AFRICAN STUDENT LAW JOURNAL

VOL. 1 2025

Institutional autonomy and the administration of student disciplinary processes in public HEIs

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Abstract

South African public Higher Education Institutions (HEIs) enjoy a great amount of institutional autonomy that allows them to govern their own affairs. Institutional autonomy is enabled by the Higher Education Act 101 of 1997, which permits HEIs to develop institutional student disciplinary rules without the requirement of state approval. Institutional autonomy, however, can lead to inconsistencies in the administration of student discipline across HEIs and create the risk of violation of students' right to administrative justice. This article examines the tension between institutional autonomy and administrative justice in student disciplinary proceedings, analysing key review cases wherein students and, in certain cases, former students litigated against their HEIs. The analysis reveals that while institutional autonomy allows HEIs to tailor their disciplinary processes, it may also result in legal uncertainty and perceptions of bureaucratic inertia that trigger student unrest. The article argues for legislative reform as a necessity to harmonise the administration of student discipline across HEIs.

Keywords: administrative justice; student activism; institutional autonomy; administration of student discipline; institutional governance; higher education

1 INTRODUCTION

Public Higher Education Institutions (HEIs) enjoy greater discretion and autonomy in the governance and management of their own affairs including in regard to the development and content of their curricula. This discretion is different in comparison to public schools that must maintain a centrally planned curricula and

direct state involvement in the approval.[1] This is generally referred to as academic freedom and the institutional autonomy of public HEIs.[2] It is a key element of higher education in South Africa; however, it does have its shortfalls. This article considers whether institutional autonomy facilitates the promotion of the right to administrative justice in student disciplinary proceedings or whether it, or the abuse thereof, impedes the true realisation of the right to just administrative action. This will be done by, first, providing an articulation of the statutory framework of institutional autonomy in the South African higher education sector. Secondly, a judicial interpretation of the right to administrative justice will be discussed in detail. Lastly, the differing bureaucratic systems employed by HEIs, ones borne out of the concept of institutional autonomy, will be analysed in view of the issues above.

2 FRAMEWORK OF INSTITUTIONAL AUTONOMY IN HIGHER EDUCATION

The Higher Education Act 101 of 1997 (HEA) provides for matters connected with the institutional governance of HEIs in regard to the establishment of statutory structures required in terms of an HEI's institutional statute.[3] The HEA requires each HEI to develop an institutional statute to give effect to the HEA, as well as to provide for any matter not expressly prescribed by the HEA.[4] The HEA further provides that an HEI may make institutional rules to give effect to provisions of the HEA.[5] In the spirit of the co-operative governance of HEIs, the HEA requires the council of an HEI to first consult the senate and students' representative council (SRC) of such HEI, prior to making, amending or repealing any institutional rules concerned with the administration of student discipline.[6]

The Minister responsible for Higher Education (the Minister) published a standard institutional statue in the Government Gazette that applied to HEIs which had not yet developed institutional statutes at the time of the commencement of the HEA.[7] Paragraph 60 thereof provided for the promulgation of institutional rules governing the administration of student discipline,[8] and reads as follows:

> *Student discipline*
> 60. (1) The disciplinary measures and discipline provisions applicable to the students are set out in the Rules, and may be changed by the council after consultation with the senate and the SRC.
> (2) *(a)* The principal may, from time to time, amend monetary penalties.
> *(b)* Such amended penalties must be placed before the council at the next ordinary meeting of the council.

1 Waghid Y et al. "In defence of institutional autonomy and academic freedom: Contesting state regulation of higher education" (2005) 19(6) *South African Journal of Higher Education* 1179.
2 See Waghid Y et al. (2005).
3 Section 26 of the Higher Education Act 101 of 1997 (HEA).
4 Section 32(1)(a) of the HEA.
5 Section 32(1)(b) of the HEA.
6 Section 32(2)(d) of the HEA.
7 Section 33(3) of the HEA.
8 Paragraph 60 of the Higher Education Act of 1997: Standard Institutional Statute in GN 86 *GG* 23061 of 25 January 2002.

> (3) If the council should alter or set aside any such amendment, its validity up to ordinary meeting of the council the time of alteration or setting aside by the council is not affected.[9]

Several HEIs have favoured this wording in their institutional statues on the administration of student discipline.[10] The promulgation of institutional rules relating to the administration of student discipline thus becomes a generally internal matter of the HEI concerned, giving university councils the autonomy to decide how student discipline is administered and managed at their institutions through the self-development of rules.[11] This by its very nature implies institutional autonomy. The result is that there is no state involvement, as would be the case in the approval of institutional statutes by the Minister.[12]

Institutional autonomy in higher education pre-dates the promulgation of the HEA and arose as a safeguard against state intervention in HEIs.[13] It protects academic freedom and thus facilitates an environment in HEIs in which critical debate and dissent can flourish.[14] Institutional autonomy is expressed not only through provisions relating to student discipline in institutional statutes and the development of institutional student disciplinary rules, but also, more broadly, through the governance and management of HEIs.[15]

The cases of *Sibanyoni*,[16] *Dyantyi*,[17] *Ngcamphalala*,[18] and *Ndlovu*[19] all involved transgressions of student disciplinary rules emanating from student protest action. The bureaucratic systems of each HEI could be considered as the impetus of all such protest action.

For instance, in *Sibanyoni* students at the University of Fort Hare were protesting at the slow pace of resolving intermittent power outages in students' residences.[20] In *Dyantyi*, protests were ignited by what students believed to be the failure on the part of Rhodes University to address the existence of a 'rape culture' in the university.[21] In *Ngcamphalala*, a boycott of lectures and protest action ensued as a result of various grievances, including a demand for the removal of the housing director, who had been accused by students of allocating unsafe

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9 Paragraph 60 of the Higher Education Act of 1997: Standard Institutional Statute in GN 86 *GG* 23061 of 25 January 2002.

10 Paragraph 16.1 of the Statute of the University of the Western Cape in GN 927 *GG* 41887 of 7 September 2018; paragraph 55 of the Amended Institutional Statute of the University of the Free State in GN 3133 *GG* 48187 of 10 March 2023; paragraph 53 of the Institutional Statute: University of Cape Town in GN 41 *GG* 42967 of 24 January 2020; paragraph 66(1) of the Statute of the University of KwaZulu-Natal in GN 684 *GG* 29032 of 14 July 2006.

11 Paragraph 60 of the Higher Education Act of 1997: Standard Institutional Statute in GN 86 *GG* 23061 of 25 January 2002.

12 Section 33(1) of the HEA.

13 Council on Higher Education Kagisano: Issues and Trends in Higher Education Issue (2003) 2 at 2.

14 See Council on Higher Education (2003) at 8.

15 Berdahl R "Academic freedom, autonomy and accountability in British universities" (1990) 15(2) *Studies in Higher Education* 169 at 171.

16 *Sibanyoni and Others v University of Fort Hare* 1985 (1) SA 19 (CkS) ("*Sibanyoni*").

17 *Dyantyi v Rhodes University and Others* 2023 (1) SA 32 (SCA) ("*Dyantyi*").

18 *Ngcamphalala v University of Mpumalanga and Others* Unreported Case No: 2307/2018 ("*Ngcamphalala*").

19 *Ndlovu and Others v Mangosuthu University of Technology and Others* Unreported Case No: D8841/2022 ("*Ndlovu*").

20 *Sibanyoni* at 20H–21A.

21 *Dyantyi* at para 2.

accommodation to some off-campus students.[22] In the *Ndlovu* case, students protested mainly at the Mangosuthu University of Technology's failure to comply with requirements by the National Students Financial Aid Scheme (NSFAS), which resulted in some students not receiving their NSFAS allowances.[23]

What these cases illustrate is that the failures of HEIs to be proactive in addressing student grievances often leads to student protest action that at times turns violent or disrupts the day-to-day operations of HEIs. In turn, each HEI identified in the cases above acted within the bounds of the autonomous authority vested in it by its own institutional rules regulating student discipline. The question that arises out of this analysis is not whether the HEIs were empowered to administer student disciplinary proceedings against students, but whether the administration thereof is utilised as a means of supressing student dissent and protest. An analysis of the facts of each case indicates clearly that the concept of institutional autonomy is utilised as a means of suppressing legitimate dissent through protest action. As a result, the very concept of institutional autonomy that was meant to protect and advance free dissent and robust engagement in HEIs is being repurposed to implement internal institutional control and the suppression of dissent. It is submitted that this undermines the very purpose and democratic ideals that institutional autonomy was designed to uphold.

3 THE RIGHT TO ADMINISTRATIVE JUSTICE IN HIGHER EDUCATION

Muphangavanhu and Muphangavanhu correctly point out that the administration of student discipline can only be carried out within the confines of national legislation such as the Constitution and the Promotion of Administrative Justice Act 3 of 2000 (PAJA).[24] They further observe that the administration of student discipline may result in a limitation of rights.[25] This observation is informed, for instance, by cases such as *Hamata*, wherein Marais JA pointed out that the right to legal representation is not a *sine qua non* of procedurally fair administrative action.[26] Due to the potential of a limitation of rights, the drafters of the Constitution made it an imperative to ensure that rights are not unconstitutionally limited, doing so by framing section 33 of the Constitution as a safeguard against the unconstitutional limitation of rights in administrative proceedings.[27] Therefore, any limitation must pass constitutional muster.[28]

The then Ciskei Supreme Court in 1984 delivered judgement in the case of *Sibanyoni and Others v University of Fort Hare* in which it held that the *audi alteram partem* rule could not be invoked in the matter where the University of Fort Hare had disguised the expulsion of students as a voluntary deregistration.[29] The appellants in that matter were expelled from the

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22 *Ngcamphalala* at paras 3–16.
23 *Ndlovu and Others v Mangosuthu University of Technology and Others* Unreported Case No: D8841/2022 at paras 9–17.
24 Mupangavanhu BM & Mupangavanhu Y "Alignment of student discipline design and administration to constitutional and national law imperatives in South Africa" (2011) 14(2) *Potchefstroom Electronic Law Journal* 126.
25 See Mupangavanhu & Mupangavanhu (2011).
26 *Hamata v Chairperson, Peninsula Technikon IDC* 2002 (5) 449 at para 11 ("*Hamata*").
27 See Mupangavanhu & Mupangavanhu (2011) at 127.
28 See Mupangavanhu & Mupangavanhu (2011) at 127.
29 *Sibanyoni* at 23.

respondent university, without having had been provided a formal hearing, as a result of their failure to attend lectures.[30] The court failed to examine the context in which the students' studies were terminated; furthermore, it incorrectly held that the *audi alteram partem* principle found no application in the matter, as the matter was a contractual one – a view which has been criticised in multiple cases, including in *Lunt*.[31]

What this case (*Sibanyoni*) demonstrates is that even prior to South Africa's constitutional dispensation and the promulgation of the HEA, HEIs, through the guise of institutional autonomy, would fail to view themselves as state entities established for the benefit of the public. This perception led to the abuse of institutional autonomy in which the University of Fort Hare in *Sibanyoni*[32] viewed its relationship with students as a contractual one, not subject to administrative law principles such as *audi alteram partem* and procedural fairness.

Zondo AJP held the following in *Modise* in reference to the case of *Sibanyoni* and *Mkhize v Rector, University of Zululand* 1986 (1) SA 901 (D):

> In passing, I mention that the correctness of the conclusion in the last two decisions that the audi rule did not apply is, to say the very least, open to serious doubt because universities are public institutions which are funded, at least partly, with public funds and are governed by statute.[33]

One must agree with the view of the Labour Appeal Court in *Modise* with respect to *Sibanyoni* and *Mkhize*. In *Mkhize*, the applicant had been denied readmission to the University of Zululand as he fell within a category of students which the council of that university had decided should not be readmitted due to their transgression of university hostel rules.[34] The then Durban and Coast Local Division of the Supreme Court followed the principle established in *Sibanyoni*, which was that the matter was a contractual one and that the *audi alteram partem* rule found no application in it.[35] It is axiomatic from reading the criticism in *Lunt* and *Modise* (the former being an apartheid-era judgement and the latter, a post-apartheid one) of both *Sibanyoni* and *Mkhize* that the decisions taken in these cases were incorrect in law.

What this illustrates yet again is how institutional autonomy has been relied upon to avoid just administrative action. The fact that HEIs are funded partly by public funds and governed by statute is not only a valid reason for the application of PAJA but also indicates that institutional autonomy is not an absolute principle and state involvement through the funding of HEIs and the enactment of legislation that governs them is a limitation on institutional autonomy.

In *Ngcamphalala*, the Mpumalanga Division of the High Court was to decide on a review application that had sought to review the expulsion of one Mcolisi Ngcamphalala, the then president of the SRC of the University of Mpumalanga (UMP), from the university.[36] The grounds on which the applicant argued that the decision to permanently expel him from the

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30 *Sibanyoni* at 20E–F.
31 *Lunt v University of the Cape Town and Another* 1989 (2) SA 438 at 449E–F.
32 *Sibanyoni* at 30H.
33 *Modise and Others v Steve's Spar, Blackheath* 2001 (2) SA 406 (LAC) at para 15.
34 *Mkhize v Rector, University of Zululand and Another* 1986 (1) 901 (D) at 902G–H ("Mkhize").
35 *Mkhize* at 904B–F.
36 *Ngcamphalala* at para 1.

university be reviewed was that the decision was irrational and unreasonable, that the chairperson of the disciplinary proceedings was biased, and that Ngcamphalala was denied an opportunity to be heard (*audi alteram partem*).[37] In considering the ground that the *audi alteram partem* rule was not observed by the UMP when it concluded on the applicant's matter without the applicant or his legal representative, Mashile J held that:

> it was unfair and unjust, especially when the First Respondent was to adopt an extreme measure such as expulsion, which would adversely affect the life of the Applicant, [not] to exercise more patience to make certain that … [the applicant] attended the hearing. I say this mindful that the situation may have been fairly frustrating to the Respondents but that comes with the territory and one ought to have the stamina and strategy of engaging with students …
>
> The conclusion on the *audi alteram partem* rule must be that the First Respondent ought to have given the Applicant opportunity to present his case before the disciplinary hearing. The decision that ensued has huge implications [for] the life of the Applicant that it cannot be adopted in circumstances where he was not present. Tolerance of such blatant violation of the *audi alteram partem* rule must be discouraged at all costs.[38]

The court went on to find that the UMP's decision to permanently expel the applicant was irrational.[39] The UMP's statute recognised the legitimacy of the SRC as a representative of the student body and acknowledged its role in advising on the governance and management of the university on student matters.[40] Despite this, the university singled out the applicant for expulsion even though its own statute allowed for student representation.[41] The strong censure by the court in this matter illustrates clearly that, if left unchecked, institutional autonomy is prone to exploitation in the service of suppressing student activism. This could thus open a gateway for institutional autonomy to be leveraged for the purposes of targeting student activists that represent a dissenting voice within HEIs.

Evidence placed before the court clearly suggested that the applicant did not instigate the protest but rather attempted to calm students and respect the court's previous orders and interdicts.[42] Given that the protests were widespread, the court found no rational basis for holding the applicant solely responsible.[43] The university's conclusion therefore lacked objective justification, making the decision to expel the applicant irrational and amenable to being reviewed and set aside.[44] It is clear that the unchecked discretion inherent in institutional autonomy is gravely problematic.

The Mpumalanga division's decision in *Ngcamphalala* could be viewed as a victory for student activism in South Africa. Here, the court recognised the background of the matter as something

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37 *Ngcamphalala* at para 24.
38 *Ngcamphalala* at paras 40 and 43.
39 *Ngcamphalala* at para 48.
40 *Ngcamphalala* at para 44.
41 See *Ngcamphalala* at para 46; section 64(2) of the Institutional Statute: University of Mpumalanga in GN 922 *GG* 40216 of 19 August 2016.
42 *Ngcamphalala* at para 47.
43 *Ngcamphalala* at para 48.
44 *Ngcamphalala* at para 48.

that had a bearing on how student discipline was administered by the UMP. Nicholson AJ in *Ndlovu* however did not take into consideration the factual context in the matter before the court. The circumstances leading up to the constitutional challenge by the Applicants (in *Ndlovu*), was a protest action by students of Mangosuthu University of Technology (MUT) including the Applicants, which took place in June 2022 engendered by the MUT's failure to compile and submit the requisite reports to the National Students Financial Aid Scheme (NSFAS), resulting in delays and interruption of student funding for the Applicants and other students under the N+1 Rule.[45] The protest action that took place in June 2022 (which also caused damage to infrastructure and university property) resulted in the MUT invoking the impugned rules, in terms of which the Applicants were suspended, disciplined and expelled.[46] The impugned rules which this constitutional challenge was centred around were the 2022 General Rules and Regulations for Students of the MUT, the applicants had sought an order declaring certain provisions of the general rules to be declared, unlawful, invalid and unconstitutional.[47]

The impugned rules regulated the administration of student discipline at the MUT.[48] This article focuses on the rule that prohibited political meetings and activities at the MUT's residences as well as gatherings and activity involving five or more students at the MUT's residences after 20h00 without the consent of the superintendent. The applicants challenged the constitutionality of the rules because they provided no minimum periods for which students are to be disciplined and because they were silent on the use of external legal practitioners by students charged with serious misconduct.[49]

The court found that the rule prohibiting political activity and gatherings at residences of the university as well as any gatherings and activities involving five or more students after 20:00 at the residences was reasonable and justifiable.[50] It found, furthermore, that the silence of the rules on the allowance of the employment of external legal representation by students met constitutional muster.[51] It is submitted that the court, in this regard, failed to consider the fact that the impugned rules, which came about as a result of institutional autonomy, could arguably create a limitation on the ability of students to have any form of political engagement or plan and execute protest action, thereby suppressing dissenting voices in the HEI concerned.

The court also held that there is no general right to legal representation.[52] It found that, as per the evidence placed before it, there was no indication that the applicants had requested the employment of external legal representation in their hearings; the court made this finding on the basis that it is up to the discretion of the presiding officer in disciplinary proceedings to allow legal representation or not, as held in *Hamata v Chairperson, Peninsula Technikon*

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45 The N+1 Rule is a rule in terms of which NSFAS would not fund students beyond an additional year of studying.
46 *Ndlovu* at para 1 and 18.
47 *Ndlovu* at para 2.
48 *Ndlovu* at para 25.
49 *Ndlovu* at para 26.
50 *Ndlovu* at para 31.
51 *Ndlovu* at para 57.
52 *Ndlovu* at para 55.

Internal Disciplinary Committee 2002 (5) SA 449 (SCA).[53] The outcome here is a clear demonstration that restrictive and potentially repressive measures could arise out of the indirect endorsement of the abuse of institutional autonomy by South Africa's courts.

However, Nicholson AJ in *Ndlovu* neglected to consider that the MUT itself had to consider factors laid out in *Hamata*, such as 'the nature of the charges brought, the degree of factual or legal complexity attendant upon considering them, the potential seriousness of the consequences of an adverse finding …'[54] In essence, serious misconduct which had the potential of resulting in the expulsion of the applicants from the MUT (an extremely adverse sanction) warranted that there be a clause in the rules that provided the presiding officer of the disciplinary committee concerned with the discretion to allow the employment of external legal representation by students. In the absence of such a clause, and with the expressed limitation of representation to only staff members of the MUT, the rules could not be considered to amplify the values entrenched in section 33 of the Constitution and section 3(3)(a) of PAJA.

As correctly held by the Supreme Court of Appeal, there is a duty on the presiding officer in administrative proceedings to balance various factors, such as the nature of the decision, the rights affected, the circumstances under which it is made, and the consequences that would result from that decision.[55] Succinctly put, student disciplinary proceedings in which there is a possibility of the student being expelled from a public HEI should be considered as serious or complex cases, as per the provisions of section 3(3)(a) of PAJA. The author therefore submits that in this case the court's failure to call for stronger procedural safeguards against the abuse of institutional autonomy effectively reinforced open and unchecked autonomy in the administration of student discipline, exposing it to the potential for abuse. The difference between *Ngcamphalala* and *Ndlovu* illustrates inconsistency in the court's oversight in examining the role of institutional autonomy in the administration of student discipline.

One is therefore of the view that the courts have not been able to provide clear direction as to what the shape and form the administration of student discipline would be lawful, reasonable and procedurally fair. This is evident from the differences between the analyses by the Mpumalanga division and KwaZulu-Natal local division of the High Court in *Ncamphalala* and *Ndlovu*, respectively. The Supreme Court of Appeal has also been less than helpful in providing clear direction on this question. It thus goes without saying that the lack of clarity from South Africa's courts on this particular issue opens the door for the abuse of institutional autonomy in the administration of student discipline.

4 THE BUREAUCRACY EMANATING FROM INSTITUTIONAL AUTONOMY

Haniff and Daya suggest that students feel side-lined and excluded from university management, arguing that university bureaucracy often leads to management by crisis, as it (bureaucracy) is not fast enough to react to emergent issues.[56] The authors go on to argue that

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53 *Ndlovu* at paras 55–56. See also *Hamata* at paras 8–11.
54 *Hamata* at para 21.
55 *Dyanti* at para 22.
56 Haniff N & Daya P "Distributed leadership: A model for student engagement" (2023) 37(4) *South African Journal of Higher Education* 102 at 114.

the bureaucracy of public universities is the trigger of student unrest, in that unrest is fuelled by the belief that the managers of public HEIs are responsive only to mass student protest action, which is often a measure of last resort by students in need of being heard.[57] Student activists tend to view management as being less than consultative on matters affecting the students they represent and advocate for; management is, in other words, seen as trying to exert institutional control and restrict students' involvement in decision-making that affects them.[58]

It can therefore be deduced that the problematic result of the institutional autonomy model that has been preserved by the HEA could be summarised in two parts. First, institutional autonomy creates a level of legal uncertainty in the higher education sector insofar as the administration of student discipline is concerned. The current practice of institutional autonomy in effect gives public HEIs absolute autonomy in shaping the administration of student discipline in their institutions, something which jurisprudence on this matter has shown to cause incongruencies in the shape and design of the administration of student discipline.

Secondly, institutional autonomy in its current form could be viewed as the root cause of the different bureaucratic systems employed by different institutions, that slow down the pace of resolving student grievances, precipitating protest action, and consequent violations of institutional student disciplinary rules. Institutional autonomy is thus a weakening force in the advancement of the right to administrative justice in student disciplinary proceedings. It could be concluded that transformation in this area of law is the responsibility not of South Africa's courts but the legislature.

5 CONCLUSION

The concept of institutional autonomy was developed for the purposes of ensuring the protection of academic freedom from state control and interference. This concept has however been abused by HEIs in the administration of student discipline, as it is used to suppress student dissent and protest, thus undermining the right to administrative justice. This has been evidenced by the case analyses of *Sibanyoni*, *Mkhize*, *Hamata*, *Dyantyi*, *Ngcamphalala* and *Ndlovu*, that clearly demonstrates how institutional autonomy has been raised as a justification for effecting harsh and unreasonable student disciplinary systems. What has also been illustrated is that there is little clarity in the judiciary's approach to this problem, hence the solution not being a judicial one, but possibly being legislative. Such reform could be realised through the creation of safeguards against the abuse of institutional autonomy, and therefore ensuring the protection of the right to administrative action that is 'lawful, reasonable and procedurally fair' a right entitled to everyone without qualification.[59]

[57] Haniff & Daya (2023) at 114.
[58] Haniff & Daya (2023) at 113.
[59] Section 33(1) of the Constitution of the Republic of South Africa, 1996.

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