



Kagisano No. 8 - ACADEMIC FREEDOM

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CONTENTS

Foreword	V
Introduction Sioux McKenna, Rhodes University.....	1
The Genesis and Scope of Academic Freedom in the South African Constitution Rosaan Krüger, Rhodes University.....	5
Losing the Academic Freedom plot? The CHE and the debate on institutional autonomy and public accountability André du Toit, University of Cape Town.....	28
Academic Freedom: revisiting the debate Lis Lange, University of the Free State.....	57
Against the Discourse of Academic Freedom Pedro Alexis Tabensky, Rhodes University.....	76
Contributing authors	88
Kagisano Series	90

FOREWORD

In mature democracies, academic freedom and institutional autonomy are generally concepts that are taken for granted. They can even be seen to be arcane or conservative notions, inherent in an order of higher education that prides itself on pursuing knowledge for its own sake only, or even, in some contexts, as excuses for upholding exclusive academic privileges or protecting universities from the brutal realities of the challenges of the broader society in which they are situated. Yet, in instances where the academy perceives that academic freedom and institutional autonomy are under threat, these concepts gain traction, and are defended with vigour. In such circumstances, academic freedom and institutional autonomy become hotly contested concepts, with widely differing perceptions of what they mean and when they may be invoked in legitimate defence of the academy.

Indeed, the level of intensity of debate around academic freedom and institutional autonomy is a measure of the health or otherwise of a higher education system and the society in which it is located. The recently formed Council for the Defence of British Universities, for example, is indicative of a society in which the tension between institutions of higher education and what has been perceived to be increasingly intrusive managerialism on the part of the state has become overt after simmering for many decades. The noise thus created around academic freedom and institutional autonomy exemplifies the extent to which such notions matter in times of stress, and the extent to which the academy will go to defend the space it needs to pursue and create knowledge which it understands to be in the long-term interest of society. The noise of debate is healthy: in mature democracies such noise often heralds a new accommodation in the relationship between higher education and the state in which notions of academic freedom and institutional autonomy again recede into the realm of taken-for-granted notions.

How much more worrying, then, is silence around these issues in young democracies such as South Africa, where threats to academic freedom and/or institutional autonomy may be becoming more commonplace? The recent changes to legislation in higher education in South Africa, affording the Minister of Higher Education and Training the right to intervene in the management of institutions on an almost undefined set of pretexts is an example of such threats. What is more baffling is that the changes have been met with an ominous silence on the part of the academy. Why the silence? Is it because institutions have, as in the British context, become subject to funding regimes that reach deep into the affairs of an institution such that none wants to be the tall poppy in the field for fear of the punitive funding scythe? Is it because institutions, in the South African context, fear being labelled as conservative and anti-transformation if they complain? Is it because they are so battle-worn with policy changes and increasing regulation and trying to deal with a myriad of intractable challenges that they don't really care? Whatever the reason, silence, in this instance, is not healthy.

Given the above, this edition of Kagisano is timely. It brings together contributions on academic freedom and institutional autonomy in the South African context that should serve to bring the debates to the forefront, and, as Lange asserts, help not only to protect higher education and its academics, but the democratic project itself. Let there be noise.

Ahmed Essop
Chief Executive Officer

INTRODUCTION

Sioux McKenna
Rhodes University

The much-lauded South African Constitution lists a great number of freedoms in the Bill of Rights but these are generally widely encompassing. That the constitution directly refers to academic freedom is thus curious and leads one to wonder whether this is a freedom that is of particular importance to our country – more so than the many other potential specific freedoms inferred within such broad freedoms as those of thought, association, or freedoms from slavery or cruelty etc. Perhaps the authors of the constitution believed that academics would have a particular role to play in forging our new democracy and that this needed alluding to in the supreme law of the country. Or perhaps academic freedom was considered by the writers to be a freedom likely to be threatened and therefore needing stipulated protection. Maybe the inclusion of this explicit freedom is simply the textual vestige of the particular backgrounds and interests of some of the authors.

Whatever the significance of its constitutional reference, it is clear that the very definition of academic freedom is greatly contested with some including under its banner issues of institutional autonomy, and the rights of institutions to self-govern with limits to state steering, and others insisting that academic freedom is a concept pertaining to the individual academic and her rights and responsibilities. Furthermore, with changes in university management practices and the increasing use of models from the business world to run institutions, there is debate as to whether such changes are simply shifts in the role and functioning of the university to adapt to a new era or whether these constitute breaches of academic freedom in pursuit of a neo-liberal agenda. This edition of Kagisano brings together four articles that address these issues and deepen the on-going conversation about

what academic freedom means and why the higher education sector needs to rigorously engage in debates about its nature.

Krüger's piece, entitled 'The Genesis and Scope of Academic Freedom in the South African Constitution' provides a legal consideration of academic freedom and presents possible interpretations by a court of law. By looking at the drafting of the South African Constitution and at foreign interpretations of academic freedom, Krüger outlines the scope of constitutional protection that is enjoyed by this equivocal concept and queries whether such protection would include issues of institutional autonomy. She argues that, while we have not had a test case in this country, tracking the evolution of the concept of academic freedom gives us some indication as to what would be included under such constitutional protection, and also suggests potential threats to this freedom.

Du Toit's article is entitled 'Losing the academic freedom plot? The CHE and the debate on institutional autonomy and public accountability' and looks back at the ambitious project on 'Academic Freedom, Institutional Autonomy and Public Accountability in South African Higher Education' undertaken by the Council on Higher Education (CHE), which culminated in the CHE HEIAAF report of 2008. By providing a detailed tracking of the processes undertaken by the task team and by reviewing the final report, du Toit concludes that attempts to reconceptualise the concept of academic freedom were largely unsuccessful. Du Toit argues that the potential routes to understanding the relationship between the state and the higher education sector presented in the CHE HEIAAF report were problematic. The constitutional route merely stipulates that academic freedom is indicated in the constitution, it does not specify how such freedom might be secured; the discussion in the CHE HEIAAF report of academic freedom as a duty, rather than a constitutional right, is confusing; and the 'democratic route', du Toit argues, fails to spell out the relationship between academic freedom, public good and democratic accountability. Du Toit also suggests that this project could have been a means whereby the CHE secured its position as

facilitator of debate regarding higher education but that its anti-climatic conclusion has prevented this from being the case. In this critique of both the process and the final product (and the lack of impact this product has had), du Toit raises a number of questions about how the debate around academic freedom, institutional autonomy and public accountability can be taken forward.

Lange's article, 'Academic Freedom: revisiting the debate', places the issue of academic freedom firmly in the context of the knowledge economy and argues that this has increased demands for accountability between the university and the state. Lange provides a brief international picture and specifies how similar issues play out in the current political context of South Africa. Lange moves beyond issues at an institutional level to suggest that there have been profound changes in terms of individual academic's identities that have curtailed their ability and willingness to engage critically with institutional and national debates. She argues that threats to the role of academics as intellectuals need to be addressed, and refers to the CHE HEIAAF project as one process whereby such engagement has occurred. She concludes by calling for more rigorous and on-going engagement with issues of academic freedom by the sector as a whole and at the level of individual academic's; without such engagement, Lange argues, academic freedom will fail to protect not just academics but also the democratic project.

The last article in this volume is Tabensky's piece entitled 'Against the Discourse of Academic Freedom'. Tabensky turns the entire discussion around by questioning the rhetoric around academic freedom and suggesting that it is more pertinent to consider what it is that constitutes academic work and thereby to be in a position to identify what it is that violates or interferes with an academic's ability to perform such work. The focus on conditions that allow academics to perform their defining activities allows us to interrogate a range of threats, including internal threats by academics themselves. Tabensky argues that he is not advocating the prescriptive imposition of academic norms and behaviours, but rather he is critiquing the

notion that academic empowerment entails having *carte blanche* over one's actions. Tabensky provocatively calls for a move away from freedom-talk and duty-talk towards ensuring that academics have a space in which to exercise academic virtues.

This volume of *Kagisano* on Academic Freedom and the next in the series, on the Aims of Higher Education, arise out of and extend Ford Foundation-funded Roundtable Discussions organised by Pedro Tabensky and held at Rhodes University in 2010. It was decided that the deliberations engendered through this process should be extended and captured to allow for wider dissemination. The CHE's support in this process has ensured that the sector can enjoy ready access to these debates and discussions.

Thanks are due to the following academics for undertaking blind review of the articles for this volume and for offering valuable feedback to the authors: Doctors Lynn Quinn, Carol Thomson, and Sue Southwood and Professors Brenda Leibowitz, Driekie Hay, Jenny Clarence-Fincham, Chrissie Boughey and Vivienne Bozalek.

THE GENESIS AND SCOPE OF ACADEMIC FREEDOM IN THE SOUTH AFRICAN CONSTITUTION

Rosaan Krüger
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INTRODUCTION

The South African Constitution is one of the few constitutions worldwide that explicitly mentions academic freedom.¹ It does so in the Bill of Rights under the heading 'freedom of expression' (section 16) and it protects academic freedom and freedom of scientific research, alongside media freedom and artistic creativity as incidents of expression. Or, at least, that is what it looks like at first glance. A cursory reading would lead one to conclude that the right to academic freedom and freedom of scientific research is one that affords protection to persons engaging in academic activities – teaching or research – without undue interference from the government, educational institutions or other individuals. It is clear from the textual formulation that 'everyone' is entitled to the protection of the right and that the protection it affords is not restricted to individuals in the academy. However, restricting the scope of the right to an individual's teaching and research activities, fails to account for the context within which teaching and research take place, particularly the context of higher education in post-apartheid South Africa.

In this contribution I consider the evolution of the concept of academic freedom in South Africa as it relates to public universities in an attempt to determine the scope of the constitutional protection,

¹ Barendt (2010) lists the constitutions of Portugal, Spain, Japan, South Africa as explicitly recognising academic freedom and states that Article 13 of the Charter of Fundamental Rights of the European Union also protects this right. Malherbe (1993) lists the constitutions of Germany, Spain, Portugal, Mexico and Brazil as those with explicit reference to academic freedom.

as it would be interpreted by a court of law.² To this end, I consider the history of academic freedom in South Africa and the drafting history of the interim and final Constitutions.³ Where appropriate, I consider comparable foreign interpretations of the concept, but I focus in the main on unravelling the scope of the constitutional protection of academic freedom in the South African higher education context. This focus is important given the uncertainty as to whether the right extends to institutional autonomy as an aspect of academic freedom.⁴ The evolution of academic freedom in recent history gives us an indication of the extent of the protection provided by the Bill of Rights and it highlights potential threats to academic freedom.

² Du Toit, in his CHE publication *Autonomy as a Social Compact* (2007, p.9), distinguishes between 'a rights-based principled affirmation of academic freedom and an approach concerned with the underlying social compacts involved.' See also Finkin and Post (2009, p.8).

³ See *Sv Makwanyane 1995* (3) SA 391 (CC) paragraphs 16-19 on the role of *travaux préparatoires* in the interpretation process. The dictum of the court in paragraph 19 is particularly relevant and in my view applicable in the current instance: 'Background evidence may, however, be useful to show why particular provisions were or were not included in the Constitution. It is neither necessary nor desirable at this stage in the development of our constitutional law to express any opinion on whether it might also be relevant for other purposes, nor to attempt to lay down general principles governing the admissibility of such evidence. It is sufficient to say that where the background material is clear, it is not in dispute, and is relevant to showing why particular provisions were or were not included in the Constitution, it can be taken into account by a Court in interpreting the Constitution'.

⁴ See for example Currie and de Waal's comment that 'At the core of the right to academic freedom is the right of the individual to do research, to publish and to disseminate learning through teaching, without government interference. The right to academic freedom vests in individual academics and not the university. In fact, a university's decision-making bodies, such as its Council or Senate, may be as prone to infringing academic freedom as organs of state' (2005, p.370). The authors then temper this narrow view by adding that 'academic freedom would be a hollow ideal without institutions such as universities. ... A right to a degree of institutional autonomy, at least to the extent necessary to realise academic freedom, may therefore be derived from s 16'.

THE HISTORY OF ACADEMIC FREEDOM IN SOUTH AFRICA

Academic freedom under apartheid

Universities in South Africa are modelled on the British model, with the senate of each university taking responsibility for academic matters and councils assuming responsibility for internal governance. Under apartheid each university existed as a separate statutorily created institution governed by a private act of parliament. From 1910 onwards, universities in South Africa were financially dependent on the government and had to submit their budgets to the government on an annual basis (Moodie 1994, p.1). Governmental oversight of higher education institutions was accepted and programmes and qualifications could only be offered with government approval.⁵ Prior to 1948, the government appeared to respect the decisions of institutions regarding admission of students and matters academic and it was only with the active pursuit of the policy of apartheid to enforce racial segregation that political pressure on universities started to mount (Moodie 1994, p.3).

The issue of academic freedom came to the fore when the government proposed the establishment of separate institutions for people of 'different races' in the 1950s. In response, academics of the so-called open universities.⁶ in South Africa prepared a statement on academic freedom in 1957 (Van de Sandt Centilivres et al 1957). In this statement, the open universities insisted that they should be allowed to continue to admit 'non-white' students to their institutions. In

⁵ Moodie (1994) reports that in a letter to Monica Wilson dated 28 November 1956 (University of Cape Town Archives), Dr Davie stated that academic freedom and institutional autonomy are distinguishable. The former, he said is 'the freedom of the individual to study at any University which is willing to accept him' and the latter 'the freedom of the University to determine whom it will teach.' It is clear that this letter was written with the issue of enforced racial segregation in mind.

⁶ As Beinart *et al* (1974, p.vii-ix) point out, the English universities were generally referred to as the 'open universities', but it was in particular the University of the Witwatersrand and the University of Cape Town that played a leading role as members of this group.

order to do so, the open universities relied upon what is known as the Davie-definition of academic freedom. Dr Davie, former principal of the University of Cape Town, stated in a 1953-address to students that academic freedom of a university involves 'four essential freedoms ... to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught and who may be admitted to study' (Van de Sandt Centilivres et al 1957, p.11). According to the authors of the 1957-statement, interference with these core freedoms constituted a breach of the institution's right to academic freedom. The attempt by the apartheid government to prescribe who may be admitted to a university on non-academic grounds was accordingly viewed as unjustifiable interference with academic freedom. In the absence of legally enforceable fundamental rights, the reliance placed on this freedom was unable to prevent the enforced segregation of people of 'different races' in universities. Consequently the legislation, in the form of the Extension of University Education Act, enabling forced segregation was passed by the sovereign parliament representing the interests of the white minority.

As opposition against apartheid increased in the next decades, the Nationalist government responded with stringent legal provisions to suppress dissent and opposition. These provisions necessarily impacted on universities. Security legislation such as the Suppression of Communism Act 44 of 1950 set out severe penalties for the 'incitement to commit certain actions designed to bring about social and political change' thus stifling open academic (and other) discussions about political alternatives for South Africa (Beinart et al 1974). For example, outspoken academics and students lived under the threat of banning orders which left those critical of the status quo incommunicado and their academic work inaccessible to other members of the academy and to students. Laws that allowed for long periods of detention without trial of those involved in suspected 'terrorist activities' or those affiliated with banned organisations further served to deter the academic exploration or discussion of political alternatives. Censorship laws also restricted access to 'undesirable' material. The interpretation of 'undesirable' was broad

and the apartheid authorities banned literary and academic works perceived as a threat to the system without hesitation.

It was against this background that academics of the University of the Witwatersrand and the University of Cape Town prepared a publication in 1974 to supplement the Davie-definition of academic freedom. The academics contended that the changing circumstances in South Africa demanded the recognition of an additional aspect to academic freedom. This aspect was freedom of academic expression. It included 'the freedom for university teachers to teach and to pursue research freely, and freedom for students to debate old and new ideas freely' (Beinart et al 1974, p.25). This expanded definition placed emphasis on the role of individual academics and students, rather than on the university as institution. But the fact remained that the apartheid government during the 1980s not only posed a threat to individual rights to academic freedom, but also to academic freedom as institutional autonomy. This is evident from one of the few South African judgments commenting on the relationship between the government and universities discussed below.

As internal opposition to apartheid intensified, political activities on several campuses around the country escalated (Moodie 1994, p.9-11). In an attempt to subdue these activities, the Minister of Education attached particular conditions to the awarding of subsidies to universities. These conditions related to conduct of staff and students in respect of demonstrations and protests against apartheid. The conditions determined that the payment of subsidies to universities would be dependent on steps taken by the university to prevent the disruption of teaching and research, deterring protests on campus, preventing the use of university resources to 'further the aims or public image of unlawful organisations' and so forth.⁷ Under the conditions, the universities further had to take disciplinary steps against individuals who engaged in the prohibited behaviour and

⁷ The conditions that the Minister of Education attempted to impose are set out in the judgment *University of Cape Town and another v Ministers of Education and Culture (House of Assembly and House of Representatives) and others* 1988 (3) SA 203 (C) 207D-E.

they had to report such breach and the steps taken in respect thereof. These conditions were challenged as invalid by the University of Cape Town and the University of the Western Cape in the Cape High Court.⁸ The court found the conditions to exceed the powers conferred by the legislation and to be vague and unreasonable. In its judgment, the court considered a statement of the Minister of Education's in which academic freedom was raised in defence of the conditions imposed:

'After referring to disturbances and other events on certain campuses second respondent [the Minister of Education] said:

"Responsible academic freedom is being threatened hereby. Freedom of speech at our universities is being threatened hereby. The right of all students to study and to be taught without threat or interference is being threatened hereby. I would like to say that the very essence of the university as an institution is at stake.'" (University of Cape Town 211I-J).

It was clear, however, that the conditions were rather aimed at quelling dissent and opposition as the next paragraph of the Minister's statement illustrates, and as the court accepted:

"Simultaneously, the present situation poses a potential threat towards the maintenance of law and order in general. In the atmosphere of the existing state of emergency throughout South Africa, whether you agree with it or not, and where the Government has been forced to take strong steps in many spheres, there has been a shift towards our campuses amongst those behind the revolutionary onslaught'" (University of Cape Town 212A).

While the court did not make any particular pronouncements on academic freedom as it relates to individuals or institutions, it clearly rejected the argument of the Minister that the conditions relating to subsidies were imposed in the interests of academic freedom.

⁸ See Bray (1988) Rabie and Du Plessis (1988) for discussion and analysis of the judgment.

The threats posed by apartheid to the free pursuit of teaching and research at different times, crystallised different aspects of academic freedom as applicable to universities and academic staff and students at universities. In the 1950s, the nature of the threat emphasised the role of the institution in academic matters. Threats in the 1970s stifled frank discussions of political alternatives and demanded the emphasis to be placed on the individual as bearer of the right. Different aspects of academic freedom can be distinguished that relate to institutions and to individuals respectively. These aspects are inextricably related and have in common the pursuit of knowledge (or then, the academic endeavour).

Under apartheid the South African courts made no pronouncements on the scope and meaning of academic freedom. Notwithstanding this, the Davie-formulation of academic freedom received the judicial stamp of approval of Frankfurter J in *Sweezy v New Hampshire* in the Supreme Court of the United States of America (*Sweezy v New Hampshire* 354 U.S. 234, 77 S.Ct. 1203). This approval is widely seen as the 'classic statement' of institutional autonomy as an aspect of academic freedom in America constitutional law (Barendt 2010, p.28, du Toit 2007, p.13 who is of the view that the Davie-formulation was concerned only with issues of institutional autonomy, (Moodie 1994, p.8). A closer look at the 1957-statement and Frankfurter J's extensive quote from the 1957-publication of the open universities shows a more nuanced understanding:

"In a university knowledge is its own end, not merely a means to an end. A university ceases to be true to its own nature if it becomes the tool of Church or State or any sectional interest. A university is characterized by the spirit of free inquiry, its ideal being the ideal of Socrates - 'to follow the argument where it leads'. This implies the right to examine, question, modify or reject traditional ideas and beliefs. Dogma and hypothesis are incompatible, and the concept of an immutable doctrine is repugnant to the spirit of a university. The concern of its scholars is not merely to add and revise facts in relation

to an accepted framework, but to be ever examining and modifying the framework itself.

... Freedom to reason and freedom for disputation on the basis of observation and experiment are the necessary conditions for the advancement of scientific knowledge. A sense of freedom is also necessary for creative work in the arts which, equally with scientific research, is the concern of the university. ...

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university-to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'"

(Quoted by Frankfurter J in *Sweezy* 262-263).

Even in the 1950s, the open universities in South Africa did not see academic freedom merely as a question of institutional autonomy. Such a reading of the 1957-statement, or *Sweezy* for that matter, does not do justice to the deeper understanding of the concept that is illustrated by the quotation above. Academic freedom, according to this statement, goes to the heart of the business of the university to investigate this world (and beyond) sincerely, and the essential freedoms to determine who may teach, what the curriculum should include (or exclude), the teaching methodologies to be followed and who may be admitted as students are to be exercised on academic grounds only. It is this last qualifier that is often downplayed in considerations of the *Davie*-definition of academic freedom. *Sweezy* involved the alleged breach of the academic freedom of an individual. Frankfurter J's reliance on the *Davie*-formulation established a link between the individual academic's freedom to teach and research as a professional within the framework of his or her discipline and according to the dictates of his or her conscience, and the freedom of an institution to determine its curriculum, to appoint its staff and admit students (Barendt 2010, p.26). This relationship is symbiotic. If

a government dictates to a university what it may teach, whom it may appoint as staff and whom it may admit as students, the freedom of an individual to teach and research is necessarily compromised (Barendt 2010, p.67).

Transition to democracy

At the end of apartheid the higher education landscape in South Africa was racially fragmented and unequal, as was state and society. The fundamental change brought about by the political negotiation and the consequential transition to constitutional democracy necessarily affected higher education and higher education institutions in South Africa as these are (for the most part) publicly funded.⁹ At the time of the introduction of a supreme Constitution (at first the interim Constitution) with a justiciable Bill of Rights,¹⁰ there was a clear awareness of the importance of academic freedom and freedom of scientific enquiry. This awareness is evident from the inclusion of s 14(1) and s 15(1) in the Bill of Rights of the interim Constitution.

Section 14(1) reads:

'Religion, belief and opinion

(1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning'.

Section 15(1) reads:

'Freedom of expression

Every person shall have the right to freedom of speech and expression, which shall include freedom of the press and other media, and freedom of artistic creativity and scientific research'. A

⁹ The transition to constitutional democracy and the transformation of South African society affect state and society, in my view, in totality. Neither public nor private institutions are immune to the impact of the Constitution. The fact that an institution is publicly funded strengthens the 'hold' of the Constitution, but even if it were not publicly funded one could not argue that the Constitution has no relevance for the institution.

¹⁰ A justiciable Bill of Rights is enforceable in a court of law, as opposed to a normative Bill of Rights that only provides guidelines but which is not legally enforceable.

brief consideration of the history of the inclusion of these provisions in the interim Bill of Rights provides a background for the ultimate inclusion of academic freedom in the text of the 1996 Constitution.

The Bill of Rights in the interim Constitution was the product of technical advisors and political compromise between the negotiating parties at the Multi-Party Negotiation Process (Du Plessis and Corder 1994; Atkinson 1994, Du Plessis 1994). Du Plessis and Corder, two of the technical advisors, make the point that the Technical Committee refrained from referring to academic freedom in their first drafts of the Bill of Rights. The technical advisors were of the view that academic freedom would be adequately protected by the right to freedom of thought, belief and opinion. A further motivation for the omission was the disagreement between the negotiating parties about the desirability of including a comprehensive set of rights in the Bill (Du Plessis and Corder 1994, p.157). The African National Congress and its partners were of the view that the decision regarding rights to be included in the Bill of Rights had to be made by the elected representatives of the people and thus favoured a 'minimalist' Bill of Rights to be included in the interim Constitution which would serve only to facilitate the transition to constitutional democracy. Representatives of several of the smaller negotiating parties advocated for a comprehensive and final Bill of Rights to be negotiated at Kempton Park, and the Nationalist government positioned itself somewhere in between these two positions (Du Plessis and Corder 1994, p.41).

The compromise inclusion of academic freedom and freedom of scientific research in the respective provisions as set out above was the result of a 'number of submissions ... in which the explicit constitutionalization of academic freedom and of the freedom of scientific research were advocated' (Du Plessis and Corder 1994,

p.157).¹¹ In relation to academic freedom, the wording of s 14(1) follows the example of the Namibian Constitution which states in article 21(1)(b) that 'All persons shall have the right to freedom of thought, conscience and belief, which shall include academic freedom in institutions of higher learning' (Du Plessis and Corder 1994 p.156). Du Plessis and Corder note, however, that the wording of the two provisions '(introduced by the phrase "which shall include") suggests that the particular freedoms explicitly mentioned are already included in the entitlements initially entrenched in broad and non-specific terms' (1994, p.157). This observation is important – it is not the specific enumeration of academic freedom and freedom of scientific research that extends constitutional protection to these endeavours. A court could thus, even in the absence of the explicit references to academic freedom and freedom of scientific research, interpret the rights in question to extend protection to those involved in teaching and research. In this regard a consideration of the application and enforcement of the Bill of Rights is important.

The Bill of Rights contained in chapter 3 of the interim Constitution and the Bill of Rights under the 1996 Constitution have the same basic structure. The rights that are set out in the Bill of Rights are not absolute in their functioning and may justifiably be limited in

¹¹ According to Du Plessis and Corder (1994), the Democratic Party made a submission to the Technical Committee on 12 May 1993 in the following terms which seems to be the main catalyst for the inclusion of academic freedom in the interim Bill of Rights:

'Freedom of Learning and Education

12.1 The freedom to study, learn and teach shall be guaranteed.

12.2 The State shall not try to shape education or culture in accordance with any particular political or ideological commitment.

12.3 The academic freedom of every university and similar institution of higher learning shall be guaranteed'' (Emphasis added.)

In the explanatory note the Party motivated its call for the inclusion of the right as follows: 'The light of learning is also the torch of democracy. True learning, independent of political control is the nemesis of tyranny. Recognising that the authors of apartheid twisted education into a means of repression (sic). Never again can that be permitted. ... During apartheid, among those who most constantly kept alive the idea of democracy, and indeed the values affirmed by this Bill of Rights, were the independent universities. They became, in consequence, targets for repression. This Bill seeks to put them, and all institutions of higher learning like them, beyond further interference'.

terms of a law of general application or where rights are in conflict with one another, the limitation analysis will involve a proportionality analysis, which balances competing interests (Du Plessis and Corder 1994, p.81, Currie and De Waal 2005, p.163). The right 'to freedom of conscience, religion, thought, belief and opinion' as it extends to academic freedom at a university (under s 14(1) of the interim Constitution) could accordingly justifiably be limited by legislation regulating, for example, funding to tertiary education institutions, provided that the limitation of the right meets the requirements for limitations set out in s 33 of the interim Constitution. Essentially, a general limitations clause allows for the justifiable limitation of rights provided that the limitation is reasonable and justifiable in an open and democratic society.

The rights as set out in s 14(1) and s 15(1) of the interim Constitution relating to teaching, research and learning were never tested in a court of law. Natural persons (ie. Individuals, academics) could logically claim the protection of these rights, and insofar as 'institutions of higher learning' could justify their entitlement to set their academic agendas for themselves, the institutions could, to my mind, also claim protection of the rights.¹² The institutions (and individual academics) could not, however, legitimately resist the constitutional commitment to transition and transformation under the guise of academic freedom since the public function and nature of universities also bound them to the Constitution and the ideals set out therein.¹³ These considerations similarly apply under the 1996 Constitution. It is to this Constitution, its demands regarding transformation and its provisions regarding academic freedom that I now turn.

¹² See s 7(3) of the interim Constitution: 'Juristic persons shall be entitled to the rights contained in this Chapter where, and to the extent that, the nature of the rights permits'.

¹³ The Bill of Rights of the interim Constitution applied vertically directly (ie. rights could directly be enforced against organs of state), but horizontally indirectly (ie. the common law as applied between individuals had to be interpreted in the spirit of the Constitution, but direct enforcement of a fundamental right against another private individual was not possible): *Du Plessis v De Klerk* 1996 (3) SA 850 (CC). Whether or not universities are viewed organs of state (in which event they would have been bound by the provisions of the interim Bill of Rights directly) depends on the nature function in question (see Du Plessis and Corder 110).

ACADEMIC FREEDOM AND TRANSFORMATIVE CONSTITUTIONALISM

In accordance with the political agreement reached during the multi-party negotiations, the transition to democracy was to take place in two stages. This included the drafting of the Constitution by the democratically elected Constitutional Assembly in accordance with the 34 constitutional principles contained in Schedule 4 of the interim Constitution. The agreement further stipulated that the newly-established Constitutional Court had to certify the new constitutional text as being compliant with the principles.¹⁴

Principle II guided the constitution-making process insofar as fundamental rights were concerned:

'Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution.'

In its October 1995 report to the Constitutional Assembly, Theme Committee 4 (advising on the Bill of Rights) set out the different considerations and submissions in relation to academic freedom and its potential inclusion in the Bill of Rights. The Committee noted that international law does not per se protect or demand the protection of academic freedom (Theme Committee 4 Report, October 1995, p.181). Different foreign jurisdictions deal with the protection of academic freedom differently – with protection granted in the United States of America via the First Amendment, and with explicit protection granted in the Namibian Constitution and German

¹⁴ See *In re: Ex parte Chairperson of the Constitutional Assembly, Certification of the Constitution of the RSA*, 1996 (10) BCLR 1253 (CC); 1996 (4) SA 744 (CC) paragraphs 13-15.

Basic Law (Theme Committee 4 Report, October 1995, p.181-182).¹⁵ The Report highlights the importance of academic freedom in the South African context given the history of the violation of academic freedom by the apartheid government through enforced segregation and suppression of free expression. The Committee accordingly recommended continued 'special attention' to academic freedom in the Constitution to be drafted (Theme Committee 4 Report, October 1995, p.180).

The Committee recommended the protection of academic freedom and freedom of scientific research in a single provision and noted that the separation of the two aspects in the interim Bill of Rights worked uncertainty in hand as it was unclear who the bearers of the respective rights are:

'The word "person" in s 15(1) [of the interim Constitution] probably includes juristic persons. If freedom of scientific research is to be meaningfully protected it should extend to both the individual researcher and the research institution. The word "person" in s 14(1) [of the interim Constitution] in respect of academic freedom has a less certain meaning. While common sense dictates that the right should extend to the 'institutions of higher learning referred to in s 14(1), the coupling of the right with the freedom of conscience, thought, belief and opinion, which clearly do not extend to the juristic person, suggests that the right attaches to the natural person only' (Theme Committee 4 Report, October 1995, p.182).

The Committee added that the content of the right to academic freedom 'is clearly not fixed' and that the scope thereof would be determined judicially, i.e. in relation to a specific set of facts. It added:

'The accepted core content of this right includes the freedom of

¹⁵ The formulation of the right in the German Basic Law is interesting. Under the heading 'Freedom of expression, arts and science', article 5(3) provides: 'Art and science, research and teaching, shall be free. Freedom of teaching shall not absolve from loyalty to the constitution'. This provision has been interpreted to oblige the state to provide financial and infrastructural support to allow for the realisation of the right: see Barendt (2010, p.133) for discussion.

members of the academic community, individually or collectively, to pursue knowledge through research, study, discussion, teaching and writing. It also embraces the freedom of the university to decide on academic grounds who may teach, what may be taught, how it shall be taught and who may be admitted to study' (Theme Committee 4 Report, October 1995, p.183).

The concern of the Constitutional Assembly was not limited to drafting a 'model' Bill of Rights for South Africa, but it was also to draft a constitution to guide the transformation of South African society from authoritarianism to constitutional democracy in which respect for the inherent dignity of people is paramount.¹⁶ The drafting process was thus not only intended to yield a constitution to establish the state, but more was (and still is) at stake. The constitution yielded by the process was also meant to guide the process of change in an egalitarian direction. The need for transformation logically extended to educational institutions. Any constitutional protection afforded to academic freedom could not be at the expense of transformation. The fear that constitutional protection of academic freedom in the form of institutional autonomy could justify resistance to transformation clearly impacted on the discussions (Dlamini 2000, p.185).

Prior to the October 1995-report of the Theme Committee, submissions from several universities and political organisations reflected great divergence in respect of the extent to which academic freedom required constitutional protection. The universities generally supported extensive explicit protection of institutional autonomy and academic freedom.¹⁷ The different political parties expressed different

¹⁶ See Klare (1998, p.150) who explains the commitment to transformative constitutionalism as 'a long-term project of constitutional enactment, interpretation and enforcement committed (not in isolation of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law'.

¹⁷ See for example the submissions by the University of Stellenbosch (5 June 1995); the University of the Orange Free State (26 June 1995); the University of Pretoria (12 July 1995) and the undated submission of Potchefstroom University.

views in this regard; with support for its inclusion under the right to freedom of expression (ANC); as a separate provision (National Party) and under the right to education (Democratic Party and Freedom Front).¹⁸ It is worth noting that the Committee was of the view that explicit protection of institutional autonomy was superfluous since academic freedom also encapsulated the autonomy of a university in respect of teaching and research (Theme Committee 4 Report, October 1995, p.186).

In the October 1995-report, Theme Committee 4 assuaged fears regarding academic freedom and possible resistance to transformation:

‘Fears that an academic freedom clause might obstruct university freedom are unfounded. When the Bill of Rights is studied as a whole it will be seen that the clauses dealing with equality and education will ensure that the appointment of teaching and administrative staff within such institutions, and the admission of students will take place on the basis of equality, with allowance made for affirmative action programmes. If a university resists transformation in other ways it will be possible for Parliament to intervene in terms of the limitation clause to remedy the position’ (1995, p.185).

In this regard, the view of the Committee accords with the British tradition regarding institutional autonomy of universities. Autonomy of universities in the United Kingdom has ‘never meant absolute immunity from ... regulation’ (Barendt 2010, p.77). Parliament is accordingly at liberty to steer the direction of higher education, but this has to take place within the framework of the Constitution.

Despite favouring a separate section to deal with academic freedom specifically, the Committee also set out other options for consideration by the Constitutional Assembly sub-committee:

¹⁸ The Democratic Party made detailed submissions on the same terms as to the Technical Committee responsible for the drafting of the interim Constitution (20 April 1995).

- i. to protect academic freedom under the right to education and to indicate expressly that both individuals and institutions are entitled to the protection afforded;
 - ii. to protect academic freedom together with freedom of religion, belief and opinion;
 - iii. to protect academic freedom under freedom of expression.
- (Theme Committee 4 Report October 1995 p.186).

In respect of the last option the Committee noted that academic freedom involves freedom of thought and opinion and expression, but it maintained that academic freedom also includes aspects of autonomy in academic decision-making which is not self-evident if the right is set out under freedom of expression (Theme Committee 4 Report, October 1995, p.188).

Disagreement about the appropriate ‘home’ for academic freedom persisted into 1996, but the political role-players ultimately agreed that the last option was to be followed (Constitutional Talk Number 1: 9-29 February 1996). The protection of academic freedom and freedom of scientific research under freedom of expression was accordingly approved by the Constitutional Assembly and certified as compliant with principle II by the Constitutional Court.

This exposition of the drafting history has emphasised the complexity of academic freedom and the close association thereof with other rights. Freedom of thought, conscience and opinion, freedom of association and freedom of expression all relate to academic freedom and freedom of scientific research. The right as it is protected in the Constitution does not stand alone, but must be interpreted within the framework of the Bill of Rights and the Constitution as a whole.¹⁹ Historically and contextually, the right – even under the heading ‘expression’ – accrues to individuals and institutions in relation to academic matters. Juristic persons (ie. institution made up of natural persons) are entitled to the protection of s 16, at least insofar as

¹⁹ See *S v Makwanyane* para 10; *Case v Minister of Safety and Security* 1996 (3) SA 617 (CC) para 27, *Khumalo v Holomisa* 2002 (5) SA 401 (CC) para 8.

freedom of the press and media is concerned.²⁰ There seems to be no logical reason to exclude juristic persons from protection of the right in respect of academic freedom and freedom of scientific research. However, should a court interpret s 16(1)(d) to limit its protection to individuals, that would not leave institutions completely vulnerable as the 'residual freedom rights',²¹ and the right to freedom of association would extend protection to institutions to engage in their academic work without undue interference.

The explicit reference to academic freedom and freedom of scientific research in the Constitution has wider implications. Barendt (2010, p.45-49) makes the point that a constitutionalised academic freedom provision operates as an enforceable right, but that it also exerts influence as a value, thus informing the interpretation of other laws and the resolution of conflicts as a result of competing claims of academic freedom between individuals and institutions.²² Viewed as such, the explicit reference to academic freedom in the Constitution has a wide impact that affects all law applicable to the academy.

CURRENT THREATS TO ACADEMIC FREEDOM: PERCEIVED OR REAL

In 1957, the drafters of the statement on academic freedom stated with confidence that 'in a university knowledge is its own end, not merely a means to an end' (Van de Sandt Centlivres *et al* 1957, p.10). But times have changed and universities are now expected 'to contribute to the economic well-being of the country and to be responsive to national needs' (Barendt 2010, p.6). This is most certainly true of universities in post-apartheid South Africa. Education

²⁰ See *In re: Ex parte Chairperson of the Constitutional Assembly, Certification of the Constitution of the RSA*, 1996 paragraph 57.

²¹ *Ferreira v Levin NO* 1996 (1) SA 984 (CC) Ackermann J's judgment paragraphss 47 and 57 in particular, and see also paragraph 184 per Chaskalson P.

²² Barendt (2010) explicitly refers to the judgment of the Eastern Cape High Court, Grahamstown in the matter of *Chetty v Adesina* (33/2007) [2007] ZAEHC 98 (2 November 2007) in which Froneman J considered the defence of fair comment in the light of the value of academic freedom.

White Paper 3: The Programme for Transformation of Higher Education of 1997 identifies the purposes of higher education as follows: to contribute to transformation of South African society, to meet the learning needs of individuals, to contribute to development in society and the labour market, to contribute to the 'socialisation of enlightened, responsible and constructively critical citizens' and to contribute to the knowledge pool. In the process of transformation universities are thus seen in the White Paper as key role-players, steering the process of transformation through investigation of the needs of society, while undergoing transformation at the same time. The racial divide of apartheid and its legacy at universities must be addressed, while quality research and teaching, effective and efficient use of resources, democratic governance and public accountability are to guide and inform public university education. These principles, together with academic freedom and institutional autonomy were identified as foundational to the reform of higher education in South Africa. It is noteworthy that academic freedom and institutional autonomy are distinguished in government policy documents such as the White Paper, and that the latter is particularly linked to public accountability. It would seem that in the view of the policy drafters, academic freedom is constitutionally protected, while institutional autonomy is not. This narrow view of academic freedom is contrary to the historical and contextual interpretation of the right as illustrated above. An institution has the right to determine academic matters within the framework of the Bill of Rights and governmental attempts to, for example, regulate student access to institutions on non-academic grounds beyond the framework of the Bill of Rights (as it relates to, for example affirmative action which is constitutionally permitted and regulated) would amount to an infringement of an institution's right to academic freedom.²³ This is a lesson well worth learning from the 1950s.

²³ Admission policies are determined by the Councils of higher education institutions (s 37) and must provide for redress of past inequalities without unfair discrimination. The Act clearly leaves the academic considerations of admission requirements to the Senate, an academic body (s 37(4)).

The Higher Education Act 101 of 1997, uncontroversially in my view, gives effect to the core policy considerations of the White Paper, by providing for oversight and guidance of universities in respect of institutional planning, funding and quality assurance.²⁴ Institutional autonomy does not require universities to have complete free reign in respect of all its affairs. Legislation may limit institutional autonomy as an aspect of academic freedom (thus as it relates to academic matters) provided that the limitations are justifiable under section 36 of the Constitution. Administrative and governance issues unrelated to (or more distant from) the academic work of an institution may be regulated more closely since those affairs fall outside the scope of academic freedom. The Higher Education Act standardises governance structures of public higher education institutions and prescribes democratic participation in structures, particularly to represent students' interests. Funding of institutions is regulated and dependent on, amongst other things, appropriate record-keeping to ensure accountability. This level of regulation does not compromise academic freedom. If the legislation or an executive directive were, however, to make funding dependent on the pursuit of a particular political agenda as the Nationalist government tried to do in the 1980s, it would be in breach of the constitutional right.

Academic freedom entitles a university to make academic decisions without undue interference from government, or any institution or person. The decisions of an institution on academic affairs are made by academics collectively in accordance with professional standards and the dictates of a particular discipline. Academic self-governance is an important aspect of academic freedom and requires respect from administrators in an institution (Barendt 2010, p.32-34, du Toit 2007, p.17). The freedom of an individual academic to teach and research without undue interference is dependent on numerous factors. Individual researchers are dependent on institutional support, funding and access to information. There is potential tension between the academic freedom of an individual and that of his or her institution. An institution can, for example, restrict funding to

²⁴ In contrast to this, see Malherbe and Berkhout (2001) and Alston and Malherbe (2009).

projects that it deems unsuitable without academic justification, or it can prevent individuals from publishing work critical of the institution or government, or it can attempt to silence or discipline an outspoken academic (Barendt 2010, p.38-45). In such instances the university may be in breach of the individual's right to academic freedom. A careful proportionality analysis focusing on academic considerations, rather than on administrative or political considerations will be necessary to determine whether the restrictions placed by the institution are justifiable. Undue restrictions placed on intellectual property rights by an institution could similarly impinge on academic freedom (Barendt 2010, p.213-225). Insofar as these issues are concerned, the safeguard lies in academic self-rule to ensure that decisions impacting on academic work are taken on academic grounds.

Funding from industry has the potential to undermine academic freedom of an individual (and by extension that of an institution) since contracts negotiated with external funders may require approval of the funder rather than assessment of the research on academic merit (Barendt 2010, p.226). Through prescriptions regarding curricula, the regulatory bodies of the professions may also infringe on academic freedom.

A similar threat from outside the academy to the academic freedom of individuals relate to the regulation of access to information. In the United Kingdom and in the United States of America extensive anti-terrorism legislation has impacted on teaching and research relating to the academic study of terrorism (Barendt 2010). In South Africa, the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004 criminalises the collection or making of a document 'connected with the engagement in a terrorist activity'. The penalty a conviction on this charge carries is up to 15 years imprisonment. Sweeping provisions such as these have a chilling effect on academic work in the field. The controversial Protection of State Information Bill may similarly deter academics from engaging in research or teaching on the topic of state security, or involving any classified information. Teaching and research based on classified

material will be difficult as several bureaucratic obstacles²⁵ are put in place to restrict the free flow of information. These obstacles are backed by stringent criminal sanctions,²⁶ further discouraging academic consideration of these important matters.

CONCLUSION

Academic freedom is explicitly protected in the South African Constitution. If it were not explicitly mentioned, it would still have been constitutionally protected, but the drafters of the Constitution reacted to the past infringement of academic freedom by referring to it explicitly. This signifies that lessons are to be learnt from the past. Undue governmental interference in respect of admission requirements to institutions unrelated to academic merit and not permitted by the Bill of Rights, undue restrictions to stifle criticism and critical analysis of governmental actions and policies, and unjustifiable and illegitimate conditions relating to university funding are clear contraventions of academic freedom. But academic freedom does not grant universities, academic staff and students carte blanche. It grants universities, academics and students the freedom to consider our realities (and aspirations) within the boundaries and the transformation agenda set by the Constitution.

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²⁵ See clause 19 of the Bill.

²⁶ See chapter 11 of the Bill.

LOSING THE ACADEMIC FREEDOM PLOT? THE CHE AND THE DEBATE ON INSTITUTIONAL AUTONOMY AND PUBLIC ACCOUNTABILITY

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In 2005 the Council on Higher Education (CHE) initiated an ambitious flagship project on “Academic Freedom, Institutional Autonomy and Public Accountability in South African Higher Education” (HEIAAF) to address key issues around academic freedom in current South African higher education. The HEIAAF process involved a range of local as well as international academics, university leaders and policy figures in research projects, local workshops and national conferences culminating in a report from a high profile independent task team published in August 2008 (CHE HEIAAF, 2008). The Task Team report provides a detailed and systematic account of this complex process - drawing together the diverse inputs including institutional and individual submissions, commissioned research reports, regional workshops and national conferences - as the basis for its own conclusions and recommendations. This report should have been an authoritative landmark text for South African discussions of academic freedom. In practice, though, the Task Team report achieved no significant public profile and attracted hardly any serious attention or responses. Indeed, it seems the CHE itself pretty much abandoned the Task Team report and with it the HEIAAF process. The HEIAAF report is available on the CHE website, and presumably the CHE communicated its views on the findings and recommendations of the Task Team to the Minister of Higher Education but no public announcement was made in this regard.

This must raise a number of questions: What were the context, agenda and objectives of the HEIAAF process? In what way has the HEIAAF process contributed to the discourse on ‘academic freedom’

in South African higher education? What are the Task Team Report’s main contributions, key findings and recommendations? What should we make of the CHE’s abandonment of its own flagship project, and what does this say about the CHE’s own role and significance in this connection?

The first part of this paper will provide some comparative historical background with reference to the 1957 T.B. Davie formulation of ‘academic freedom’, the 1974 Van Wyk de Vries Commission and the National Commission on Higher Education (NCHE) process in the mid-1990s. It will then give a brief overview of the immediate context of the HEIAAF process and an account of its main components followed by a consideration of some key features of the Task Team report and its conclusions on ‘academic freedom’. On this basis it will then revisit some of the questions raised above.

1 HISTORICAL BACKGROUND: ‘ACADEMIC FREEDOM’ FROM T.B. DAVIE TO THE NCHE

Let us start by recalling some key moments in the public discourse on academic freedom in South Africa. Of greatest renown has been the “Open Universities” declaration of 1957 in response to the apartheid government’s proposed legislation to exclude black students from our universities. The celebrated T.B. Davie formulation of the “four essential freedoms” (“our freedom from external interference in (a) who shall teach, (b) what we teach, (c) how we teach, and (d) whom we teach”) has served as a point of departure and frame of reference for South African debates on academic freedom for the past half century. In some ways it is not obvious why this should be so. At the time the “Open Universities” declaration was issued on behalf of the ‘liberal’ universities only, and these did not even include English-language institutions such as Rhodes University or the University of Natal but was restricted to the University of Cape Town and the University of the Witwatersrand. Moreover, as a conceptualization of academic freedom it was inadequate and peculiarly limited: despite the elegance of the “four essential freedoms” these primarily

amounted to an assertion of institutional autonomy against possible threats of interference by the state. In effect the T.B. Davie formulation of academic freedom expressed neither the classic principles of scholarly freedom (*Lehrfreiheit*) nor that of unrestricted student access to higher education (*Lernfreiheit*). Its primary concern was to assert the prerogative of the university itself - and not of the state or other external agencies - to decide who shall teach, what should be taught, how it would be taught, and who would be taught. This left open the basic question of just who represented the university in deciding such matters. (Is it the Executive and Council or the academic professoriate through the Senate and in Departments?) It also evaded the whole issue of the university's accountability to any instance but itself. But in circumstances where the manifest threat was posed by the apartheid state's determination to interfere in the universities this assertion of institutional autonomy served as a necessary and eloquent defence of academic freedom. For decades to come the liberal universities ritually affirmed the T.B. Davie formulation in annual "Academic Freedom" ceremonies and public lectures organized by dedicated Academic Freedom Committees. More generally, the assumption that institutional autonomy was at the core of academic freedom continued to inform public discussion, even on the part of critics of the liberal universities.

The official counterblast to this 'liberal' discourse on academic freedom was provided by the Report of the Van Wyk de Vries Commission in 1974. The Report provided an abstruse and complicated, not to say incoherent, account of the relation between university, society and the state but was clear enough in its categorical rejection of any notion of academic freedom premised on institutional autonomy. As a statutory corporation, the purposes and capacities of the university were deemed to be limited to those provided for in the relevant legislation (Van Wyk de Vries Commission, 1974, p.73). This legalist and positivist conception of the university was married to a relativist vision of the university as socially and culturally embedded in a particular society: "The universities of one country cannot be identical with the universities of another; there is always a bond between the university

and the nation. This is also true of universities in South Africa; they have their own character, and of necessity follow a distinctive South African development" (Van Wyk de Vries Commission, 1974, section 3.2). (In line with the ideological logic of 'separate development' it followed that the ethnically distinct peoples of South Africa should each acquire their separate universities in their own 'national states'). Remarkably, though, the report was not prepared to recognize the distinct conceptions of academic freedom respectively espoused by the liberal English-language and the Afrikaans-language universities as a product of differing cultural backgrounds. Instead it rejected the liberal conception of academic freedom as "incorrect" while affirming that "there is no room in any country for more than one conception of the function of the university" as determined by the state (Van Wyk de Vries Commission, 1974, section 4.14 & 5.5; cf du Toit, 1975). The Report concluded by decisively rejecting any notion of academic freedom in terms of institutional autonomy and/or scholarly freedom:

In the exercise of its academic freedoms the community of 'scholars' cannot claim the right to decide what the interests of the community, society or the State should be, nor can it ignore the realities of those interests. It is unrealistic and fallacious to argue that such a community of 'scholars' has a right or a freedom derived from an international tradition or ideal or for that matter its own tradition; it is equally erroneous to argue that a community of 'scholars' (or a university) is at liberty to place itself beyond or above its community, society or State, there to determine its own character and nature, its own ethical and moral norms, and to operate as an *imperium in imperio*.

(Van Wyk de Vries Commission, 1974, section 6.22)

In substance and intent the apartheid state's authoritarian conception of academic freedom denied all scope for scholarly freedom and institutional autonomy alike; in practice this served to highlight the gravity of the issues at stake.

This position provided the implicit target for the NCHE process that set out to reconfigure the higher education system of the new post-apartheid South Africa in the mid-1990s. Drawing on the preparatory work done from the late 1980s by the ANC-aligned National Education Crisis Committee, the Educational Policy Units at University of the Witwatersrand, University of Western Cape and Natal University as well as the National Education Policy Investigation, the NCHE initiated a consultative and participatory process across a broadly supportive higher education sector. The NCHE's report and proposals (1996b) were then taken up as the basis for official policy development through the successive Green and White Papers (1997), the Higher Education Act (1998) and the eventual National Plan for Higher Education (NPHE) in 2001. The NCHE process was, of course, by no means primarily concerned with issues of academic freedom. Rather it sought to bring about a comprehensive restructuring of the higher education system within a single integrated framework based on democratic principles in order to overcome the deeply entrenched apartheid legacies of racial division and inequality. Even so, academic freedom was explicitly recognized as a basic right in the new Constitution while the need to allow sufficient scope for the institutional autonomy of universities informed "cooperative governance" as the official framework for the restructuring of the higher education sector. The newly integrated system of higher education would not be centrally directed by the state through the Ministry of National Education. Instead, the state would be involved in a supervisory or 'steering' role only (as opposed to a role of 'control' or 'interference') and the new system would be characterised by increased cooperation and partnerships, with defined roles for intermediary bodies between the state and the higher education institutions (such as the CHE) as well as the development of internal constituency partnerships and linkages between these institutions and civil society (CHE 2004, p.25).

At the levels of policy discussion as well as that of intellectual discourse the NCHE process and its model of "cooperative governance" attempted a paradigm shift. Compared to what had gone before, it represented a deliberate break with apartheid

ideology, not only in doing away with racial separation and divisions but also in setting out to avoid a single state-imposed and -controlled conception of the university (as had been articulated by the Van Wyk de Vries Commission). Similarly, compared to the liberal affirmation of institutional autonomy, it insisted that this should be accommodated within the framework of "cooperative governance" steered by the state. In theory as well as in practice this proved an unstable hybrid conception: in various ways state 'steering' shaded into 'interference'. More direct forms of intervention (with regard to the application of funding formulas for state subsidies, accreditation of programmes etc.) were increasingly perceived as threatening to the universities' institutional autonomy. Conversely, faced with major systemic problems and crises, the Ministry increasingly had recourse to directive interventions while allowing only limited and inadequate opportunity for consultation with stakeholders (notably with the process of imposed institutional mergers from 2001 consolidating some 36 higher education institutions to 23). Increasingly 'academic freedom', and more specifically institutional autonomy and accountability, became a highly contested terrain. Moreover, South African universities were being transformed during the 1990s in other ways as well: the local impact of global trends in higher education, the internal transformation of institutional governance by the rise of 'managerialism' and the unintended consequences of post-apartheid policy changes. These, too, increasingly impacted on academic freedom, though in other ways than by state interference. The CHE's HEIAAF project was conceived to address this complex new problematic involving academic freedom, institutional autonomy and public accountability.

2 THE HEIAAF PROCESS: OPENING UP THE DEBATE ON AUTONOMY AND ACCOUNTABILITY

In a number of ways the CHE's HEIAAF project over the 3 years from its inception in October 2005 to the publication of the Task Team Report in August 2008 was a remarkable process of structured deliberation:

- in its ambitious aims and objectives to attempt nothing less than to re-think academic freedom, institutional autonomy and accountability as the underlying principles of South African higher education;
- in its sustained attempts to do so at the various levels of conceptual principles, scholarly research and debate, policy development, inter-institutional negotiation as well as public engagement and consultation;
- and in its mobilisation of contributions from a wide range of academic researchers, policy experts, institutional and stakeholder representatives, public figures, state officials, regional fora etc.

As such this reflected one of the distinctive features of the South African higher education community in the 'new' post-apartheid context since 1994. Much has rightly been made of the legacies of fragmentation, division and inequality still scarring South African higher education in the aftermath of apartheid. But precisely in order to counter and overcome these, a new culture of inclusive public deliberations had begun to take root in the higher education sector, not least as an achievement of the inclusive NCHE process in the 1990s. At a CHE Colloquium on "Ten Years of Higher Education under Democracy" in November 2004 Colin Bundy, from his vantage point of someone with insider experience of local as well as of other higher education systems, observed that:

the colloquium provided an extraordinary discursive space: one shared by academic theorists, university administrators, students, those responsible for making policy and those charged with implementing policy. The opportunities provided for collective reflection by this mix are rare, anywhere, and possibly unique. South Africans involved in higher education should cherish them

(Bundy 2006, p.1)

Evidently the HEIAAF project was very much conceived in this spirit as an attempt to consolidate and expand this discursive space.

At the same time, the HEIAAF process also represented a significant effort on the part of the CHE to define a more independent role for itself in South African higher education. The CHE was a new kind of hybrid institutional animal on the South African higher education landscape, not an academic or research institution but also not merely an organ of the state. The NCHE had originally proposed the establishment of an independent Higher Education Council to have both an advisory role as well as policy-making functions (NCHE, 1996a. p.101). However, the NCHE's proposal was not accepted and the eventual CHE did not have any independent policy-making powers but only certain advisory functions and a partial co-implementation role in relation to the NQF, the auditing of quality assurance and the accreditation (or de-accreditation) of programmes (CHE, 2004, p.29). This limited the CHE's capacity to develop an independent role mediating between the state and higher education institutions; in effect, the CHE appeared set to become little more than an ancillary agency for the Department of Education. On the other hand, the CHE could still find a distinct role by creating a public space for, and promoting independent debate on, key issues of national higher education policy. An opportunity for this was provided by "the recent (largely unresolved) scholarly, sectoral and public debates about the state of academic freedom, institutional autonomy, and accountability in SA higher education" (CHE HEIAAF, 2008, p.vii). Accordingly Dr Saleem Badat, CEO of the CHE, launched the HEIAAF process to provide an overview of these recent and current debates (CHE 2008, p.5).

This, then, was the immediate context of the HEIAAF project. The consensus position represented by the 1997 White Paper and its framework of "cooperative governance", balancing state steering and institutional autonomy, was coming under increasing strains. This consensus position had been an achievement of the NCHE process as codified in the White Paper and the Higher Education Act. Various subsequent developments, including the official 2001 National

Plan for Higher Education (NPHE) indicated underlying problems and tensions as well as some unravelling of this consensus. These developments included the Department of Education's negative reception of the CHE's 'Shape & Size' Report in 2000, the strongly directive intervention of the Ministry through the 'merger' process following the 2001 National Working Group Report, the controversial 2002 CHE review of Masters of Business Administration programmes and the Department of Education's equally controversial Programme and Qualification Mix (PQM) exercise. Other major policy initiatives at this time were the introduction of the Institutional Audit Framework as well as the Higher Education Quality Committee's Founding Document followed by the new funding framework from 2004. Already in 2002 the CHE appointed a Task Team to conduct a review of cooperative governance. The report, prepared by Martin Hall with Thierry Luescher and Ashley Symes, proposed the adoption of "conditional autonomy" as a possible framework for renegotiating the limits of state steering in its advice to the Ministry of Education (Hall a.o., 2002). However, "the conditional autonomy concept was poorly received by the sector, especially because it seemed to imply that institutional autonomy could be taken away under certain conditions" (CHE HEIAAF, 2008, p.23). In his 2004 University of Cape Town Academic Freedom lecture "Accounting for Autonomy", Prof Jonathan Jansen proposed a notion of "differentiated autonomy", emphasizing the need for differentiated state steering of institutions with divergent histories, capacities and performance (Jansen, 2004). Further debates on issues around academic freedom and institutional autonomy followed in a series of workshops organized by the Centre for Higher Education Transformation (CHET) as well as by the CHE. In its own overview of these developments, the HEIAAF Task Team Report notes that "the most general reaction to the unfolding policy trajectory has been a sense that state steering of higher education has markedly intensified since 1997. Many stakeholders claim that steering of this degree risks running to interference" (CHE HEIAAF, 2008, p.2).

Against this background the CHE announced the appointment of

the initial Task Team investigation in October 2005. Among the Task Team's stated objectives were to "describe and critically analyse the conceptions of institutional autonomy, academic freedom and public accountability that are held by key higher education actors (and to) identify, describe and critically analyse the claims being made of government interference in higher education" (CHE HEIAAF, 2008, p.2). Dr Saleem Badat, Chief Executive Officer of the CHE, was appointed as Convenor of the Task Team while Dr Khotso Mokhele, President of the National Research Foundation served as Chairperson. Other members of the Task Team were Steven Friedman (Centre for Policy Studies, University of the Witwatersrand), Dr Frene Ginwala (former Speaker of Parliament), Prof. Ebrima Sall (Council for the Development of Social Science Research in Africa ((CODESRIA)) and Dr Mala Singh (CHE). Prof Njabulo Ndebele (Vice-Chancellor University of Cape Town) was also initially appointed but withdrew at a later stage while Prof Loyiso Nongxa (Vice-Chancellor (University of the Witwatersrand), Judge Dennis Davis, Dr Adam Habib (University of Johannesburg) and Prof Peter Vale (Rhodes University) were added to the Task Team. The Task Team Secretary, Ashley Symes, had a vital part as a Higher Education Consultant in putting together the documentation for the Task Team's work and preparing drafts of its Report.

3 COMPONENTS OF THE HEIAAF PROCESS

The complex and sophisticated HEIAAF process was designed to function at a number of different levels and in different contexts so as to be both professionally informed as well as inclusive of a range of different stakeholder constituencies.

A first component consisted of a substantial set of solicited submissions. Submissions were invited in July 2005 and by 2006 some 33 had been received. These included institutional submissions by key higher education organizations such as the NRF, Higher Education Quality Committee, South African Qualifications Authority and Higher Education South Africa; formal institutional submissions

from 16 universities (including some individual academic viewpoints) as well as submissions by a few Institutional Forums and the UNISA Academic Association, two submissions by unions (National Tertiary Education Staff Union and National Union of the Tertiary Employees of South Africa) and one by a student organization (South African Students Congress). More generally there were also submissions by the Freedom of Expression Institute, the National Council of Provinces and 4 individual submissions. The Task Team also met with selected individuals and groups including representatives of the Department of Education (CHE HEIAAF, 2008, p.5). However, there are indications that the submissions were not as representative and inclusive as might have been wished. Some corporate submissions tended to deal with “individual institutional trajectories and problems” rather than with “more systemic perspectives” (CHE HEIAAF, 2008, p.6). Significantly the universities’ institutional submissions “were rarely the outcome of an internal process” and few of these “represented consensual agreements on the issues addressed” (CHE HEIAAF, 2008, pp.6, 23). Unions and stakeholder submissions focused on issues directly affecting their immediate interests as stakeholders (CHE HEIAAF, 2008, pp.6-7). For their part, staff bodies were critical of managements who had failed to engage them in governance matters. Different perspectives were provided by the Freedom of Expression Institute submission which focused on the growing ‘disciplinary culture’ inside institutions and by SASCO, which the Report singles out as a “significantly dissenting voice” (CHE HEIAAF, 2008, p.8).. In general the weight of the submissions was significantly slanted towards institutional and organizational viewpoints, with relatively little input from the academic and research community.

A second component consisted of specially commissioned research projects. These did not produce anything like a settled ‘expert’ view but dealt with different aspects and issues of academic freedom from markedly different perspectives. In the Task Team’s view, Ruth Jonathan’s analysis of State-Sector relationships was notable for its central argument that academic freedom and institutional autonomy should not just be constrained by public accountability but needed to

be firmly grounded in democratic accountability (CHE HEIAAF, 2008, p.10). The key argument of Steven Friedman and Omano Edigheji’s commissioned report was taken to be that the substance of higher education – accountability, is evolving and should be subject to continuous negotiation (CHE HEIAAF, 2008, p.10). Kristina Bentley, Adam Habib and Sean Morrow’s commissioned research report proposed a strengthening of academic freedom and institutional autonomy by achieving a diversity of stakeholders, a diversity of income streams, and a system of supports and rewards for intellectual engagement (CHE HEIAAF, 2008, p.10). With regard to my own commissioned research the Report refers to the development of a composite ideal of academic freedom and the analysis of a multi-layered conception of accountability as a social compact (CHE HEIAAF, 2008, p.10). In April 2007 the CHE organized a representative national seminar on the commissioned research reports also for the benefit of the Task Team who subsequently engaged in deliberation with sectoral representatives including meetings with Higher Education South Africa, Department of Education representatives, Higher Education Quality Committee representatives and SASCO. In their eventual Report the Task Team engages with specific aspects, arguments and conclusions of the commissioned research reports. This could make for interesting and potentially enlightening debate, except that in the context of the Report the exchanges are inevitably one-sided with the Task Team serving as both a party to the debate as well as the judge of its terms and outcomes. More importantly, these exchanges tend to get in the way of presenting and developing the Task Team’s own approach and position, the more so since, as the Report frankly and repeatedly admits, its members disagreed among themselves. Indeed, the Report makes a point of stressing the limits of possible ‘consensus’ in its findings:

The Task Team has had to allow that consensus on various issues may or may not – now or ever – exist. This report has had to navigate: (dis-)agreement among Task Team members, (mis-)alignment between submissions, and other sectoral

contributions, and Task Team views, (mis-)alignment between commissioned research findings, other expert opinion and Task Team views, (non-)existence of a system consensus on particular issues ... and among higher education institutions

(CHE HEIAAF, 2008, p.15).

As if these complications are not enough, there is the additional factor that two of the authors involved in the commissioned research projects, Adam Habib and Steven Friedman, also became members of the Task Team itself. If certain of the key notions in their own research reports are prominently taken up by the Task Team while alternative notions in other commissioned research are downplayed or discarded, then one must wonder just how the qualitatively different roles of research analysts and Task Team membership have been held in balance. (I will return to the implications of these issues in the concluding section of the paper below).

A third component of the HEIAAF process consisted of a set of 6 regional fora between March and June 2006 at different South African universities. These involved presentations and discussions by individuals associated with the HEIAAF project as well as local and other participants (with papers and reports posted on the CHE website). In my own experience the regional fora varied significantly in terms of attendance, engagement and effectiveness. The Task Team Report does not attempt to make any assessment of the role or 'success' of these regional fora, but confines its account to some of the key themes to emerge from their proceedings. Amongst those listed are growing agreement that academic freedom and institutional autonomy are distinct concepts, not to be conflated, as has often occurred in the past; identification of a range of threats to academic freedom including those of 'managerialism', academic orthodoxies, commercial consultancy and contract research, commodification, commercialization and corporatisation of higher education and the failure to transform institutional cultures. More generally the regional fora also entailed sustained discussions on the

nature of the university and the issue of state 'steering' (CHE HEIAAF, 2008, p.9; cf also pp.29-30). It does not appear that the regional fora had any particular impact on the thrust and concerns of the eventual Task Team report. Conversely, these regional fora also did not do much to raise the public profile of the HEIAAF process in the wider academic community. As far as one can judge, few academics at local universities, apart from those directly involved in the HEIAAF process, took much interest in or were at all familiar with it. This appeared to be the case even on those campuses, such as University of KwaZulu-Natal (UKZN), which were in the throes of serious "crises" around academic freedom during this same period. One of the HEIAAF regional fora took place at UKZN in June 2006, followed by a set of "Academic Freedom" public lectures in late 2007, but this made little difference to the on-going confrontations on campus.

4 THE HEIAAF TASK TEAM REPORT

This paper cannot attempt an account and detailed analysis of the Task Team Report as a whole. I will only focus selectively on the Report's treatment of the central notion of academic freedom itself. My main purpose will be to clarify how, and to what extent, the Task Team developed a clear and coherent position on academic freedom in the Report.

The HEIAAF process amply demonstrated that in the post-1994 context discourse and debates on academic freedom had moved on from the primary concern with the external threat of state interference in the institutional autonomy of the universities. From its report, it is evident that the Task Team was very much aware of this changing intellectual landscape. It saw its own role as that of "(recording and discussing) some key contending views where these arise, while retaining a focus on those findings which constitute Task Team agreements" (CHE HEIAAF, 2008, p.15). One might then well expect that on this basis the Task Team would proceed with its own account drawing on the new conceptions of academic freedom being developed in response to a different and changing set of issues. Curiously, though, this is not the

case since the Task Team Report found it necessary to first confront the pre-1994 T.B. Davie notion of academic freedom.

The section on ‘academic freedom’ in the Task Team Report starts with a curious digression on the T.B. Davie ‘paradigm’ (CHE HEIAAF, 2008, p.28). If the T.B. Davie formulation of academic freedom had once enjoyed ‘paradigmatic status’, then this had been in limited circles, that of the leading ‘liberal’ universities, while more recent debates on academic freedom had moved on to different issues, as the HEIAAF process itself demonstrated. On all sides it was agreed that the T.B. Davie formulation had been overtaken by historical developments. So why this concern with its alleged ‘paradigmatic’ status? Was this a case of setting up a straw man and/or of flogging a dead horse? A possible answer may be found in the Report’s comment that the consensus represented by the 1997 White Paper had still involved the T.B. Davie formula. It was this consensus which the events and perceptions leading to the Task Team’s enquiry had signaled as, after all, imperfect (CHE HEIAAF, 2008, p.18). So there was a post-apartheid consensus at stake, but it was the consensus represented by the 1997 White Paper. This consensus around the model of ‘cooperative governance’ was evidently neither a straw man nor a dead horse. That put a rather different construction on the Task Team’s statement that

“South Africa’s ‘paradigmatic’ view on academic freedom – and the notions of institutional autonomy and accountability with which it is bound up – is no longer adequate; but, equally so, it is no longer appropriately contextualized for the new socio-economic context. Renewal of the concepts of academic freedom, institutional autonomy and accountability is unquestionably necessary – and is the essential work of this [report]”

(CHE HEIAAF, 2008, p.20).

If we take this to apply, not just to the historical T.B. Davie formulation of academic freedom, but to the post-1994 consensus model of ‘co-

operative governance’, then the Task Team’s objectives become more intelligible.

How then did the Task Team proceed to re-conceptualise the concept of academic freedom in the current changed context of post-apartheid higher education? It turns out that this is not entirely straightforward. The Report itself refers to “three potential ‘routes’ to a revitalized understanding and exercise of a co-operative ‘state-sector’ relationship” (CHE HEIAAF, 2008, p.23). On closer scrutiny it appears that in practice the re-conceptualisation contemplated by the Task Team actually involved two such ‘routes’: i) a ‘constitutional route’; and ii) a ‘democratic route’ invoking notions of the public good and deliberative democracy. Let us briefly consider both of these ‘routes’ in turn.

4.1 THE ‘CONSTITUTIONAL ROUTE’

First, the ‘constitutional route’ takes the South African Constitution as the necessary starting point for analyzing higher education governance. Section 16 (1) of that Constitution provides that each citizen has the right to freedom of expression, including academic freedom and freedom of scientific research (CHE HEIAAF, 2008, pp.23, 28). As far as it goes, this is unexceptionable and it would be difficult to disagree with it. The problem, of course, is that it cannot go very far. The fact is that while academic freedom has been recognized as a constitutional right in South Africa, the specific significance of this remains to be determined. More than a decade on, no relevant case has yet been brought before the Constitutional Court for its authoritative determination. This constitutes a very real problem for any attempt to give force to the significance of academic freedom as a constitutional right since it leaves the field open to different contending interpretations and theoretical constructions. Surprisingly, though, the Task Team Report does not comment on this problem, much less offers suggestions on how an authoritative legal determination of academic freedom as a constitutional right might be secured. Instead it makes use of the opportunity to insert its own

preferred interpretation of the significance of academic freedom as a matter of duties rather than of constitutional rights.

The correlative relation of rights and duties is, of course, a basic feature of rights discourse. But the Report has something else in mind when it asserts that “rights are necessarily accompanied by duties, including free speech as a duty and precondition for the good society” (CHE HEIAAF, 2008, p.28, *italics added*). This is not the familiar correlative relation between rights and duties within rights-based discourses (Hohfeld, 1919); rather it suggests that the discourse of duties should complement and even override the discourse of rights. It represents a move from the rights-based conceptions basic to the Constitution to a duty-oriented discourse. Thus the Task Team emphatically asserts that it “agrees that universities are guided by their duty to the public good, and their responsiveness to society, within a constitutional framework of national goals” (CHE HEIAAF, 2008, p.24, *italics added*). And when it comes to its conclusions, the Report records that the Task Team believes that among its key contributions have been to clarify “the exercise of academic freedom as both the right to free enquiry and the duty to pursue free inquiry for the good of society” (CHE HEIAAF, 2008, p.69, *italics added*). Somehow the significance of academic freedom as a constitutional right of individuals has been equated with, and transmuted into, a *duty* to society and the public good.

At this point it may be helpful to take a step back and ask what it could mean to conceive of academic freedom itself not as a right but as a duty. The implications of a right to free inquiry are tolerably well understood (especially in relation to potential interferences in, or obstructions to, such free inquiry). But what is implied by the notion of a duty to pursue free inquiry for the good of society? What would follow, for example, for an academic who did not engage in free inquiry, or who pursued free inquiry but not for the good of society? That is far from clear. What is clear is that this kind of thinking is fundamentally at odds with the basic logic of rights discourses. Crucially, within a rights-based discourse duties are not conceived as alternatives or

complements to (individual) rights. Rather, rights are relational terms: if individuals have ‘rights’ then this implies that other parties have correlative ‘duties’ (Hohfeld, 1919). A ‘right’ to academic freedom implies correlative duties on other parties (whether other individuals, institutions or the state). Of course rights-bearing individuals may also have correlative duties with regard to the rights (including that of academic freedom) of other individuals. But having such duties precisely serve to provide meaning and force to individual rights. On closer scrutiny it thus becomes apparent that the Task Team’s attempts to re-conceptualise academic freedom in large part consist in proposals to counter the implications of a distinctively rights-based discourse. Rather than basing its position on the constitutional right to academic freedom, it proposes a re-conceptualisation in terms of “the constitutional right and duty of academic freedom” (CHE HEIAAF, 2008, p.34, *italics added*). Effectively this amounts to an attempt to construe academic freedom in terms of the ‘language of duty’ rather than within a distinctively rights-based discourse.

Of course, the Task Team could well be justified in making a case for an alternative and duty-oriented conception of academic freedom. But it is incoherent and confusing to present this as the ‘constitutional route’ to re-conceptualise academic freedom. The closest the Report comes to providing any justification for its duty-oriented interpretation of the Constitution is a brief reference to the Preamble:

“The overall framework of the Constitution lays the foundations for a society based on democratic values, social justice and fundamental human rights. This implies that rights are necessarily accompanied by duties, including free speech as a duty and precondition for the good society”

(CHE HEIAAF, 2008, p.28).

However, the Report does not indicate even an outline of the argument linking the Preamble’s democratic framing of the Constitution to

its own notion of 'duties'. In fact the Constitution is not structured around a formulation of the public good, a general notion of social justice or a commitment to specified duties. The Constitution is based on a set of fundamental rights (Cachalia, 1994), including that of academic freedom, which implies correlative duties, but not in the sense proposed by the Report. The fundamental rights have to be interpreted and implied with regard to the limitations clause – this is where the democratic framing by the Preamble would also come in – but that is a long way from the notion of “rights and duties” utilized in the Report. If the Task Team had a problem with the Constitution's rights-based approach, or with the implications of academic freedom as a constitutional right in this sense, then it would have done better to come clean and spell out its critique as well as the grounds for its alternative duty-oriented approach. But it is confusing, if not misleading, to present its own alternative construction as the 'constitutional route' to a re-conceptualisation of academic freedom.

4.2 THE 'DEMOCRATIC ROUTE' AND THE PUBLIC GOOD

A second approach to re-conceptualising academic freedom, in the Task Team's view, is that of the 'democratic route' invoking notions of deliberative democracy and the public good. This is not really articulated in specific detail, or developed to any great extent, but the general thrust is that academic freedom and institutional autonomy do not have independent value but have to be firmly grounded in 'democratic accountability'. The Report invokes the Lima, Dar es Salaam and Kampala Declarations on Academic Freedom to the effect that “any codification of academic freedom must gain the public's trust in the social value of academic work” (CHE HEIAAF, 2008, pp.30-31). This is then taken up in the Report's eventual conclusion on academic freedom that in serving the public good “the state must call the academy and institutions to account for the exercise of higher education functions” (CHE HEIAAF, 2008, pp.71-72, Conclusion 2).

Even at this level of generality and abstraction these formulations give rise to serious questions. Just what are the conceptual and

normative relations between academic freedom, the public good and 'democratic accountability'? The Task Team Report does not provide the missing steps of this argument. What we get, instead, is a one-sided stress on the importance of 'democratic accountability' leaving little or no space for 'academic freedom' as an independent value. Secondly, just what are the practical implications and consequences of this 'democratic' re-conceptualisation of academic freedom in terms of the public good? This will depend on our assumptions regarding the nature of the state. In their Conclusion on academic freedom the Task Team refers to “the responsibility of both state and higher education to serve the public good” (CHE HEIAAF, 2008, p.71). Evidently the Task Team assumes that the state is an agent of democratic accountability which can and must act as representative of the public good. But what if the state does not observe its responsibility to serve the public good? Who could then act to call the state to account for the exercise of its democratic functions? Could there be a role for higher education in this regard: is there a democratic responsibility for public intellectuals and scholars, as representatives of the public good, to call the state to account – and could this provide relevant grounds for a conception of academic freedom? If so, this is not spelled out in the Task Team Report in any notable way. What we get, instead, is a highly problematic formulation: “academics and institutions must practice scholarly freedom” (CHE HEIAAF, 2008, p.71). Even more obscure: what does it mean to say that academics and institutions “(must) enjoy academic authority”? (CHE HEIAAF, 2008, p.71). It would seem that these formulations could be an attempt by the Task Team to incorporate the notions of 'scholarly freedom' and 'academic rule' in its formulation of academic freedom. But translated into the language of 'duties' in this way it is difficult to make any coherent sense of them. Alarmingly, such formulations are also reminiscent of the authoritarian assertions of the Van Wyk de Vries Commission even if now expressed in terms of “democratic accountability”.

In short, neither of the Task Team Report's two “routes” towards reconceptualising the concept of academic freedom in the current changed context of post-apartheid higher education arrived at

anything like a relevant and coherent destination. To say the least, as outcome of the elaborate and ambitious HEIAAF process this is a frustrating anti-climax. It needs to be stressed that the above account and discussion has perforce been highly selective and does not provide anything like a systematic overall account of the Task Team Report. I have focused only on a single theme in the Report, that concerned with the basic concept of academic freedom, and have not given proper attention to the whole array of related concerns and issues — including institutional autonomy, accountability, co-operative governance, state ‘steering’ and ‘interference’, modes of regulation, ‘managerialism’, student claims to academic freedom and ‘Lernfreiheit’, social compacts and ‘continuous engagement’ etc. — which make up the larger part of the Report. No doubt there are many important contributions, findings and recommendations relating to these related themes and issues to be found throughout the Report. These also deserve closer attention and critical discussion. Still, from my account and critical discussion of a selected but central theme, it should be clear that something had gone seriously wrong with the Task Team’s attempt to re-conceptualise the concept of academic freedom.

5. CONCLUSION: ROLE CONFUSION AND/OR MISSION CREEP?

Let me return to the questions posed at the outset of this paper: What are we to make of the HEIAAF process and the independent Task Team Report? A report that should have been an authoritative landmark text for South African discussions of academic freedom achieved no significant public profile and on closer examination proves to be problematic and incoherent itself. Why has this been the case? It may be all too easy to blame the frustrating outcome of the HEIAAF process on the external context. Key figures at the CHE who had been responsible for initiating and shaping the process had moved on, and the ball may have been dropped by successors with different priorities. However, from the above account it appears that there are reasons to consider the Task Team Report, and confusions

about its underlying objectives, to have been part of the problem. In conclusion we may consider what had gone wrong with the Task Team’s attempt to re-conceptualise the concept of academic freedom in its Report and how this relates to underlying problems in defining its objectives as well as, beyond that, the implications for the CHE’s approach to its mission.

Given its mandate, and given the context in which it operated, how did the Task Team conceive the nature of its task? It is evident that the Task Team was only too aware of the changing intellectual landscape of post-apartheid higher education as well as of the contending nature of the different conceptions of academic freedom. In such circumstances the Task Team certainly did not have an easy or enviable task. We should perhaps first reflect on what the available alternatives might have been. It may be helpful to distinguish between three possible approaches the Task Team might have adopted which I will characterise as i) a *reporting* approach; ii) a *constructive articulation and development* approach; and iii) an *independent re-conceptualisation* approach. I will briefly describe each of these in ideal-typical terms and then consider how that compares to the actual approach adopted in the Task Team Report.

i) *The reporting approach*: In this approach the Task Team’s role would be primarily concerned with identifying, recording and describing relevant conceptions of academic freedom based on the submissions received, the commissioned research reports and the debates and discussions at the regional fora. It could identify significant changes and shifts in the prevalence of such conceptions, perhaps the demise of former ‘paradigmatic’ conceptions or the breakdown of more recent ‘consensus’ positions, and the emergence of new issues and concerns along with different views of academic freedom more generally. It could describe possible patterns and trends concerning such conceptions of academic freedom, trace how they might be associated with different constituencies or stakeholders in higher education, and to what extent these positions have polarised, fragmented or might share common ground. In such a reporting approach the Task Team

would not see its primary role as that of a partisan participant in the on-going debates and discourse on academic freedom, much less as having the objective of authoritatively settling the issues at stake between contending conceptions of academic freedom. It would be the primary role of the Task Team to report on prevailing conceptions of academic freedom, and not to articulate and develop its own independent conceptualisation of academic freedom

ii) *The constructive articulation approach*: In this approach it would be an integral part of the Task Team's role to articulate and develop an appropriate conception of academic freedom, but to do so on the basis of (elements of) the various changing and contending conceptions of academic freedom it would identify in the prevailing debates and discourse, and more especially among the submissions it received, the research reports it commissioned and the discussions at the regional fora. Given the changing and contested nature of prevailing conceptions of and discourses on academic freedom, this would inevitably have to be a selective and also to some degree a partisan approach: it may consist in aligning itself with particular conceptions of academic freedom and then developing these more coherently and systematically, perhaps with certain modifications or qualifications; or it may consist in utilising elements derived from different sources and usually distinct positions, and combining or synthesizing them in new ways. But the starting point would be to work with the extant conceptions of academic freedom rather than to provide some alternative and independent perspective. This would involve entering into debates with, and critiques of, other contesting conceptions, and to that extent such an approach would inevitably be drawn into the prevailing controversies and be unable to claim the authority of an impartial external observer. But if it could succeed in articulating a strong, clear and coherent conception of academic freedom, based on selected positions in, or elements of, the prevailing discourses, then that could make a major contribution.

iii) *The independent re-conceptualisation approach*: In this approach it would also be part of the Task Team's role to articulate and

develop an appropriate conception of academic freedom, but on the basis of some independent conception or framework. Obviously a great deal will depend on the nature and status of this independent conception or framework. If it involves a familiar and clearly articulated conception with authoritative status - e.g. that of relevant constitutional principles, or an established policy framework such as that represented by the 1997 White Paper on "co-operative governance", or a distinctive and widely supported normative position – then such an approach might be intelligible and effective. However, if that independent basis or framework is not clearly articulated, or does not have a credible status and relevance, then it is difficult to see how the proposed "re-conceptualisation" of the concept of academic freedom can possibly work. Instead it is likely to become a source of confusion and weakness.

How should the actual approach adopted by the Task Team in its Report be characterised in relation to these ideal-typical options? Arguably the Report contains elements of all three approaches but predominantly it involves a somewhat unclear and unstable combination of ii) and iii). In its own words:

this report contains the Task Team's findings and conclusions, drawing on aspects of the HEIAAF process ... the report focuses on the outcomes of the Task Team deliberations, rather than trying to capture all the detail, interest and, often, scholarly integrity, of these contributions ... The analysis ... is therefore informed by such conceptual *clarification as the Task Team has found appropriate and possible*

(CHE HEIAAF, 2008, p.15, italics in the original).

In practice this position was further complicated in two important respects. First, the Task Team frankly acknowledges that its approach did not always reflect a consensus among Task Team members: on some issues unanimity could not be achieved and are so noted in the Report (CHE HEIAAF, 2008, p.15). Second, as already noted above, some

members of the Task Team had also been involved as commissioned researchers. This meant that the re-conceptualisation of academic freedom attempted in the Report was neither quite independent nor distinct and coherent. As we have seen, both the 'constitutional' and the 'democratic routes' to its conception of academic freedom proved to be unclear and problematic. In other words, having taken on its self-imposed task of developing an independent re-conceptualisation of academic freedom, the Task Team Report failed to articulate a well-grounded, clear and coherent concept of academic freedom relevant to the key issues under discussion. We have to conclude that this reflects an underlying confusion of the Task Team's conception of its own role and objectives in this regard resulting in the problematic and hybrid nature of the approach adopted.

And so the CHE's ambitious and complex HEIAAF process petered out in anti-climax. Building on the submissions received from mid-2005, the series of regional fora during the first half of 2006 and the commissioned research reports published by February 2007 the HEIAAF process provisionally culminated with the national seminar in April 2007. This then had to be completed by the Task Team Report as the basis for the CHE's recommendations to the Minister. But that did not quite happen. First there was a considerable hiatus of some 18 months while the Task Team Report was prepared and eventually published in hard copy and placed on the CHE website in August 2008. The Report then had to be considered by the CHE Council who would decide on advice to be submitted to the Minister of Education as well as publication and wider dissemination of the outcomes of the HEIAAF process. However, at this point the HEIAAF process pretty much disappeared from public view. Presumably the Report has been considered by the CHE Council and some kind of communication has been made by the (new, and since departed) CEO of the CHE to the (new) Minister of Higher Education, but it is not known what this entailed, or what, if any, further developments may be expected. No public statements communicating or explaining this outcome were made. To all intents and purposes the HEIAAF process had come to an end with the publication of the Task Team Report.

More generally this outcome must raise serious questions regarding the CHE's conception of its own independent role and mission. In principle the HEIAAF process represented a significant effort on the part of the CHE to extend its role beyond its advisory functions (and ancillary co-implementation agency) to the Ministry. It suggested an attempt to carve out an independent position for the CHE as facilitator of public debate and discourse involving members of the academic community as well as administrators, policy planners and the general public. Viewed in this light, the HEIAAF process initially had some success in generating a range of contributions, debates and research publications. But when it came to the Task Team Report this momentum was dissipated. At a practical level the Task Team got bogged down in logistical complications. More seriously, as its report itself shows, the Task Team did not have enough confidence in the emerging discourse on academic freedom to build on that. Instead it ambitiously set out to provide an independent re-conceptualisation of academic freedom – and then produced an unclear and problematic formulation raising more questions than answers. In turn, the CHE Council did not have enough confidence in the Task Team Report and its recommendations to endorse these in its report to the Minister of Higher Education or for public discussion. At this point the problem may well have been that the CHE did not consider the Task Team Report a suitable basis for policy recommendations. However, that would amount to shifting the goal posts. As we have seen, the Task Team Report is indeed problematic in a number of ways. But the HEIAAF process had not been designed to come up with a set of specific policy recommendations. Rather it was an attempt to move into the different domain of generating and facilitating independent public discourse on academic freedom.

The indications are thus that the more serious problem is that the CHE may have given up on its ambitions for carving out an independent role in public discourse and relapsed into a narrower conception of its advisory functions to the Ministry. So, instead of taking responsibility for the mixed outcomes of the HEIAAF process and the (evidently problematic) Task Team Report in ways that could become the basis

for further development of the discourse on academic freedom and accountability, the CHE has just quietly dropped the whole idea. Or so one must conclude from the fact that it has not found it necessary to make a public statement or provide an explanation for this unfortunate outcome of the HEIAAF process. Sad to say, that does not bode well for the prospects of the CHE developing a more credible independent role. In the bigger picture this is even more worrying in view of the increasing threats to academic freedom, both internally and externally. Universities such as UKZN have experienced some of the gravest violations of academic freedom yet in the South African context concurrently with the HEIAAF process. When this was brought into the public domain in the course of one of the CHE's University Audit Panels in 2008 the CHE backed down from publishing its report in the face of the University Executive's non-cooperation (Brooks 2011, Hall 2011, MacFarlane 2011, Essop 2011). Internationally the prospects may be even more dire, as witnessed by the unprecedented crisis currently faced by British Universities (see, e.g., Collini 2010 & 2011, Thomas 2011). In these circumstances, the HEIAAF process initiated by the CHE could have made an important start in establishing a constructive public discourse on academic freedom and accountability. Perhaps it may not be too much to ask the CHE to be accountable, not just to the Ministry but also to the general academic community, for what has happened to this process itself.

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ACADEMIC FREEDOM: REVISITING THE DEBATE

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For this reason the modern university is in essence a conglomerate of earlier concepts and organisational forms, it is a product of centuries of societal challenge and institutional response.

Stephen Lay, (2004: 14)

Questions about academic freedom are inextricably entangled with the political economy of higher education and research.

Craig Calhoun (2009: 581)

INTRODUCTION

The quotes at the beginning of this article remind us that no discussion about academic freedom can take place without taking into account the historical character of the university and the importance of the conditions of production of knowledge at any given time. Both these ideas shape my re-examination of the debate on academic freedom in South Africa against the backdrop of similar debates taking place in other higher education systems.

In most higher education systems traditional notions of academic freedom, i.e. the lack of external interference in the teaching and research that takes place at universities, have been called into question by two socio-political developments: the rise of the knowledge economy, i.e. the centrality of knowledge in national prosperity; and the introduction of new and stronger forms of accountability between universities, the state and society. The rise of the knowledge economy has changed both the definitions of knowledge fields and the modalities of knowledge production. This,

in turn, has had an undeniable impact on the exercise of academic freedom and on academics' definition of their professional identities (Henkel 2005; 2007 and Marginson 2008; 2009). The introduction of greater accountability at higher education institutions (HEIs) came hand in hand with the external imposition of new forms of control and measurement of productivity and efficiency that increased the regulation of academic life. The impact of these processes was felt especially in the institutional reorganisation of knowledge (merger, fusion and the closing down of departments and programmes), the structure of the curriculum (the reorientation of many programmes to respond directly to market needs) and the funding of research (the prioritisation of research areas in relation to new definitions and measures of impact and relevance).

Taking the case of the South African public university since 1994, this paper argues that the rise of the knowledge economy and of new forms of accountability at universities create prescribed paths for professional academics and that these paths move academics further away from the fulfilment of their potential role as intellectuals, that is as a person who, besides academic expertise in a particular field, also has the capacity to represent and articulate a view to and for a public (Said, 1994:9). Thus (professional) academics are less and less inclined to participate in public debate about matters that concern society, a choice that in turn weakens the role of the university in the development democracy. This paper is organised in four sections. Section 1 focuses on the international debate on academic freedom to contextualise the terms of this debate in South Africa. Section 2 describes the constitutive elements of the (global) political economy of higher education, how they relate to the notion of the knowledge economy, the impact these have on academic freedom and how this is being manifested in South Africa. Section 3 explores the contradictions between the conceptualisation of the intellectual as amateur, as somebody moved only by an "unquenchable interest in the larger picture" (Said, 1994: 57) and the current political economy of higher education and knowledge production. Section 4 brings the

argument together and concludes with a reflection on the role of academic freedom in democratic societies.

1. THE INTERNATIONAL DEBATE

Academic freedom has been a topic of concern for academics, the state and society since the 12th century, to take a short genealogy of the university (Lay, 2004). However, the impact of globalisation and the political dominance of neo-liberalism with its national variations have raised the question of academic freedom with renewed force across very different settings.

A search for academic freedom-related articles appearing over the past five years in the United Kingdom (UK) Times Higher Education Supplement, as a relevant source of information of the daily happenings and preoccupations of UK universities, throws up more than a hundred entries. The articles can be classified in three groups: those that refer to straightforward disputes about freedom of research; those that focus on the effect of higher education policy reform on academic freedom either in relation to the university as a whole or on specific areas of research (humanities and basic research); and those that focus on the restriction of academic freedom caused by policy on classroom practice and curriculum. Across the English Channel, the celebrations of the anniversary of the Magna Carta Universitatum raised a number of concerns as to the extent to which the principles of the Charter were being truly observed (Lay, 2004: 87-88). In the last decade the European University Association has conducted two studies on the state of academic freedom in Europe, including the development of a scorecard to measure levels of academic freedom across the European higher education area (Estermann, Nokkala & Steinel 2011). In the US the more or less permanent concern with academic freedom, first expressed in the 1915 declaration of the Association of University Professors, was heightened early this century after the attack of 9/11 (Doumani, 2007) and periodic attempts by progressive American academics to boycott Israeli universities (Butler, 2006). Besides the debates about academic freedom that are directly

informed by US foreign policy, American academics have also raised concerns about academic freedom in relation to greater demands for accountability, funding cuts and a more directed research agenda (Clark, 2010).

Academic freedom is a clear political issue in countries such as China and some countries in the Middle East in which authoritarian regimes regard as criminals the academics (and students) who hold critical views of the government. Cases of torture of students and academics have been reported in China and Iran (Akker, 2006: 106 and 108; Albach, 2001). However, this is not the only dimension of academic freedom in Asia and the Middle East. Particularly in Asia, the impact of globalisation and the drive to internationalise universities accompanied by greater accountability and the introduction of benchmarking and international rankings, are being regarded by academics as a new form of colonialism that also erodes academic freedom (Mok, 2007). In Latin America the issue of academic freedom and institutional autonomy came to the fore at the beginning of the 20th century. All public universities, funded either through a Spanish or a French model, recognised academics' freedom to teach and research without interference, students' freedom to attend lectures, and academics' and students' right to participate in the governance of the university. This tradition was subverted in most countries as democratic instability and successive military governments not only encroached upon institutional autonomy (through direct interference in university governance) but also undermined academic freedom through the persecution and banning of critical academics. The restoration of democracy in Latin America in the mid-1980s together with the rapid expansion of structural adjustment programmes and the impact of globalisation, brought new forms of accountability and conditions of production for knowledge which, as in other contexts, were seen as restricting academics' freedom (Figueredo-Cowen, 2002; Altbach, 2001).

On the African continent the relationship between universities and the state was a point of debate immediately after independence as

new governments and academics negotiated the role of universities in national development. Persecution of intellectuals who from the universities exercised a critical role in relation to the state resulted in the exile and imprisonment of many African intellectuals and in a number of initiatives to define and secure academic freedom in the African universities (Diouf and Mamdani, 1994; Zelesa, 2003). In the 1980s and 1990s the impact of neo-liberal reforms and structural adjustment programmes took their toll in relation to the quality, range and purpose of academic offerings as well as on the focus of the research effort with serious consequences also for the role and freedom of academics at universities (Mamdani, 2007 and 2011).

In South Africa the concern with academic freedom first emerged in relation to the Apartheid state as "open universities" and some of the institutions created through the Extension of Universities Act of 1959 defended their right to decide on academic grounds only what may be taught, how it shall be taught and who may be admitted to study (CHE HEIAAF, 2008: 19). This classic formulation of academic freedom, named after T.B. Davie, then Principal of the University of Cape Town (UCT), was mostly accepted in the South African higher education system until 1994.

A second wave of concern about academic freedom at South African universities arose against the backdrop of the post-1994 multi-pronged reform that redefined the place of higher education in a democratic society (Department of Education, 1997). This reform introduced a new funding framework, a new approach to planning both enrolments and academic offerings and a national quality assurance system. These aspects of the transformation of the higher education system were accompanied by a government-led restructuring of the higher education system which, through mergers and incorporations, reduced the number of HEIs from 36 to 23 and, in some cases, changed the mission and purpose of HEIs (Singh, 2006; Lange, 2006; CHE HEIAAF 2008:1-4).

The scope and depth of the reform of higher education raised

concerns among institutions about state interference in universities' affairs. In 2005, partially in response to these concerns, the Council on Higher Education (CHE), the statutory body responsible for advising the Minister of Education on higher education matters, launched an investigation into institutional autonomy, academic freedom and public accountability. The findings of the investigation brought to the fore a variety of problems. Among them were the potential impact of higher education reform on the determination of research agendas and curriculum, and the role of university management in curtailing the academic freedom of individual academics. A particular manifestation of this latter problem was the penalisation of academics who publicly disagreed with their institution's management in the implementation of internal reforms (CHE HEIAAF 2008:29-30). The report of the CHE Task Team addressed the conceptual limitations of the T.B. Davie definition of academic freedom and proposed a new definition of institutional autonomy and academic freedom more attuned with the changed relationship between state and university under democracy (CHE HEIAAF 2008:31-46).

In terms of concepts and definitions, it is important to remember that the vocabulary of academic freedom varies across higher education systems. While in the Anglo-Saxon context, where institutions exist independently from the state, academic autonomy brings together individual academic freedom and university autonomy, in the Western European system based on a close relationship between the state and the universities in which the state is *de facto* the guarantor of the academic freedom exercised by the universities, there is no such distinction (Henkel, 2007: 88).

Academic freedom as defined by the United States (US) Association of University Professors includes freedom of research and publication, the freedom of teaching, and the freedom of extramural utterance, that is the right of academics to publicly express their views on matters outside their field of specialisation. Finally, academic freedom also includes the right of academics to participate in academic governance and through university senates to be the deciding voice on academic

matters, and, closely related to this, the right of academics to voice their views on the manner in which universities are led and administered by senior management. This definition of academic freedom is particularly useful for the argument developed in this paper as it explicitly includes the freedom of academics to comment on institutional affairs and their freedom to engage publicly on socio-political issues.

In relation to all its different components (research, teaching, extramural utterance and participation in governance), two elements underlie the conceptualisation of academic freedom. Firstly, its characterisation as an exercise in judgement. As Fuller has shown, academic freedom is not about mere facts but about the interpretation of those facts (theory construction) and the identification of what is worth learning (Fuller, 2009: 168 and 170). And secondly, the role of the concept of academic freedom in managing the relationships between power and knowledge, politics and truth and action and thought. In other words, academic freedom has attempted to manage the tensions and contradictions in relation to issues such as these: Who determines the value and importance of knowledge? What is the role of peer review in controlling, foreclosing or advancing the search for knowledge? What is the role of 'objectivity' in deciding on the truth claims of academics? What is the role of the academic as citizen? What is the value of the academic's political opinion? To what extent can academics use their freedom as a protection for public extramural utterance? The next section will show how, to some extent, the current political economy of higher education affects not only the answers to these questions but also the very formulation of the issues at stake.

2. THE POLITICAL ECONOMY OF HIGHER EDUCATION IN THE KNOWLEDGE SOCIETY

This section considers the characteristics of the political economy of higher education in the knowledge society from the point of view of

- (i) the changes in the form of the state and its relation to higher education,
- (ii) the transformation of knowledge into both a commodity and a 'means of production'; and
- (iii) the reorganisation of the university and its changing relationship with other sectors of society.

The state that emerged in Europe and eventually in many other countries after the 1970s financial crisis and in the context of rapid massification of higher education was, as Neave categorised it, an evaluative state (Neave 1988 and 1998). Its more salient characteristics were the ability to steer at a distance, the concern with accountability and performance, the search in management sciences for solutions to public service efficiency problems and the progressive privatisation of services. The evaluative state had a wide impact on higher education. Three aspects of this impact are relevant for the argument of this paper: it pushed institutions to diversify their sources of funding, it created a class of managerial professionals in charge of measuring the performance of the university (Rhoades and Maldonado, 2007) and it opened universities to greater public accountability and scrutiny in terms of their usefulness to society. As Henkel aptly put it, universities became more explicitly part of the polity (2007:97). While in some cases this had a more democratic intent (France, Sweden) in other cases it was accompanied by staunch forms of neo-liberal conservatism, as in the UK (Neave, 2004). In Africa the postcolonial state introduced neo-liberal reforms as part of structural adjustment packages that prioritised schooling over higher education. By the time of the change in orthodoxy, the capacity of the state was considerably weakened and many countries saw the mushrooming of private universities which often had unholy links to the higher echelons of the government (Zezeza, 2003, Mamdani, 2007). In South Africa, while apartheid protected the higher education system from the direct impact of neo-liberalism, many of the prescribed elements of the toolkit of higher education reform entered higher education policy hand in glove with its transformative project (Bundy, 2006) and arguments were built around the legitimate, if risky, use of

conservative tools for progressive ends (Lange, 2006; Singh, 2006, 2011). The CHE Task Team that examined state steering between 2005 and 2007 reported on many potential dangers to academic freedom which could emerge not so much from the government's choice of reform package – the elements of which were often accepted as necessary – but from its implementation with disregard to stakeholders, institutional nuance, and the state's own democratic accountability (CHE, 2008: 47-62).

In all higher education systems the usefulness of the university as a social institution was specifically predicated on the new role of knowledge as both commodity and means of production in the knowledge economy. The centrality of knowledge in the context of globalisation and the informatics revolution was due to its role as a driver of economic prosperity. This takes place mainly through two fundamental mechanisms, innovation, that is the transformation of research outcomes into products or applications that can be sold in the market, and the acquisition of educational credentials that aid social mobility (Lay, 2004: 74-79). Moreover, this useful knowledge was no longer bounded in Polanyi's Republic of Science, but spread to industry; was not discipline-based but inter-, multi- and trans-disciplinary (Henkel, 2007: 89). In the knowledge economy the distinction between knowledge and technology became blurred and the linear model of knowledge production that had characterised university life for centuries was displaced by the production of mode 2 knowledge in the context of application (Henkel, 2005: 160).

Henkel argues that the promotion of mode 2 knowledge, the need to produce knowledge for a market in order to generate income but also to demonstrate the usefulness and responsiveness of higher education, had important consequences for the organisation of the university, the identity of academics and their exercise of academic freedom. First, it created a power differential (not to mention a growing salary gap¹) between those who manage the university and those who

¹ *Chronicle of Higher Education*, Weekly Briefing, 5 December 2011.

research, and between those who research and those who teach; secondly, it created competition for resources among academics and introduced differences in the level of funding received by disciplines depending on the relative strategic importance of each area of knowledge; thirdly, it transformed the organisation of the disciplines through the restructuring and amalgamation of departments along real or imaginary inter- and multi-disciplinary coherence; fourthly, it altered curriculum and fragmented knowledge in order to pursue a more market-oriented set of skills and competencies; fifthly, the enhanced local and international competition for funds, students and staff in a context of performance measurement made international university rankings a homogenising force across national higher education systems (Henkel, 2007: 95-97).

The traditional definition of academic freedom understood as the right to pursue the truth without external interference ceased to make sense as research councils and government policy provided ever stronger framings for academics' research agendas and their careers under the rubric of 'track record'. At the same time epistemological changes made a negative notion of academic freedom (lack of interference) less appropriate when disciplinary and organisational boundaries were becoming permeable and fluid. Thus, in the knowledge society "control of academic agendas is not as much about freedom as power to manage multiple relationships" (Henkel, 2005: 170). Put differently, under the current conditions of knowledge production academics need to learn to negotiate a variety of institutional spaces (departments, industry, science councils, academic journals) and relationships (with their heads of departments, with international research groups and funders, with colleagues in cognate fields, etc.).

Empirical research has shown that academics' sense of identity is often strongly associated with a discipline. Most academics define themselves first in relation to a disciplinary field and then in terms of their loyalty to a university (Becher and Trowler, 2001; Henkel, 2005: 158). Changes in the disciplines themselves have opened new and reconfigured areas of study that not only have had an impact on

the 'epistemological' identity of academics but have also created a cleavage within academe between those researchers willing, ready and able to play by the new rules and therefore access directed research funds, and those who lack the interest or ability to play and whose research funding has been reduced or disappeared altogether.

Borrowing Sen's three elements of freedom, Marginson analysed the state of academic freedom in contemporary English-speaking higher education systems, providing a nuanced diagnostic of the state and future of academic freedom. He concludes that under neo-liberal reform, the role of the individual academic in choosing what to focus on (freedom as control) is strengthened; the range of the choice and the means to exercise it (freedom as power) are restricted by the policy frame;; and the capacity for the reframing of choices (freedom as radical critical break) is heavily affected due to the homogenising effect that rankings, accountability and accounting of outputs have on the definition of the research agenda (Marginson, 2009: 97).

Against this complex backdrop, it is unsurprising that various levels of frustration have been felt by academics and that many have raised dissenting voices. More often than not academics' dissent is the expression of the intellectual and political reservations they have about the manner in which the tensions between power and knowledge, politics and truth, and action and thought are being solved by governments and by top management at many higher education institutions. Interventions in Senate meetings, open critique in the public media by individual academics and their associations are denouncing the orientation and consequences of policy frameworks and university managements' interpretation of policy. Relatively recent studies on managerialism and the corporatisation of the university noted erosion of academic freedom as one of the features of this approach to the management of universities (UNESCO, 2004). Witness to the close relationship between managerialism and different forms of infringement of academic freedom are the instances of management reading staff emails, which are far from being the exclusive preserve of postcolonial 'Macondos' as cases of management surveillance

of academics' emails at some American universities suggest. In the US context Clark provides the example of the State of Texas where under the banner of consumer choice, legislation was passed obliging academics to publish the detailed content of their courses on the university website, a movement interpreted by many academics as an attempt at ideological surveillance (Clark, 2010). Today the charge of bringing universities or disciplines into disrepute is, as it was at the beginning of the 20th century, part of managements' staple response to academic dissent (Bentley et al., 2008; Scott, 2009). The American Association of University Professors analysed some of the underlying motives of these charges in 1986 and concluded that, "It is not merely that the long history of academic freedom teaches that charges of irreverence can readily serve as covers to objections to unorthodoxy; rather, it is that it is all but impossible to extenuate the one without abetting the other." (cited in Scott, 2009:464)

But what about academics' freedom to exercise their responsibility towards society through research, teaching and extramural utterance? While there is no question about the need for universities to become more firmly 'part of the polity' the increasing user-oriented approach to teaching and research not only does a disservice to the place of knowledge in society, it also distorts and weakens the role of intellectuals in society (Giroux, 2007; Lay, 2004: 79). In an already referred to article on the current reality of African universities, Mamdani pointed out how the market-oriented consultancy model of research undermines the intellectual culture of universities and replaces the independent researcher able to theorise a problem with consultants steeped in descriptive accounts of data collection and its methods (Mamdani, 2011).

Another form of narrowing both academics' intellectual horizons and the intellectual culture of universities comes not so much from the direct impact of the market as from the orientation of national research. Strong framing of research by governments and industry and the need to have a strong track record in a specialised area of knowledge in order to access funds (e.g., the different versions of the

research assessment exercise in Britain and the National Research Foundation (NRF) ratings in South Africa) force academics' choice of topic and publication. Thus academics will publish articles over books (faster and more effective), will publish in high impact internationally indexed journals and follow their editorial lines, will avoid 'wasting time and energy' in publications that, although wider in circulation, offer little or no recognition for track record purposes. In view of this, the notion of the university as of the polis might need to be nuanced by interrogating the extent and nature of the alignment between societal needs and the university's research. Further, what does the accounting and accountability of knowledge production, so ubiquitous in research policy, do to academic freedom as extramural utterance and therefore to the potential role of academics as intellectuals?

3. PROFESSIONALS VERSUS AMATEURS: WHAT REPRESENTATION OF THE INTELLECTUAL?

Not every academic working at a university is an intellectual. Dealing with the transmission and production of knowledge is not sufficient to be recognised as an intellectual. However, the fact that academics by definition have a public in their students makes them into potential intellectuals in the public space of the classroom/internet. Research and scholarship also put academics in a potentially powerful space to offer 'steady realism', and 'an almost athletic rational energy' (Said, 1994: 17). But still the object, the content and the manner of the communication of knowledge are fundamental in defining the role of the intellectual. According to Said, the intellectual is a person who is endowed with the capacity to represent, to articulate a view to and for a public (1994: 9). The intellectual represents her time, in that she takes a critical view of received truths, received ways of thinking and also objects to think about; the intellectual refuses to accept clichés, easy formulas, ready-made answers for the problems affecting society. Moreover, Said links the intellectual with the representation of the cause of the weak in society not from an idealised perspective but as somebody whose "whole being is staked in a critical sense." (1994: 17) This representation, which according to Said constitutes the main

role of the intellectual, is exercised in the critique of the relationship between power and knowledge, politics and truth and action and thought mentioned above as defining the focus of academic freedom. Interestingly, what Said regards as the main threat for the intellectual, professionalism, happens when these relationships are “normalised” making what Marginson calls the ‘radical critical break’ impossible.

Professionalism means turning critique into a nine-to-five job in which the academic accepts existing paradigms, standards of “objectivity” and “proper” professional behaviour (1994: 55). The opposite attitude, the one that should characterise the intellectual, is amateurism, the desire to be moved by love for an unquenchable interest in the larger picture (1994: 57). The professionalisation of the intellectual implies his confinement to the required narrow area of specialisation and the avoidance of representation at a broader social level. Said identified three obstacles for the intellectual as amateur, or put differently, three characteristics of the professionalisation of the intellectual, that are present in the contemporary political economy of higher education: (i) specialisation, the limitation of the intellectual horizon to a very narrow area of knowledge shutting out everything outside the immediate field; (ii) the cult of the certified expert, who confuses credentials with knowledge and uses the certification of expertise to decide on who can opine about what; (iii) drift towards authority, accepting the prescription of research agendas or methodologies, and the ‘sensitivity’ of research findings (1994: 57-60).

Expertise and specialisation and by implication a drift towards authority showed in peer recognition, high impact international publications, topics of theses, etc. define the track record of individual academics and the “critical mass” of expertise at institutions. These allow universities to harvest the benefits of funding, rankings, postgraduate students and postdoctoral fellows in a more or less permanently reinforcing cycle. The homogenising effect that much of this has on knowledge production reduces the spaces in which academics can act as intellectuals in relation to both society and the university itself. This undermines one important aspect of the role

of the university as a public institution: its ability to cultivate public debate in, for and with the public. In other words, supporting the exercise of democracy.

4. CONCLUSION: KNOWLEDGE AND DEMOCRACY

This paper has argued that the conditions of knowledge production that accompanied the rise of the knowledge economy and increased demands for accountability between university, the state and society have called into question the traditional definition of academic freedom as being the lack of external interference with research and teaching in most higher education systems. These changes not only have affected academics’ identities but have also changed their relationship with management and their potential position as intellectuals in relation to their ability and willingness to participate critically in university governance, their ability and willingness to challenge epistemological frameworks and their willingness and ability to engage publicly in socio-political critique and debate. In this regard the paper suggested that the current conditions of knowledge production undermine the role of academics as intellectuals.

In the specific case of South Africa, the investigation into academic freedom, institutional autonomy and public accountability launched by the CHE in 2005 questioned traditional definitions of academic freedom on the grounds of the necessary alignment of universities with a process of democratic transformation of the country and highlighted the dangers that the rise of managerialism and market responsiveness was posing to academic freedom.

In South Africa, as elsewhere, there are threats to academic freedom. As we have seen some of these threats come from the state’s management of steering mechanisms. Others come from university managements’ attempts at damping dissent. Yet others come from academics themselves who have abdicated (or never exercised) their right and their responsibility in relation to academic freedom. In the context of an on-going democratic transition, academics’ participation

in public debate, their ability to provide rational critique both as experts and as intellectuals is so crucial that, as Jonathan suggests (2006: 68-70), academic freedom should be seen not only as a right that protects academics but as a right that protects democracy.

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AGAINST THE DISCOURSE OF ACADEMIC FREEDOM

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ACADEMIC FREEDOM?

When making claims about violations to academic freedom we are, minimally, making claims about obstacles to the proper performance of our jobs. So we must have some account of academic work at its best in mind in order to have a sense of what it is that academics stand to lose when genuine threats occur. But this is not the place to develop an account of ideal academic work. I have dealt to some extent with this matter elsewhere (Tabensky in press). All we need, for the purposes of this paper, is to agree that in order to have a proper sense of what academic freedom is, we need to have a sense of how violations to academic freedom negatively affect academic work. And to have a sense of this one needs to have some sense of what the ideals that guide academic work at its best are. Clearly, the issue here cannot merely be one of preference; the freedom at issue is the freedom to do something specific well, indeed, as best as possible. And the standards for judging what is best are public, which means that there are public criteria — rules — guiding academic work. There may be a considerable amount of fluidity with regard to these rules, but to a large extent the rules must be publicly recognizable as adequate by anyone who is willing and able to recognize the weight of good reasons. In this regard, there are objective criteria (or transculturally intersubjective criteria, if you prefer). And, let me add, these rules do not fully guide, but they certainly substantially guide human action insofar as what academics do is a highly specialized — highly specifiable — type of activity. So, the story of academic freedom must

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be spelled out primarily in positive terms, in terms that clearly set out what sort of activity we wish to protect from adverse interference.

The story of academic freedom, as a first approximation, which I will challenge below, is primarily a story of positive freedoms rather than negative ones, or of positive rather than negative liberties, to use Isaiah Berlin's famous 1958 distinction. However, if the story of what is typically described as academic freedoms is, roughly put, primarily about freedom to engage in activities that are guided by highly constraining principles of action, as opposed to freedom from constraining principles, then it is not primarily in freedom-talk terms that the concern motivating those pondering about what they describe as academic freedom is best described. What we should ultimately be fighting for, when fighting what is typically described as a violation to academic freedom, is for an ideal mode of operation, an ideal manner of functioning. The conceptual resources — centering on the concept of freedom — inherited from the Enlightenment and particularly the classical Liberal tradition, significantly lose explanatory value when the sort of behavior we are concerned with is guided by strict constitutive norms — rules — that determine whether the relevant activities are being conducted appropriately.

Certainly, part of an adequate description of academic activity will include a description of the sort of leeway academics must have in order to conduct their defining activities adequately. However, this leeway is strictly determined as adequate in terms of the ultimate aims of academic work. So, it is indeed true that academics must be allowed plenty of freedom to act in accordance with the defining ends of academic work. However what ultimately justifies a particular academic pursuit is conformity with the relevant ends. This means that complaints regarding hindrances to the proper performance of our jobs should never be framed ultimately in terms of the loss of freedoms, but rather in terms of the loss of the relevant conditions for doing our jobs properly. It is not ultimately because my freedom is being violated that I should complain that conditions are such that I cannot do my job properly.

So, if someone complained that their academic freedoms were being violated, one could quite legitimately ask for a much more detailed explanation guided by the following question: 'In what way is the proper performance of your job being hindered by the alleged violation?' And the proper answer to this question will, at best, only include allusion to freedoms insofar as freedoms are instrumental to achieving the relevant defining ends of the academic profession.

But the instrumentality at issue must be qualified, for clearly it cannot be true that one could do one's academic job properly without the requisite levels of freedom. So, freedom may be instrumental, but it is also necessary for the proper realization of one's job. Freedoms are instrumentally necessary. But even if this were the case, as I think it is, one would still have to justify the claim that our freedoms qua academics are being violated in light of the role that freedom plays in furthering the aims that define academic work. I need to be allowed the relevant amount of leeway to pursue the ultimate goals of my discipline. So, justification is never ultimately in terms of freedoms. It is rather in terms of the ideals that define the activities of academics.

Another way of putting the matter is in terms of under determination: the ultimate goals of my discipline, although highly constraining, do not fully guide, thus allowing some space for freedom. But, because of this under determination, it is the duty of scholars to find their own way of pursuing the aims of academic work. But it is odd to claim that it is one's duty to be free. It seems that freedom-talk, in such contexts, loses much of its appeal. It would be strange to organize a protest march against the violation of my right to carry out my duties properly. It would be far less strange to carry out a march against the erosion of the conditions for the proper exercise of the activities that define the academic profession at its best.

ENTITLEMENTS AND OBLIGATIONS

The ideal mode of academic functioning can equally be described

in terms of freedoms — entitlements — and in terms of duties — obligations, which suggests that the problem is not best described in either of these terms. Entitlements/obligations-talk, after all, is only really effective when a clear contrast can be made between entitlements and obligations. Defined positively, academic entitlements and obligations amount to much the same. In actual fact then, positive freedoms are not best described as freedoms at all - an observation which problematizes the very distinction between positive and negative freedoms.

But, the story of what is typically described as academic freedom is also allegedly about what are standardly characterized as negative freedoms insofar as academics are concerned to protect themselves against external threats. Indeed, for instance, the 2008 report commissioned by the South African Council on Higher Education entitled *Academic Freedom, Institutional Autonomy and Public Accountability* (CHE HEIAAF 2008) focuses on the conditions for exercising one's negative freedoms — one's freedom-from — in post-apartheid South Africa. However, given the centrality of what would normally be characterized as positive freedoms to the story of academic freedom, one would expect greater analysis of these than provided in the HEIAAF report. This is because we must have a clear sense of what it is that we want to protect, although, as already mentioned, I don't think these are best described as freedoms. The CHE independent Task Team that prepared the report explicitly demands that an adequate account of academic freedom needs clearly to formulate what sorts of social goods academic activities bring about. Indeed, different theoretical accounts of academic activity will imply different, indeed potentially contradictory, measures at the level of policy, so we need an adequate characterization if we aim properly to inform policy.

The HEIAAF report focuses on the following accounts: T.B. Davie (freedom from interference), White Paper (cooperative governance in a climate of answerability to government, with the aim of consensus), and the CHE Task Team proposal (dialogical non-hierarchical

relationships between relevant stakeholders with a recognition that consensus is not always possible or desirable). And I am not particularly satisfied with any of the three as none give us a clear indication of what sort of activities define academic work; what sort of activities we should be concerned to protect. I speculate that this is largely because the ideals that define academic work — its basic principles — are largely taken for granted. And they are taken for granted as best describable in terms of negative freedoms. I do not think they should be taken for granted or be described in these terms, for reasons already provided.

The centrality of the concept of freedom in ethical and political discourse in the Enlightenment and post-enlightenment era forms part of a constellation of concepts, including those of rights and duties, which I do not think best describes the phenomenon we want to defend when we complain that academic freedoms are being violated. What we should be complaining about, indeed struggling for, is better described in terms of a “proper-function” account of academic work.

As specified in the HEIAAF report, threats to what is usually described as academic freedom typically come from the state or from academic institutions themselves (and also from industry). Little is said about the violations that academics themselves can make against their own ‘freedom’, except indirectly when touching upon the alleged intimate relationship between academic freedom and social responsibility. The implication in question is that, if social responsibility is constitutive of academic freedom, as suggested by the report, then failure to act responsibly is a violation of the academic freedom of the violator. One obvious reason this question does not arise directly has to do with the specific focus of the HEIAAF report: understanding the complex and contested interrelationship between the different players — state, society, and academic institutions primarily — that make what we typically describe as academic freedom possible, with the aim of informing policy implementation in post-apartheid South Africa. But another reason this question does not arise is that the

thought that one can compromise one’s own freedom rings oddly, at least in contemporary liberal ears. In sections of societies deeply informed by liberal ideals, where people are taken to be ideally free to do as they please within minimal constraints, threats to freedom are largely taken to be external, but I think key threats that we should be focusing on are also internal and relate in the first instance to a lack of understanding of the *raison d’être* of academic work. If we really want to understand what it is that should concern us when we make claims about violations to academic freedom, we need to pay close attention to the nature of academic practice and the norms guiding this practice.

Someone could argue that internal threats of the sort being considered above are not really threats to what is usually described as academic freedom. But I disagree. A deluded subject, that is, a subject whose actions are guided by substantially false beliefs, cannot be free under any reasonable interpretation of freedom. Actions must be properly motivated if they are to be the actions of free agents. To be free is not the same as to be free to do what one wants. Rather, it is to be free to do what one wants, and to have wants that are to a significant extent properly informed by an understanding of what is the case (Wolf 2002). A subject could retrospectively come to realize that her wants were not the wants that she should have had, and believe that her life prior to the epiphany was too distorted properly to be thought of as free. Such a subject should rightly think of herself as having been the prisoner of illusion. So, if one is concerned to theorize about what is normally described as academic freedom, then one should focus on internal threats as well. And to focus on this crucially involves focusing on the proper-functions that define our professions. However, once we focus on these, freedom-talk starts losing some of its appeal, particularly if the constraints are highly constraining of action.

One key reason I think focus on internal threats is central is because I hold an objectivist account of the constraints that define academic life, so there is plenty of scope for internal failures, gauged as failures in relation to these standards. This account of constraints is, at least

under one interpretation of 'liberal', illiberal. For I am moving far beyond, say, the minimal constraints on freedom set by Mill's harm principle. I believe that there is a far more objectively specifiable way in which academics should act. And it is because of this, among other things, that I often wonder about the real use of freedom-talk when discussing violations against the conditions that allow academics best to perform their defining activities. When, described inadequately, positive liberties take precedence over negative ones, then it seems that freedom-talk loses some of its appeal. The more precisely we picture what is often described as freedom in positive terms, the more it seems we are limiting the scope of the sort of self-regulating actions that flow from norms largely originating in the subject that is typically thought of as free. After a particular threshold, the more public and constraining the criteria for action, the less effective freedom-talk becomes.

Even though there may be a determinate way in which academics ought to behave, this does not imply that the state or someone else should impose the truth on us. The way I see it is that, if the state tried to do this, it would be undermining the motivational grounds for purposive action. Even if the Marxian dictum that religion is the opiate of the masses were true, it does not follow that atheism should be imposed by the state. Action must typically flow from understanding and understanding is almost never brought about by imposition. In short, one cannot typically promote understanding by imposing it. One must create conditions for people to take the truth on, to take possession of it as genuine agents. So, my support of a positive account of academic work should not be taken to imply a kind of agency-undermining paternalism. Even if it is true, as I think it is, that current academic institutions around the world are informed by substantially inadequate ideals, I still do not think the solution is primarily to impose change on them. The will to change must primarily flow from within, which is not to say that pressure for this to happen cannot to some extent happen from without. For instance, however unhappy I am about the pace of transformation in many if not most academic institutions in South Africa, I would

be very wary to recommend an across-the-board heavy handed top-down approach to transformation. What we need in the first instance is not punishment, but pedagogy. And for this properly to happen, agents themselves must be empowered, must be placed in a position that will help them properly to grasp what is the case.

Am I not bringing in the centrality of freedom-talk back in through the back door by admitting the importance of empowerment? I think not, for to be empowered is to be in a position to be properly receptive to the truth. It is not, by contrast, to be in a position to design one's own academic activities in accordance with standards that are largely private. To be an academic in the best possible way is to be able to follow not so much the rules that one has created for oneself, but rather to follow the rules that ultimately define the work that one does.

CHESS PLAYING AND THE ACADEMIC GAME

The case of academic work is analogous to playing chess, where the rules that define the game radically constrain the possible moves that a chess player can make. It could be argued that a given chess player is free to become a player but, qua chess player, it is not too informative to describe him as acting freely. He is arguably free to abandon the game at any point but, crucially, he is not free to change the rules, for by doing this he would cease to be playing chess (or, more precisely, rules could conceivably be changed, but only within strictly demarcated parameters which are constitutive of chess). He plays chess insofar as he follows the rules. It would be problematic if a given player were forced to play chess. And his freedom would be curtailed insofar as he has no alternative but to play. But this is not the sort of freedom that academics typically demand. Indeed, the case here is not really analogous to that of academic freedom, but rather to the violation of personal freedom. If academics are genuinely concerned with freedom qua academics, they should arguably demand freedom with regard to the rules that define their respective games. But this, I have been arguing, is a wrong demand

to make. What we should demand is the space to play our games properly, but this is not in the first instance a demand for freedom. The demand we should make is analogous to the demand that a chess player is entitled to make when a Nazi forces him to play the game wrongly, to follow the wrong set of rules. The demand here is in the first instance a demand to be allowed, by all relevant stakeholders, to play the game properly. So, the demands that I make qua academic are analogous to the demands that I make on my playing companion. I demand of her that she abide by the rules that define the game. By violating the rules she is undermining not so much my freedom, but my ability to play the game properly. Of course, much more is at stake in academic work than in chess, for we are talking here about a very serious kind of game. But, even so, it is not freedom in the first instance that we should be concerned with, although violations of freedom could certainly hinder the game, but the ability to play the game properly, to follow the rules as they should be followed. The rules in question are those that define the game.

But, perhaps I am overstating how constrained a chess player actually is by the rules that define the game. The rules of chess are not so constraining as to force every player to make exactly the same moves. If this were the case, then chess would not have the appeal that it does. Rather, part of the beauty of the game is that much leeway is allowed. Each player must ideally develop her own specific style of playing the game. The case is analogous to the game played in academia. The rules that guide the game underdetermine their application, leaving much scope for academics to develop their unique styles and specific interests. But when complaining that my academic freedoms are being violated, I should not in the first instance be complaining that my style is being cramped and I am not able to pursue my own interests, but rather that I am not being allowed to play the game properly in accordance with the public norms that guide and define the academic profession. So, my complaint is not in the first instance a complaint about violations of freedom. Complaints are only warranted, after all, if they can be properly justified, and they can only properly be justified in accordance with public norms. What I need to

do in order to show that my concerns are legitimate is to show that an academic ideal is being violated by an untoward imposition. The claim “I must be allowed to be free” will not do, for the immediate questions that arise are “Free to do what?” and “Why should I care to respect your claim to freedom?” What we need is to show to what extent allowing me to pursue my interests is justified in accordance with public criteria. It is by aligning my specific concerns to the ideal that define academic work that I am able to show that what I do qua academic is a legitimate activity that needs to be respected by all relevant stakeholders.

There is an important difference between chess playing and academic work. The rules guiding our work are far less understood and far more complex than those defining chess. And it is also the case that the methods and aims of academic work are what are often at issue in academic work, but this is only because the rules are far more complex, misunderstood and open ended. However, the moves we can make, even moves to change the rules that define our profession, are radically constrained by rules. In identifying academic pursuits as such we largely implicitly do so in relation to criteria we assume to be public, that is, to rules we take to be shared.

FROM FREEDOM TO VIRTUE

As mentioned already, the concept of freedom typically forms part of a constellation of concepts that include the concepts of rights and duties. And the constellation of concepts within which freedom belongs originates primarily in the European Enlightenment and was relatively alien to other traditions of thought about human moral agency. Greek and African philosophies, for instance, place very little emphasis on these concepts in their discussions of what moves people to action. This should at least invite us to consider the possibility that freedom-talk, its centrality at any rate, is indeed open to question, at least in some spheres. I mention this because, in our contemporary era, the central role that freedom-talk plays is dogmatically assumed to be beyond question. I think it would be more enlightening to define

our concerns in terms of another constellation of concepts, one that is more commonly associated with classical virtue ethics.

When people fight for their freedom, they fight for their rights. That is why rights are also referred to as freedoms (or entitlements). Rights-talk only has explanatory force in a context where the rights/duties contrast can clearly be established. In the context of talking about academic freedom I don't think this contrast can properly be established. To claim that my academic rights have been violated is to claim that my ability to perform my academic duties has been. (This is just another, albeit misleading, way of saying that my capacity to do my job properly is being threatened). And it would be odd, although not entirely wrong, to claim that I have a right to perform my duties properly. It would also be odd to claim that I have the duty to perform my academic entitlements or freedoms properly. The problem here is not so much one of irrationality or falsehood, but it is that not much light is being shed.

It is true that, when I protest that my rights are being violated, that my freedom is being impaired, I am demanding that relevant individuals or institutions change their behavior. And when claiming that I have a duty to do something, the demand is on me. This difference is certainly preserved, but this does not seem enough to warrant privileging freedom and duty-talk over other modes of description. The problem is that it is not entirely clear what it is that I am demanding when I make demands that others respect my freedom to perform my duties properly. The issue here is not so much about freedom, but about the conditions that best allow me to work within the constraints that define my profession. Rather than claiming that my freedoms are being violated, it is more informative to claim that I am operating within certain constraints imposed by certain stakeholders that impair my ability to operate adequately as an academic.

But part of the positive story about academic freedom will involve specifying the place that the leeway briefly mentioned above plays. So, someone could argue, part of the justificatory story that I can tell

in defence of my profession actually involves appealing to the leeway that is required for me to pursue the ideals that define my profession. It would seem then that part of the justificatory story involves appealing to the need for a certain sort of freedom. But if this is so, freedom plays an instrumental role and is never what we ultimately need to appeal to when relevant threats occur.

I hope I have managed to persuade the reader that it is not in the first instance in terms of loss of academic freedom that our concerns should be voiced, but rather in terms of the ideals that ultimately underpin the activities that define us as academics. It is perhaps better to claim that what we really want is the space where we can properly exercise the academic virtues. The vocabulary I am using here comes from the Ancient Greeks and Romans, developed long before the Enlightenment era to talk about human action at its best. What we should be complaining about when we complain about violations to our academic freedom is that our ability to act in accordance with the virtues that define our professions is being undermined.

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