was an instruction. His having seen the photograph does not necessarily amount to complicity or even consent: this is a leap in logic that should not be made.

In the light of these events, it was reasonable for Khan to have assumed that 'there was a clear decision that [he] shouldn't be in the UKZNdaba and this is a dirty revenge for [his] actions during the strike', as he is quoted as saying in the M&G, and that management had a hand in this decision. He may have been unable to prove the factual accuracy of these statements, but they were reasonable.

Also, Chetty admitted under cross examination that it may have been rational for Khan to believe that the airbrushing was a result of pressure from above: a concession that was not taken into account in the judgement.[53] Khan may have jumped to conclusions, and been unstrategic in the statements he made; but this hardly makes him a liar. In fact, under the circumstances, he was allowed to have the perception that he was being targeted.

False statements are constitutionally protected; admittedly, they do not receive as much protection as true statements, and may be more easily overridden by countervailing interests.[54]. But if false statements made in good faith were not constitutionally protected, we would be returning to the dark apartheid-era days of strict liability, where people would self-censor their speech for fear of reprisals for making mistakes. The protection of false speech should not be seen as an endorsement of such speech; it is not a licence for all and sundry to go out and lie, and then cry freedom of expression when they are held accountable for their false statements.

The fact is that no academic wants to make false statements deliberately; those who do will ruin their reputations in the long run.

But even academics make unstrategic statements they are later unable to prove. This does not make them liars. To deny academics the same space to make false but reasonable statements that the post-apartheid media enjoy is an academic freedom issue. Chetty does not seem to understand the difference between incorrect statements made in good faith and lies. In any event, in view of the fact that management has failed to come up with a plausible explanation for his exclusion, and did not address the fact that (self) censorship had taken place, Khan's suspicion of the official position was understandable, as the official position was clearly deficient.

UKZN sociology Professor Evan Mantzaris has been suspended pending a disciplinary hearing into allegations of poor performance and misconduct. Two of the four charges brought against him relate to his freedom of expression, as he is charged with being 'engaged in a concerted campaign to bring adverse publicity to the University...with respect to the unbanning of Dr. Ashwin Desai' This charge presumably relates to his vocal campaign for the reinstatement of controversial academic Ashwin Desai, who was excluded from the University on dubious grounds. Mantzaris is also charged - in his capacity as an employee and as the Chairperson of Comsa - with defamation of the Vice Chancellor, Prof. Malegapuru Makgoba.

These charges follow the Gautshi Commission of Enquiry, establish to investigate – amongst other things – the causes of negative publicity. This Commission marked a new, more confrontational management approach to staff involved in the February 2006 strike at the University, contrast to the more conciliatory approach reflected in the Senate Sub-Committee report. As Adesina has commented, senior management's approach has become 'I'm coming after you'.

A trademark UKZN attack against critics of management, Charge 2 alleges that Mantzaris "engaged in a concerted campaign to bring adverse publicity to the University and / or some members of staff, with respect to the 'unbanning' of Dr Ashwin Desai". The letter also claims Mantzaris conducted this alleged campaign "with other members of the University from the University premises and using University equipment". While the letter does not specify what the elements of the campaign were and how exactly Mantzaris is supposed to have caused "adverse publicity", apparently this refers to Mantzaris' vocal support of Desai - mainly through media statements - and arguments against the stance taken by the University that Desai was banned from working at UKZN. If academics are not allowed to support each other in terms of their right to conduct academic work and if their support - as in this case - is subject to disciplinary action, then this violates academic freedom and, by inference, freedom of expression.

The third charge against Mantzaris accuses him of having "produced and published defamatory letters about the Vice-Chancellor (VC) and other members of staff". The "defamatory letters" refer to letters criticising

Makgoba that were published in local newspapers. Makgoba accuses Mantzaris of being the secret author of the letters, even though they do not bear the latter's name. The University also cites correspondence sent by Mantzaris to Professor Makgoba, in which he accuses the VC of "conspiring to get rid of [him]". This, the initiator concludes, is proof that Mantzaris "engaged, and continue[s] to engage in, a campaign to discredit the Vice-Chancellor in your capacity as an employee and Chairperson of COMSA."

If the University believes that it has received adverse publicity, then frankly the institution has only itself to blame. It has responded inappropriately to a range of controversies, often lashing out at its critics, leading to even more adverse publicity. UKZN management should not be pursuing defamation charges against their critics through the disciplinary process, as this will chill critical debate. Public figures generally have less protection from critical commentary than ordinary individuals, and senior managers like Professor Makgoba need to accept that this is a consequence of the positions they hold.

But when defamation cases are pursued, they should not be flimsy excuses to intimidate people engaging in genuine debate. One of the most controversial actions the University has engaged in involves support for the defamation case of Professor Chetty against Professor Adesina. The case follows a series of emails last year, just before UKZN staff went on strike. Before the strike began, Chetty's office issued an email requesting "all staff who receive any media query related to the impending industrial action refer these calls" to his staff. In response, Adesina sent an open letter to Chetty, accusing him of attempting to gag academics and of being an instrument of authoritarianism at the University. He also claimed Chetty had brought sociologists into disrepute. Chetty then sued Adesina for defamation.

In passionate testimony, Adesina argued that the issue was really about academic freedom. He said Chetty's actions were typical of the beginning of the end for academic freedom on University campuses in other parts of Africa, and expressed concern that academic freedom and freedom of expression were under threat in South Africa, too.

The magistrate found that, given the prevailing circumstances at the University, Chetty's letter "could very well be understood" as a gagging order. Adesina's comments, the Magistrate said, showed no malice and were about "matters of public interest". In spite of the fact that Chetty clearly did not have a case, he is reportedly appealing: an unjustifiable use of public funds.

UKZN and Fort Hare management have clearly not heeded Mahmood Mamdani's warning that Vice Chancellors should resist the temptation to close down debate administratively, and practice intellectual leadership rather than intellectual hegemony. His warning can be extended to senior managers too.

While much public attention has focused on the freedom of academics, the freedom of students also needs to be examined more closely. Academic freedom does not belong to academics only. For instance, the Socialist Student Movement at UKZN have complained that they are unable to picket or hand out pamphlets unless they are 'recognised' by the Student's Representative Council (SRC).

Freedom of expression for students at Wits University has decreased considerably over the past decade. While University life is supposed to be one of great exploration and expression, student societies at Wits are finding that the right to free expression is only allowed once a number of hoops have been jumped through.

Student societies often have to submit posters that they want to put up on campus or leaflets that they want to distribute to the SRC and, thereafter, to the Dean of Students. In the case of some societies, which the Dean deems to be 'controversial' – such as the Palestine Solidarity Committee and the South African Union of Jewish Students, such material is also sent to others within the University administration for vetting. If the Dean decides that material is undesirable, the society will not be allowed to distribute it. There is no real objective test for what is undesirable and, according to reports the FXI has from student groups, the Dean generally errs on the side of extreme conservatism, regarding anything that could be 'controversial' as undesirable.

Student societies that want to march on campus have also had to have all their banners and placards vetted by members of the Council moments before the march begins. The Council members will – in full view of the marchers and passers-by – select which banners will be allowed and which should be removed. Thereafter, no additional banners or placards will be allowed to enter the march. Further, an activity like a march requires permission to be obtained – even though students will be marching in the open and will not be entering any areas where classes will take place. If students want to use other outside venues – like the piazza – for any kind of gathering, they also need to get permission for that. A recent such applicant was told by a senior admin staffer that he didn't think permission should be given because 'the purpose of the University is education'!

One student society could not have an event on a particular day because the University did not allow 'two groups with opposing ideologies to have an activity on the same day' and, apparently, another group with an 'opposing ideology' had already to have an activity. Gone are the days when the purpose for student societies dealing with the administration was purely functional; booking of lecture rooms, for example. The administration now applies a range of other tests to determine whether an activity might be allowed or proscribed.

These restrictions on freedom of expression do not affect student societies only, but individual students as well. A group of students will soon face a disciplinary hearing for 'bringing the University into disrepute' and for interfering with the governance of the University. Their crime? They sent out an email to a group of about 20 Wits email addresses. In the email, the students expressed dissatisfaction that a certain staff member was facing a disciplinary hearing who was involved with students in an equity programme. Ironically, the email accused the University of acting against free expression. After it was leaked to the media, the University took action against the students.[55]

It is untenable that student organizations have fewer rights than in ordinary society; as centres of critical debate, they should set the example and afford even higher protection of these rights than those available to the rest of society.

Conclusion

It has been argued that the coming together of various factors in the labour, academic and free speech sectors strongly suggests that the season of academic disciplinaries is here to stay. The disciplinary turn in academia, impacting on the free speech of academics and students, mirrors the disciplinary turn in employment relationships generally. This is hardly surprising; even the Congress of South African Trade Unions (Cosatu) had to concede during Mayday celebrations this year that the first thirteen years of democracy have benefited capital more than labour.[56] Free speech in the workplace is a casualty of these structural inequalities.

But how seriously are academics and students taking these problems? Many speak about possible threats to academic freedom, as they though are on the distant horizon, to be observed in case they come any closer. What is not taken into account is the fact that they are much closer than we think; many of the erosions of free speech have not yet manifested themselves in disciplinary charges, but it is only a matter of time before the trickle of academic disciplinaries becomes a flood, because the scaffolding for this to occur is being put in place, pole by pole. This bigger picture is often not taken into account, as debates about measures impacting on free expression takes place in silos.

Punishing people for what they say, especially about their own employers, is odious. But it is especially odious in an academic environment, where recourse to other mechanisms such as the Press Ombudsman or the Broadcasting Complaints Commission or even the courts, is possible. The problem with punishing speech in academic environments is that it quickly has a knock on effect, and people may prefer to self-censor rather than risk official action. In relation to the UKZN situation, Journalist Amelia Naidoo has noted in an article in the Mercury newspaper that, in the light of the disciplinary actions against Khan and Mantzaris, 'hardly anybody is prepared to speak to newspapers on the record or openly challenge management for fear of being singled

out and punished, or losing a job'. However, this is not a problem peculiar to the UKZN. More and more people working in the public service say that there is the official position on freedom of expression in public institutions. Then there is the actual position.

It is now time for academics, students and broader society to debate what kind of freedom we want academics to have. It may even be time to codify these matters, given that state, commercial and managerial forces have clearly been writing their own code for some time now, and are now starting to implement it, whether we like it or not. However, as has been argued, academic freedom will be impossible to achieve if Universities do not become socially engaged, as this freedom will become a freedom merely to reproduce the ruling class. The disciplinary University must become the University without walls.

Finally, we could do well to heed Jimi Adesina's warning during his defamation trial, that '...a threat to academic freedom may not be extreme, but if people don't raise their voices because they think it doesn't concern me, twenty years down the line it will consume everybody'.
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