

On pushing a pen and questions about academic freedoms and restrictions in a transitional setting*

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1 Introduction

In a paper published online, Chaya Herman¹ examines the relationship between political change and epistemologies and methodologies employed in research at doctorate level in the Faculty of Education at the University of Pretoria from 1985. She groups the doctoral dissertations under scrutiny together into three periods: 1985 – 1990, 1995 – 2000 and post 2000. She presents particularly negative assessments of the theses in question, characterising them among other things as research fundamentalism, patronising and pseudo-scientific knowledge, pseudo-philosophical knowledge, 'ideology masquerade [*sic*] as science' and disengaged knowledge lacking critical discourse and relevance.² It would be understandable if the university management in general, deans of education, staff of the Faculty of Education and the PhDs who graduated during the period reviewed by Herman questioned her *ex post facto* analysis of their work. The paper by Herman evokes intriguing questions about issues such as fairness of comment, academic rigour and freedom, dignity and freedom of expression and how they play out in a before and after scenario of far-reaching political change and transformation. In this article we examine Herman's article (which suggests

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¹Herman 'Political transformation and research methodology in doctoral education' (2008) *Higher Education Close Up 4 (HECU4)*, University of Cape Town, Breakwater Conference Centre, 26-28 June, 2008 DOI 10. 1007/s10734-079-9261-6 (accessed 2013-02-27).

²*Id* 5.

to us a certain reluctance to deal with the above questions in her analysis regarding the circumstances in which the text(s) on which she reports were written) in the light of their apparent relevance to the constitutional right to freedom of expression including academic freedom with its restrictions/limitations. Our paper introduces aspects of common law and the notion of 'who pushed the pen' into the critical consideration of the article and its possible implications for examining long-established academic and research traditions as they manifest themselves in a transformed setting. We conclude with comments on how the notion of 'pushing the pen' and knowledge of the meaning, limitation and application of the right to freedom of expression could apply to Herman's article and to all academic texts produced after the apartheid era in the democratic South Africa.

2 Who pushed the pen?

In *Peter-Ross v Ramesar Desai* J quotes with approval *Cala Homes (South) Ltd v Alfred McAlpine Homes East Ltd* 1995 FSR 818 in which Laddie J held that to have mere regard to 'who pushed the pen' is to take too narrow a view of authorship.³ Desai J suggests that it is perhaps not a simple matter to assess 'who pushed the pen' in a given situation and that one needs to have regard to more than merely the name of the author who is credited with the publication. In this particular judgement, the question was whether one specific academic had the right to write an article and have it published without acknowledging another academic who had clearly been involved in the research on which the article was based as his name was mentioned in the first draft of the article. Desai J⁴ found that the applicant, who tried to publish a second draft of an article without the consent of the first respondent who was mentioned as an author in the first draft, was not entitled to publish the article as sole author. It is Herman⁵ herself who provides what is probably the most useful description of what is meant by 'pushing the pen'. She articulates a thought which led us to the idea that a pen is not only pushed by a human being but also by various other factors and influences which cannot be ignored when analysing academic texts such as PhD theses:

The PhD theses on the library shelves bear traces of the setting in which their author lives and worked [*sic*] – biographical, familial, institutional, cultural, historical, political and geographical. What is possible for the individual

³2008 4 SA 168 (C). Quotation marks inserted by Desai J. See also <http://www.saflii.org/za/cases/ZAWCHC/2008/39.pdf> at 15.

⁴(N 3) 21–22.

⁵(N 1) 1.

researchers to ask, the methods with which it is possible for them to inquire, and the templates for what counts as 'academic' vary over time, between and within institutions.⁶

One would expect such traces of settings to form part of the assessment of PhDs produced in a specific defined period which are bound to be characterised by, among others, historical milestones and specific policy and legal frameworks. One would also expect these facts to have an impact on the understanding and application of academic freedom and freedom of expression in relation to the protection of the reputation and good name of people and institutions.⁷ One could also ask what would be the influence of not taking these traces into account on the scholarly status and fairness of an assessment. 'Pushing the pen' is a concept that endeavours to introduce into the assessment of scholarly work issuing from previous dispensations the role of academic traditions (including notions of what research is, what knowledge is and what methods will lead a researcher to acceptable knowledge) as well as the 'resurgent notion that academic freedom is in some way subservient to a greater loyalty to society, be it now a democratic, majoritarian one rather than the *volksgebondenheid* (bonds of kinship) ...' and the fact that 'academic freedom finds different expressions at different times'.⁸ It implies *inter alia* that those whose work Herman criticises have to be thought of as pen-pushers whose pen pushing was at least co-determined by contextual issues as much as Herman's own pen pushing has likewise been determined by contextual issues including academic traditions, political beliefs and systems and epistemological assumptions. In order to explore the degree to which Herman may or may not have complied with the notion of pushing the pen and established legal provisions, we will now discuss pertinent aspects of her paper. After that, and in order to put possible questions about academic freedom that might arise from the Herman article into context, we will briefly consider South African law in this regard.

3 Relevant aspects of Herman's paper

Jansen⁹ compares the 'open' knowledge system of the English University of Cape Town and the 'closed' knowledge system of the Afrikaans University of Pretoria

⁶Herman (n 1) 1 acknowledges Middleton *Educating researchers: New Zealand education PhD 1948–1998* (2001).

⁷Which is an uncontested part of the limitation of the right to freedom of expression and academic freedom.

⁸Gauntlett 'Minister given a blue light to ride roughshod over academic rights' *Mail and Guardian* (2013-05-17), available at <http://mg.co.za/article/2013-05-17-minister-given-a-blue-light-to-ride-roughshod-over-academic-rights> (accessed 2013-05-29).

⁹Jansen *Knowledge in the blood, confronting race and the apartheid past* (2009).

where 'fierce contestations' (over the content of the curriculum) could never happen. It is clear that Jansen's preferred knowledge system is not the 'closed system' of the Afrikaans University of Pretoria as he sees it.¹⁰ In terms of Jansen's view of such systems, the authors of this paper would be classifiable as participants in a closed knowledge system and not likely to engage in 'fierce contestations'. Jansen would be correct to assume that we would be loath to engage in fierce contestations (suggesting to us among other things elements of disrespect, tactlessness and insensitivity) but we nevertheless want to engage in a rigorous examination of Herman's paper in the light of its relevance to constitutional rights that are extremely important in academia. We do not know if either Jansen's or Herman's work is driven by a desire to show up the maladies of 'Afrikaans' universities or praise the traditions and practices of 'English' universities but we believe that the notion of 'pushing the pen' could be an aid to understanding work that may seem to differ from one's views about what constitutes good academic and scholarly practice. It is in the interests of fairness, academic freedom and the debate of central issues pertaining to research and publications that we offer the discussion below. In doing so we agree with Gauntlett's belief¹¹ that universities are 'essential to free thought and a free society'.

3.1 *Data analysed*

Herman's paper is based on 'a systematic review of abstracts of the doctoral dissertations that were awarded at the University of Pretoria's Faculty of Education from 1985 to the present'.¹² She reports that she analysed the abstracts of 66 of the 67 dissertations/theses awarded in those years and supplemented the analyses of the abstracts by studying selected chapters from the dissertations as well as conducting interviews with graduates and academics at the institution. No indication is given as to what chapters were selected and what criteria were used to select either the chapters or the interviewees. One has to surmise that it was only chapters written in English that were selected because Herman mentions that she is a 'non-Afrikaans speaker'.¹³ From the references at the end of the paper it appears that, although reference is made to the abstracts of 66 of the 67 dissertations, the total number of sources referred to in the paper is 49 (20 in English (virtually all the English dissertations¹⁴ produced by the

¹⁰At the time that both Jansen and Herman wrote the University of Pretoria could no longer be described as an 'Afrikaans university'. Afrikaans is one of the 11 official languages of South Africa.

¹¹(N 8).

¹²(N 1) 2.

¹³*Ibid.*

¹⁴It is clear that not all of these were written by mother-tongue speakers of English.

Faculty in the period she reviewed as set out in Figure 4 in her paper), 15 in Afrikaans (15 of the 42 represented in Figure 4 of her paper), 1 uncertain and 13 other references. There is no indication why the others were left out of the sample and what effect the lack of reference to them may have (had) on the outcome of the analysis of the work of the University, its staff and students during the period in question and, of course on the interpretation and evaluation of the information by the author. Herman acknowledges that it is 'evident that the use of sampling to determine trends and the use of abstracts as the main data source pose some limitations on the analysis'.¹⁵ The author also acknowledges that as a non-Afrikaans speaker, her access to people, documents and the politics of the institution had certain limitations and since the early dissertations are in Afrikaans, she had to rely on the English abstracts provided by the authors who themselves might not have been fluent in English. Occasionally the services of an Afrikaans-English translator were used. Garth Stevens¹⁶ reflects on limitations similar to the ones mentioned by Herman and discusses the Thompson 'Depth-Hermeneutics' which could provide greater analytical depth to the interpretation of hermeneutic units undertaken within the socio-historical context within which symbolic constructions are embedded, and which could reveal their ideological significance. In the paper under discussion, the hermeneutic units would be dissertations whose titles and abstracts (and some chapters) were reviewed. Stevens refers to a study where the abstracts were used to verify the nature of the article, especially since titles often represent the context of articles cryptically or abstractly and points to the inadequacy of such a data set.

3.2 *Language barriers and limitations*

Herman¹⁷ contradicts herself and admits to a dilemma that she faced when she acknowledges that as a non-Afrikaans speaker, her access to people, documents and the politics of the institution had certain limitations since the early dissertations are in Afrikaans. Yet she unequivocally creates the impression that she has gleaned the necessary biographical, familial, institutional, cultural, historical, political and geographical information from titles, abstracts and some chapters to make damning pronouncements and cast aspersions on the doctoral dissertations and, by implication, the PhD students and academic staff. It would be a phenomenal achievement to trawl all the suggested information from the

¹⁵(N 1) 2.

¹⁶Stevens 'Academic representations of "race" and racism in psychology: Knowledge production, historical context and dialectics in transitional South Africa' (2003) 27(2) *International Journal of Intercultural Relations* 189-207, available at <http://www.sciencedirect.com./science> (accessed 2013-02-27).

¹⁷(N 1) 2.

sources reportedly used. If anything, this demonstrates the limitations of the sampling and the use of abstracts for data collection in this instance. The University of Pretoria (the Faculty of Education in this case) as an institution unavoidably comes under scrutiny as do the staff who supervised the doctorates in question. It would be relatively easy to identify the supervisors in question.

3.3 *Conditions conducive to institutional change*

Herman points out, and rightly so we believe, that even though the 'broader transformation' in South Africa (presumably from 1994 onwards) 'created the conditions for institutional changes in higher education', it is evident that substantive change could only take place at institutional level where the 'capacity and the incentives to do so' were present.¹⁸ She also quotes with apparent and uncritical approval Jansen's assertion that 'distinctive racial birthmarks' of universities were still present and were 'expressed in dominant traditions, symbols and patterns of behaviour'.¹⁹ One would expect the availability of incentives and capacity and the lingering birthmarks of race to be factored into an analysis of work produced during specific eras with understanding, if not empathy.

It is our opinion that she could have added the notion of 'language' birthmarks as they could signify identification either with Anglo-Saxon scholarly traditions or with European (German, Flemish, and Dutch) traditions which are divergent. Such 'birthmarks' could also indicate possible isolation from the broader academic community in the period under review and may need to be factored into assessment of scholarly work of this era. We do not think that in the analysis there is much evidence of attempts to understand or take cognisance of the possible imprints of these factors on the doctorate work under review. Just as the current government in South Africa uses money as a lever to effect certain changes at universities or to get them to prioritise certain research through teaching and input grants,²⁰ for example, the previous regime also used money and the threat of the withdrawal of money to steer institutions in certain directions through policies and practices regarding matters such as the admission of students from different races, emphasis on the natural sciences and rewarding specific types of research. Du Plessis²¹ refers to an aspect of institutional management that Herman seems to have missed, namely that academics' search for the truth can be a search on behalf of the powerful and that academic

¹⁸(N 1) 2.

¹⁹*Id* 2-3.

²⁰Department of Education *Ministerial statement on higher education funding: 2006/7 to 2008/9* (2 May 2006).

²¹Du Plessis 'Legal academics and the open community of constitutional interpreters' (1996) 12(2) *SAJHR* 214 at 225.

endeavour does not necessarily serve only its own interests. Du Plessis is of the opinion that this is what the previously oppressive regime wanted it to be²² and this opinion resonates well with Gauntlett's reference to the 'resurgent notion that academic freedom is in some way subservient to a greater loyalty to society, be it now a democratic, majoritarian one rather than the volksgebondenheid (bonds of kinship)...'.²³ Du Plessis²⁴ points out that we need only remind ourselves of the threats of FW de Klerk, the then Minister of National Education, in the late nineteen eighties, to remedy 'insubordination' at universities by withholding their subsidies. In a sense the University of Pretoria was thus, at the start of the period under review, officially starved of incentives and the capacity to initiate 'substantive change'.

3.4 Assessment of the quality of the doctorates: some positions, claims and caveats in Herman's article

Herman avers that 'there is no attempt [on her part] to comment on the quality of the work; the focus is on the graduates' conceptions of knowledge and how these relate to the institution's epistemic environment'.²⁵ However, one cannot help wondering what statements like the following are if they are not comments on quality:²⁶

- research fundamentalism, patronising and pseudo scientific knowledge';
- 'pseudo-philosophical²⁷ knowledge, or rather ideology masquerade [*sic*] as science';
- 'disengaged knowledge that lacked critical discourse and relevance'.

3.5 Benchmarking

Herman's paper contains a disclaimer that there is 'no attempt to benchmark the history of educational research at UP against international trends or even against other universities in South Africa. This paper compares UP to itself at different political periods'.²⁸ At face value this represents a plausible approach of comparing an institution with itself at different periods and could even be viewed as an attempt at being fair towards the researchers and their supervisors.

²²*Id* 228.

²³(N 8).

²⁴(N 21) 228.

²⁵(N 1) 5.

²⁶*Ibid.*

²⁷It is Herman herself who uses two different spellings of word combinations, the one hyphenated, the other not of which 'pseudo' forms a part.

²⁸*Id* 5.

However, it could also be an attempt to get round the problem of having to contextualise the work being studied. Contextualising the work under review would have meant, for example, acknowledging that phenomenology, the philosophy and method espoused at the Faculty earlier, derived from work started by the Frankfurt School early in the 20th century and developed from the work of people like Husserl and Heidegger who were held in high esteem, particularly in Europe. The methods they proposed became academic and research traditions in many parts of the world, including South Africa. Furthermore it would have meant acknowledging that the phenomenological approach is now undergoing a renaissance as a research method especially in North America and even in South Africa in universities other than the University of Pretoria. Acknowledging the historical, political and research context of the work done in the Faculty of Education in the times selected for scrutiny might have forced a re-assessment of some judgements. For example, the University followed a legitimate research tradition (phenomenology) that could not have produced 'pseudo-scientific'²⁹ work even if there were aspects of the phenomenological approach that were debated by phenomenologists themselves, such as the notion that one could 'bracket' one's life views and personal convictions when studying a phenomenon with a view to describing it as it would have described itself if it were able to do so. The fundamental problem with Herman's approach is that it fails to disclose that it is looking at the work produced in a specific age with lenses acquired at a later age and that it is ignoring the historical context and the fact that research approaches all have a development trajectory and are all subject to serious contestations. We would suggest that the work was indeed benchmarked against views and understandings of knowledge, scholarship and research that became popular and acquired an academic following later on.

3.6 *An 'Afrikaans' institution*

When Herman wrote her article, and even earlier than that, the University of Pretoria could no longer be classified as an Afrikaans university. Herman quotes Mouton who says that 'from its early beginnings, UP positioned itself as an Afrikaner institution whose basic task was to serve and protect Afrikaner ideals and culture'.³⁰ She could easily have consulted a number of official and other sources such as the University of Pretoria Strategic Plan – 2025³¹ and discovered

²⁹ *Ibid.*

³⁰ *Id* 6.

³¹ See University of Pretoria (2011) 'Strategic plan: The vision, mission and plan of the University for 2025' available at [http://web.up.ac.za/sitefiles/file/publications/2012/eng/STRATEGIC_PLAN_\(V11\)_13%20Feb.pdf](http://web.up.ac.za/sitefiles/file/publications/2012/eng/STRATEGIC_PLAN_(V11)_13%20Feb.pdf) (accessed 2014-02-26).

that the University of Pretoria only became Afrikaans in 1932 and not from its early beginnings and that it adopted a multilingual policy early in the 1990s (sooner than that *de facto* if not *de jure*).

3.7 *Commitment to phenomenology*

In principle one cannot fault Herman's observation³² that, at a certain time in its history,

the Faculty of Education had a strong commitment to phenomenology, fundamental pedagogics and a Christian philosophy of life. Phenomenology was understood "as the science which studies an appearance (phenomenon) as it manifests itself in the world" (Landman *et al.* 1982, at 80). The role of the phenomenologist was to discover the authentic structure of the phenomenon by using a 'scientific method. Pedagogics, or the theory of education, comprises various sub-disciplines such as psychopedagogics, socio-pedagogics and fundamental pedagogics, with the latter forming the epistemological grounding for all other sub-disciplines.

The use of the words 'scientific method' in inverted commas is unfortunate as it suggests that she doubts the scientific status of phenomenology. Had she looked at it in context and not through the lens that she prefers and acquired while working in another era in another environment, she might not have used the single quotes with such confidence bearing in mind that, like all other methods, phenomenology has debatable features which do not necessarily place it in the category of a non-science or a pseudo-science. The choice of a method is, after all, determined by the nature of the problem investigated and a personal choice exercised by a researcher. Even today phenomenology is still evident in the work of researchers such as Bayne and Montague, Mohanty, Moran, Sokolowski, Tieszen and Zahavi.³³ One has to take issue with Herman's declaration that an 'analysis of the dissertations that were awarded between 1985 and 1990 shows understanding of knowledge as positive, scientific and objective'.³⁴ She also adduces that 'the methodological hegemony' 'produced pseudo-philosophical knowledge, or rather ideology masquerading [*sic*]³⁵ as science with little relevance to the society which it aspired to correct'. Gauntlett³⁶ would probably comment that this happens under all political dispensations and we are inclined to agree

³²*Ibid.*

³³Smith (2013) 'Phenomenology' in Zalta (ed) *The Stanford Encyclopedia of Philosophy* (2013 Winter Ed), available at <http://plato.stanford.edu/entries/phenomenology/#Bib> (accessed 2014-02-26).

³⁴*Id* 16.

³⁵Herman used the word 'masquerade', which is patently incorrect here.

³⁶*Id* 16.

with him. As if expecting and insuring against criticism of her views, she ends the specific paragraph with the sentence: 'Exceptions were few'.³⁷ Examples of the exceptions would have bolstered her argument. Contrary to Herman's assertion that phenomenology led to an understanding of knowledge as positive, scientific and objective, an analysis of the work of Landman and others on phenomenology as a research method suggests that phenomenology was a reaction to the positivist, scientific (in the sense of natural or behavioural sciences) and objective research in vogue in educational research in the United States in particular because it was not appropriate to the nature of human beings. Yonge of Davis, California³⁸ has translated some of Landman's work and the translation provides access to Landman's thinking to non-Afrikaans speakers. For instance, the word 'develop' was rejected as an inappropriate educational term and the term 'becoming' was preferred. If anything, phenomenologists were prone to an almost paranoid avoidance of terms that could be construed as behaviouristic or positivist or naturalist and they were criticised by other 'Afrikaans' academics like Van der Walt,³⁹ de Vries, Basson and Steyn⁴⁰ precisely for that reason. One could also argue that the phenomenological work did bear relevance to the society in which it operated and a sense of the socio-economic and other factors that complicated the lives of certain sectors of South African society and impeded their access to education and other social services is evident in the work of Le Roux,⁴¹ for example, and in some dissertations produced in the Department of Orthopedagogics (as discussed by Herman herself⁴²) though, in hindsight, one might debate the political and philosophical bases of the work in question).

3.8 Alleged discrimination against academics who opposed the dominant epistemic environment

Herman quotes an interviewee that such 'academics were not allowed to supervise any doctoral students – with the result that they could not qualify for

³⁷*Id* 15.

³⁸Yonge 'The development of fundamental pedagogics at Pretoria from 1969 to 1987' (1988) *Pedagogiekjoernaal (Journal of Pedagogics)* 9(2) at 46–67; Landman 'The concept "educating": A reconsideration' (1989) 9(2) *Suid-Afrikaanse Tydskrif vir Opvoedkunde (South African Journal of Education)*, available at <http://georgeyonge.net/sites/georgeyonge.net/files/Landman-Reconsideration.pdf> (accessed 2013-09-06).

³⁹Van der Walt *Fundamentele opvoedkunde en die ontisiteit van die opvoeding (Fundamental education and the onticity of education)* (1992).

⁴⁰De Vries, Basson and Steyn *Aktuele temas in die opvoedkunde (Topical themes in education)* (1986).

⁴¹Le Roux (ed) *The black child in crisis: A socio-educational perspective* (1994).

⁴²*Id* 7, 9, 11. It should be pointed out that Herman incorrectly equates orthopedagogics with 'psychology' at 7.

promotion'.⁴³ This allegation against the Head of Department, Dean and University Management in question is apparently accepted at face value by Herman. She does not produce any corroborative evidence for a statement which could be the view of a frustrated academic who may not have been given doctoral students or not promoted for perfectly appropriate and valid academic and performance reasons.

3.9 *Similar structures of dissertations*

Herman points out that, in the period under review, most of the 'dissertations have a similar structure: the introductory chapter usually includes a dictionary translation of the key words used in the dissertation into English, French and Latin'.⁴⁴ An examination of the dissertations produced after the dramatic transformations lauded by Herman shows exactly the same tendency and it is difficult to see why similarity now is right, but similarity then was wrong. One may even argue that dissertations produced in this Faculty are now more similar than ever before with hardly any quantitative studies being done and preference being given to qualitative or mixed methods studies. Furthermore, the way the studies resemble each other in approach seems to have been strengthened by the nature and practice of departmental proposal defences and ethics applications before students may commence with their field work.

3.10 *Old and new concepts of knowledge*

Herman seems to be accusing the Faculty of clinging to old concepts of knowledge. She refers to 'the emphasis that white Afrikaans universities had on "education law" and "education management" versus the English universities' tendency towards "education policy" and "education leadership"'.⁴⁵ The fallacious points of departure adopted here that education law and management should not be taught at university level because they are old concepts of knowledge show up some ignorance and lack of information. Her thinking that 'policy' trumps the law is in line with common misconceptions in state and policy circles as became evident in *Minister of Education v Harris*⁴⁶ where Sachs J quoted Harms J from the *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty)*:

I prefer to begin by stating the obvious, namely that laws, regulations and rules are legislative instruments whereas policy determinations are not. As a matter of sound government, in order to bind the public, policy should normally be reflected

⁴³*Id* 7.

⁴⁴*Id* 8.

⁴⁵*Id* 12.

⁴⁶CCT13/01 [2001] ZACC 25; 2001 4 SA 1297 (CC); 2001 11 BCLR 1157 (CC) para 10.

in such instruments. Policy determinations cannot override, amend or be in conflict with laws (including subordinate legislation). Otherwise the separation between legislature and executive will disappear.

The implication is clear. One cannot substitute policy for law. Policy is in fact subservient to the law, so it makes eminent sense to teach the law concerning education (as is indeed being done in, for example, the USA, Canada, Malaysia, China, countries in Europe, Australia and New Zealand and at a number of South African universities) in addition to (or even in preference to) policy. This bears no relation to a university being Afrikaans or English. Education law can hardly be regarded as an 'old conception' of knowledge. Mawdsley and Visser⁴⁷ conclude that '([o]ver the past fifty years, education law has ... become a well-established separate field of law in the United States'. It is hard to imagine that a discrete field of inquiry in existence for fifty years constitutes old concepts of knowledge. In addition, it was only in 2007 that these two eminent scholars were prepared to say that '

it may be concluded that a "critical mass" [of scholarly work] has probably developed as described' and that the other requirements have been met or are being met for the recognition of 'education law' as a distinct legal discipline to be a fact. For reasons of legal theory and practical expediency, it thus makes perfect sense to acknowledge 'education law' in South Africa – although it may in some respects still be in its infancy when compared with, for example, the position in the United States and Western Europe.⁴⁸

The distinction between leadership and policy is such that the terms are not mutually exclusive even though each may be distinguished from the other.⁴⁹ The term management is used in a good number of universities that are neither Afrikaans nor South African. How else would one explain the necessity for well-known academic associations such as the British Educational Leadership, Management and Administration Society (BELMAS) and the Commonwealth Council for Educational Management and Administration (CCEAM)? The Harvard Graduate School of Education has an Institution for Educational Management. In this debate one should also remember that the term 'administration' is also widely used to mean both leadership and management.

⁴⁷Mawdsley and Visser 'The development of education law as a separate field of law: The experience of the United States with some observations on South Africa' (2007) *JSAL* 153 at 161.

⁴⁸*Ibid.*

⁴⁹Bush 'Educational leadership and management: Theory, policy, and practice' (2007) *SAJE* at 391–406.

After this brief consideration of the article itself, we will now turn to an overview of legal principles that might be invoked in the light of the problematic aspects of the article that we have indicated.

4 Some relevant legal principles

4.1 *South African common law*

Earlier on we expressed our opinion that it would be understandable if the University of Pretoria management in general, deans of education, staff of the Faculty of Education and PhDs who graduated during 1985 to 1990 and from 1995 to 2000 (and presumably, also those who graduated from 1990 to 1995) questioned Herman's *ex post facto* analysis of their work.⁵⁰ Our interest is to consider the issues of freedom of expression and academic freedom and restrictions in the light of the new constitutional emphasis on them.

Gauntlett's brief comment in this regard is as good a point to start as any:⁵¹

South Africa since 1994 need not, as was once the case, scabble between the flat stones of oppressive statutes to find an etiolated common-law academic freedom. It is powerfully protected in the country's supreme law. Section 16(1)(d) of the Constitution reads: "Everyone has the right to freedom of expression which includes (d) academic freedom and freedom of scientific research.

Of course, as a constitutional right, academic freedom is not absolute. Like all rights, it may be limited by a law of general application 'to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom' (s 36 of the Constitution of the Republic of South Africa, 1996).

Applied to the topic of our paper, the following seems clear and need not be argued: Herman had the right to do the research she did and to express her opinions freely. Her right was not an absolute right and may be subject to limitation. She had a powerfully protected right to express opinions about the sample of doctorates she studied (in as far as the investigation was carried out within the limitations spelt out). Academic freedom as it may present itself in university environments (including the University of Pretoria) has been the subject

⁵⁰See para 1: Introduction.

⁵¹(N 8).

of litigation as in *Pont v Geysers*,⁵² *University of Pretoria v South Africans for the Abolition of Vivisection*⁵³ and *Peter-Ross v Ramesar*.⁵⁴

We conclude this section with a reference to de Vos⁵⁵ who writes that the law seeks to protect the interest individuals have in their reputation, for instance when someone makes a statement that could lower their esteem in the eyes of others. He continues to say that anyone familiar with the novels of Jane Austen would know that there was a time in the United Kingdom when a person's reputation was a pivotal commodity that could determine his or her success in life. The law aimed to protect this reputation and as such was very much the product of a specific (colonial and Victorian) time and place. De Vos⁵⁶ states that the extent to which this set of legal rules is relevant in a modern, electronically connected, African state is open to question. However, the interest of individuals and institutions in their reputations is not open to question.

4.2 *The superficial impartial spectator*

O'Rourke⁵⁷ introduces the notion of the superficial impartial spectator into the debate on what is fair and acceptable comment on, and analysis of scholarly work:

We envision the Impartial Spectator as having perfect knowledge of everyone's circumstances, experience, and intentions. And since the Impartial Spectator is imaginary and has no self, it has no selfish interest in any judgment that it makes. Smith claimed that what we do, when we develop morality, is to shape our natural sympathies into the thoughts and actions that we would expect from an Impartial Spectator who is sympathetic, but objective and all-knowing (and still sympathetic anyway).

O'Rourke writes that John Rae, Adam Smith's biographer, once commented on a previous author who attempted to appropriate Smith's work:⁵⁸

⁵²1968 2 SA 545 (A).

⁵³2007 3 SA 395 (O).

⁵⁴(N 3).

⁵⁵De Vos 'Defamation and social media: We have moved on from Jane Austen' (2013) *Constitutionally Speaking* (Blog), 27 February, available at: <http://constitutionallyspeaking.co.za/defamation-and-social-media-we-have-moved-on-from-jane-austen> (accessed 2013-09-06).

⁵⁶*Ibid.*

⁵⁷O'Rourke *On the wealth of nations* (2007) 32.

⁵⁸*Id* xiii.

He took only what his superficial mind had the power of taking, and the pith of Smith's thinking must have been left behind. To borrow even a hat to any purpose, the two heads must be something of a size.

O'Rourke asserts that Smith's *An inquiry into the nature and causes of the wealth of nations* cannot be understood without understanding *The theory of moral sentiments*, published by Adam Smith in 1759.⁵⁹ The relevance of O'Rourke to Herman's work lies in the application of the 'impartial spectator' test to her analysis. In contrast to the impartial spectator a partial spectator would be one that intends to be impartial but who does not quite succeed. We have already articulated our doubts as to whether Herman could succeed in escaping the dangers of being a superficial impartial spectator. The reasons for our misgivings included the following:

- a large number of the dissertations are in the Afrikaans language which is inaccessible to her;
- she relied largely on the translated abstracts only – some translated by students/persons themselves who are not first language speakers of English; and
- she purports to find a wealth of information regarding the personal circumstances of the students themselves in the abstracts, namely traces of the setting in which the authors lived and worked – biographical, familial, institutional, cultural, historical, political and geographical.⁶⁰

The question needs to be asked whether Herman was in a position to glean from her sources, and the manner in which she used them, sufficient knowledge of the circumstances, experiences, and intentions of everyone under scrutiny in the study to support confident conclusions and what appear to be scathing assessments. Herman does not appear to be an impartial spectator with *no selfish interest in any judgment that she makes* [our emphasis] nor does she appear to be an impartial investigator. With regard to the circumstances, experience and intentions of the subjects of the study, within the field of investigation, it would be fair to say that she does not even appear to be sympathetic and objective. Despite the author's limited access to the material due to the language barrier, she claims in-depth and comprehensive knowledge of the students, the professors, the institution, the government of the time and the particular language group to which many of the students and professors belonged. Based on the limited information gleaned from the extracts (and the

⁵⁹)'Rourke (n 57) 26.

⁶⁰(N 1) 1.

interpretations given to that sector of society by a limited number of non-objective commentators and also their generalisations regarding *inter alia* the Afrikaner and the government of the time) and some interviews, the author comes to a number of important conclusions regarding the failings of the institution, the students and the professors, and in the process of coming to these conclusions, casts some rather severe aspersions on those persons, the institution and doctorate research. An example of such conclusions can be found in her tacit agreement with Jansen's assertion that:

changing the epistemic environment is constrained by decades of epistemological fundamentalism and by the 'knowledge in the blood', that is, knowledge that is 'embedded in the emotional, psychic, spiritual, social, economic, political, and psychological lives of a community' (Jansen 2009, p. 171). In an interview Jansen elaborates: 'It is precisely the pretence of science or scientific that was the problem because there was a political agenda behind that ...'.⁶¹

We have gained the impression that some of Vegter⁶² and Rousseau's comments⁶³ have a ring of applicability to her work about them. Vegter warns that, 'Relying on studies just because they happen to support your point of view is dangerous. ... you only open yourself to charges of gullibility and partisan cherry-picking. Best to avoid those if you want to make a convincing argument'.⁶⁴ In another opinion piece Rousseau refers to such cherry-picking as 'confirmation bias' which he defines as 'the disposition to prefer evidence that supports your existing view, while tending to ignore evidence to the contrary'.⁶⁵

⁶¹Id 14.

⁶²a/opinionista/2013-07-08-do-reusable-shopping-bags-kill-people/#.U4b_8XKSzSc (accessed 2013-07-09).

⁶³'The unbearable rightness of maybe being wrong' (2012) *Daily Maverick*, 29 February, available at <http://www.dailymaverick.co.za/opinionista/2012-02-29-the-unbearable-rightness-of-maybe-being-wrong/#.U4cAdXKSzSc> (accessed 2013-07-09).

⁶⁴(N 62).

⁶⁵'Free speech doesn't guarantee an audience' (2013) *Daily Maverick*, 4 June, available at: <http://www.dailymaverick.co.za/opinionista/2013-06-04-free-speech-doesnt-guarantee-an-audience/#.U4cAwXKSzSc> (accessed 2013-07-09).

4.3 *An analysis of the past as 'pen pusher'*

In the title and in the introductory paragraph of this paper we suggested that anybody who engages in an *ex post facto* analysis of scholarly work needs to avoid a narrow text analysis to ensure fairness in their assessments of such work. Analysts and critics need to take full account of the context within which work was produced and which is, to an extent, beyond the control of a writer. In a sense, the writer can thus be viewed as the hand that holds a pen that is pushed by many factors and people such as academic traditions, political and other figures. Gauntlett⁶⁶ suggests that anyone who puts pen to paper at any time needs to be mindful of the fact that he or she can also be seen merely as the one who, in the final instance, pushes a pen across paper. This thought should instil in a critical reader and researcher an awareness of his or her imperfect knowledge of everyone's circumstances, experience, and intentions. It should make him or her more prudent when formulating findings and conclusions and also make him or her aware of the imperative to do everything possible to take into consideration the context, in whatever way it manifests itself, when judging texts. Analysts or critics should, in wording their pronouncements on the work of other academics, show some respect or sympathy (empathy) for the efforts of a person whose work is under scrutiny. Researchers should exercise their rights to freedom of expression and academic freedom with a sense of their responsibility to uphold the human dignity of the subjects whose work they are scrutinising and examining. The word 'dignity' refers to the acknowledgement of the intrinsic worth of human beings as entitled to be treated as worthy of respect and concern as stated in the cases *S v Makwanyane*⁶⁷ and *Le Roux v Dey*.⁶⁸ Neethling and Potgieter⁶⁹ add that the recognition of the intrinsic worth of the human being includes the individual's feelings of self-respect. In considering whether or not Herman displays a sense of awareness of who pushed the pen (in legal terms, a sense of fairness and accountability) we have to ask questions about the extent to which Herman's paper sets out to describe and analyse the past, based on information from selected but limited sources. We also have to ask questions about certain omissions in the examination of the material in question as well as the omission of reference to factors and events which would describe the context within which the dissertations were written. In other words what academic environment helped push the pens of the academics and students investigated. An apparent failure to take cognisance of possible developmental trajectories in scholarly approaches and methodology linked to and resulting from the

⁶⁶(N 8).

⁶⁷1995 3 SA 391 CC.

⁶⁸2011 3 SA 274; 2011 6 BCLR 577 (CC).

⁶⁹*Law of delict* (2010).

transformation to a new democratic society, which would require proper historical research, suggests to us that Herman failed to locate:

events in time and place, and requires sensitivity towards understanding the context within which an event took place or developed over time.⁷⁰

We believe that it would lead to more fairness in critical and analytical writing if analysts considered the points that Stevens⁷¹ makes about levels of analysis with reference to Thompson's Depth-Hermeneutics:

- Any research pertaining to ideology will reflect interactive processes
- An analyst may initially sketch a socio-historical context, then isolate particular symbolic forms, and attempt to interpret social actors' interpretations thereof
- When reaching the interpretation/re-interpretation level, the analyst may find that initial assumptions which were made about the socio-historical terrain were inaccurate and needed to be modified
- Mindful of the subjectivity of his or her interpretation of social reality, an analyst should be willing to consider alternative interpretations which may present themselves through the research process.

Some questions remain about Herman's article, for example:

- Are there any actionable wrongs that have been committed against the institution or any of the persons referred to in the paper?
- Can this work be described as the responsible conduct of research (within the ambit of the right to academic freedom)?
- Are the targets of the findings and statements sufficiently anonymous?
- Did she make a reasonable but rigorous effort to 'hear the other side of the story'?

4.4 Academic freedom and freedom of expression

Academic freedom is not only constitutionally protected in section 16 of the Constitution of South Africa, 1996, but it also rests on the capacity for independent commentary that is crucial to the evidence-based work that is unique to Academies. Indeed, the Academy of Science of South Africa's (ASSAf) mission of 'Science for Society' cannot be realised without the exercise of the freedom to research, write, and speak robustly and professionally, without fear or favour on any including the impact of science on society.⁷² Our interest is in how the article

⁷⁰Maree (ed) *First steps in research* (2007) 73.

⁷¹(n 16) *Ibid.*

⁷²Academy of Science of South Africa (ASSAf) 'Academic Freedom Statement' (2010).

may shed light on academic freedom of expression where possibly unfair criticism of work from a previous era may seem to be justified by the changed political and social positioning of [an] institution. Indeed we are also interested in the possibility of the development of what might appear to be a rigid aim to discredit an academic institution and its academic achievements of the past.

As early as 1968, in the case of *Pont v Geysers*⁷³ the then South African Court of Appeal had to deal with a flaming religious row and confirmed that, as far as the respondents' liability for the upheaval was concerned, the trial judge in question had correctly pointed out that it was the right of the respondents to express and to propagate their opinions within the limits of the laws of the land. This right is not diminished because the exercise of the right unavoidably creates violent distress – as Herman's opinions might conceivably do to the persons implicated in her research. Foreseeable distress does not establish a duty to the respondents rather to remain silent about their honest convictions and, in the context of this paper, Herman cannot be regarded as a respondent in the legal sense of the word. Apart from a number of legal constraints, the right to freedom of expression is not subject to a general limitation. As a matter of fact, taking the history of human thinking, as well as that of the church, into account, justification for such a limitation would not be found.

Since then, with the advent of the current constitutional dispensation, freedom of expression has now been entrenched in the Bill of Rights.

4.5 *Opportunity for reflection*

Steyn CJ had, in *Pont v Geysers*⁷⁴ expressed himself clearly on the issue of saying things in the heat of the battle and of having had an opportunity to reflect first. He accepted that the points of view of the church and their implications would have strengthened the feelings of the respondents. He pointed out that these sentiments had even come to the fore at the political level but this took place long before the documents in question were written. There was enough time for calm reflection and more objective thinking. In this context Steyn CJ made the point that the remarks were not made in the heat of the moment in the midst of a shouting match when it is easy to let slip something untoward.⁷⁵ He pointed out that the respondents wrote a monthly column in the publication and that this was a serious discourse. They would have considered the points of view carefully, chosen their words with plenty of time for thoughtful reflection on what was being written. There was ample opportunity to correct what was wrong and to reword any unjustified comments.

⁷³(N 52).

⁷⁴*Id* 552–553.

⁷⁵*Ibid*.

We believe that Herman, too, was under no pressure to reveal urgently what she believed she had found and had enough time to reflect on her findings and the possible explanations for some of them. She would have realised and foreseen that what she was saying would form part of a serious discourse that could harm people and an institution.

4.6 *Responsibility of the speaker or the writer*

Once the decision is made to speak (after doing research and deciding to publish the findings and conclusions), it is important:

- To remain objective and unemotional about the subject matter
- To avoid bombast and melodrama
- To avoid the trap of 'grumbling' about history
- To exercise the right to freedom of expression judiciously. In Steyn JC's words in *Pont v Geys* it remains 'the right of the Respondents to express and to propagate their opinions within the limits of the laws of the land' and not to write 'in the heat of the moment'⁷⁶
- To honour the principles and ambit or scope of academic freedom
- To bear in mind that there is always a historical context that needs to be considered.

In this regard, Geert Mak⁷⁷ states that during the time of his father there was:

... a radiant optimism, a belief in progress, technology and the advent of the new man ... Now, after a hundred years of bloodshed and ideals, we know more. It is time to let go of our historical arrogance, to build bridges through time, to go and stand next to the previous generations.

We have not become better humans. Our grandparents and great-grandparents were different but not worse or lesser. This realisation makes history more complicated. It lends greater urgency to the question: "What would we have done if we had stood in their shoes, with their background and the knowledge they had at that moment." Simultaneously, it (the realisation) brings us closer together and penetrates our historical loneliness.

The admonition is quite clear that we should not just condemn what has happened in the past on the assumption that, with the wisdom of hindsight, we now know better. In the context of this paper it stresses the imperative of trying to understand the context and history of scholars whose work we are evaluating

⁷⁶*Ibid.*

⁷⁷Mak *De eeuw van mijn vader (The century of my father)* (2005). Free translation of the text by the authors to facilitate understanding.

but it does not place on one an obligation to approve or commend everything that has been presented as scholarship. We are merely required to be fair in our assessment and mindful of the possible shortcomings in our own work.

4.7 *Academic freedom and freedom of scientific research*

There has been a dramatic change in the ground rules concerning academic freedom, freedom of expression and freedom of scientific research. According to Gauntlett⁷⁸ this change was ushered in by the new political dispensation and, more particularly, the new constitutional order. Du Plessis points out that academics (and academic institutions) belong to the open community of constitutional interpreters as part of civil society, not as agents of the State.⁷⁹ Their dependence on public resources, however, also requires public accountability. Regarding the freedom of artistic creativity and scientific research, academics' primary commitment to debating and developing ideas surpasses all their other entitlements and responsibilities both in civil society and in the public domain. Academics' association with the community of constitutional interpreters is thus characteristically 'open' in all the various meanings of the word.

It is of particular significance that at the start of, and during the period under review by Herman, a particular political regime operated in South Africa, and it applied to civil society as well as academic scholarship. In this regard Du Plessis⁸⁰ and Du Plessis and Rabie⁸¹ refer to the relationship between the academic community and the State and says that it was indicated from the outset that the open community of constitutional interpreters serves as a catalyst for the 'constitutional reality' to take effect in civil society. Scholarship and the academic world are typically part of civil society. The relationship between civil society and the public dimensions of scholarship is not altogether clear and it has increasingly become a matter of controversy in South Africa. Academic endeavour is the *fons et origo* of the expertise needed to build our new nation. Du Plessis⁸² asks if it is a mere public commodity susceptible to manipulation by the political powers that be and whether academics' search for the truth is a search on behalf of the powerful. He maintains that it is what the previously oppressive regime wanted it to be. It is, however, important to remember that the rights under discussion, as contained in the Bill of Rights, had not come onto the statute book for most of the first decade of Herman's period of enquiry – also bearing in mind that some of the earlier dissertations may have been written a couple of years or more before

⁷⁸(N 8).

⁷⁹(N 21) 215.

⁸⁰*Id* 228.

⁸¹Du Plessis and Rabie 'University subsidies – the final round?' (1988) 51 *THRHR* 381 at 392.

⁸²(N 21) 228.

1985. Even then, when the process of the protection of these rights came under discussion, it was still not clear what the extent of the protection afforded, would be. Du Plessis⁸³ writes that there is no guarantee, however, that even a 'democratic' government in 'a new South Africa' will resist the temptation of getting academic communities to toe its line. There are, as a matter of fact, indications, from debates taking place in the Parliament, that some politicians would love to see universities' wings clipped. Earlier, Spitz wrote an article entitled: 'Eschewing silence coerced by law: The political core and protected periphery of freedom of expression'.⁸⁴ At that time, almost a decade into the period under research by Herman, the right to freedom of expression was guaranteed by section 15(1) of the Interim Constitution but had to be read with section 33(1),⁸⁵ the limitation clause (of the Interim Constitution), which provided the overarching framework for determining justifiable limitations upon the rights and freedoms entrenched in Chapter Three of the Constitution (the Bill of Rights).

In this context, Spitz looked at freedom of expression under the Bill of Rights and argued that our common law rules are aimed at protecting individual reputation.⁸⁶ Spitz said further that individual reputation was likely to form part of the section 10 right to human dignity, and any limitation thereof must be both reasonable and necessary.⁸⁷ Spitz continued that, as the distinction between endeavour and exploitation suggested, it made sense not to treat scientific research as a unified class of expressive activity. The arguments advanced in defence of artistic creativity as a contribution to deliberative democracy do not apply as forcefully to scientific research. In many cases scientific research may contribute to political truth and therefore warrant maximum protection. According to him there is little danger of stifling scientific research or political expression by applying reasonableness and necessity, or merely reasonable protection, as the specific circumstances demand. He believed that scientific research as a class of activity was not definitively within the core or the periphery of freedom of expression.⁸⁸

Spitz concluded by stating that in his article he had argued that the political principle contained in section 33(1) gave rise to a bifurcated guarantee of freedom of expression with a distinct and highly protected political core, and a periphery which enjoyed a lesser, but still meaningful, degree of protection.⁸⁹

⁸³ *Ibid.*

⁸⁴ Spitz (1994) 10 *SAJHR* 301-335 commenting on the Interim Constitution of the Republic of South Africa 200 of 1993..

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ Spitz (n 84) at 335.

Applied to Herman's article, Spitz's article would seem to suggest that her freedom of expression does enjoy some constitutional protection but such protection does not cover violations of the right to freedom of expression. The Interim Constitution (the forerunner of the the 1996 Constitution) was envisaged as a bridge. If this bridge was successfully to span the open sewer⁹⁰ of violent and contentious transition, those who are entrusted with its upkeep would need to understand very clearly what it was a bridge from, and what a bridge to.

If the new Constitution was a bridge away from a culture of authority, Mureinik argued, it was clear what it had to be a bridge to. It had to lead to a culture of justification – a culture in which every exercise of power was expected to be justified. The new order had to be a community built on persuasion, not coercion. Applied to Herman's article, Mureinik's article⁹¹ seems to suggest that her exercise of her right to freedom of expression and academic freedom must be supported by compelling academic evidence. We are not convinced that she always succeeds in realising this recommendation.

5 Summarising comments

In our opinion Herman's paper is thought-provoking on a number of levels *inter alia* in regard to research conventions and rigour, freedom of expression including academic freedom and the possible infringement of dignity in the exercise of the right to freedom of expression. We examined the article as a research artefact in the light of the right to freedom of expression. We introduced into the debate the notion of pushing the pen as an essential element of the discipline of assessment and comparison in an academic context, especially when *ex post facto* assessment of work produced in a previous academic era is concerned.

Our discussion and analysis of the article dealt with, among others, the following questions:

- Does Herman's paper arrive at a convincing conclusion based on sound scholarly evidence indicating where the Faculty of Education, the professors and the students within the academic environment under scrutiny went wrong?
- Does the article contain proof that data was considered in context?
- Does the article contain elements of an encroachment on the rights of the people involved or damage the reputation of the Faculty or the University?

In discussing the article the following points were made:

⁹⁰Mureinik 'A bridge to where? Introducing the interim bill of rights' (1994) 10 SAJHR 31 at 32.

⁹¹*Ibid.*

- There is a clear historical, political, academic and scholarly context which was not taken into account. Taking this context into account could have promoted fairness by giving scholars from another and different age (politically and otherwise) an opportunity to have their side of the story heard. Doing so requires an ability to put oneself in another's shoes and ask and answer the question about what one would have done had one been in a similar position to the one in which the author whose work is being examined found himself or herself.
- The Bill of Rights provides for freedom of expression which includes academic freedom and freedom of scientific research. The right to freedom of expression, including academic freedom, is subject to the general limitation contained in section 36 of the Bill of Rights. It is also subject to other limitations. With regard to the provision for freedom of expression, Moseneke J (as he was then), stated in *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International*.⁹² 'It follows clearly that unless an expressive act is excluded by s 16(2) it is a protected expression. Plainly, the right to free expression in our Constitution is neither paramount over other guaranteed rights nor limitless.' Kriegler J in *S v Mamabolo*⁹³ put it as follows: 'With us it is not a pre-eminent freedom ranking above all others. It is not even an unqualified right.' In appropriate circumstances authorised by the Constitution itself, a law of general application may limit freedom of expression.
- The fact that there is normally sufficient time for reflection and consideration, that conclusions do not have to be made in the heat of the moment, and that university rules and policies generally provide that the subjects of the research are not clearly identified directly or by innuendo.
- Our courts have expressed unambiguous views on freedom of expression and academic research. In the case of *University of Pretoria v South Africans for the Abolition of Vivisection*⁹⁴ Musi J held:

To allege that a university or a department thereof uses inhumane, cruel and invasive tests on animals is in my view defamatory to the university. Likewise to allege specific employees of that institution are responsible for the abolishing of a more humane method of testing animals and substituting it with inhumane, cruel and invasive methods is defamatory to the reputations and good names of those employees.⁹⁵

⁹²2006 1 SA 144; 2005 8 BCLR 743 (CC) par 47.

⁹³2001 3 SA 409; 2001 5 BCLR 449 (CC) par 41.

⁹⁴2007 3 SA 395 0 (relying on *Khumalo v Holomisa* 2002 5 SA 401; 2002 8 BCLR 771 (CC) para 18 and *National Media Ltd v Bogoshi* 1998 4 SA 1196; 1999 1 BCLR (CC).

⁹⁵*Id* par 12.

- Should a publication at any stage become the subject of a dispute or litigation, and it is found that the author exceeded the bounds of freedom of expression and the right to academic research, how could or would such a matter be dealt with? In this regard we referred to the development of the common law with regard to the need to strike a balance between the protection of reputation on one hand and freedom of expression on the other.⁹⁶ Herman's article triggered our examination of the possible links between academic and scholarly requirements and traditions and legal rules as manifested in *ex post facto* analyses of publications and texts which were produced under different academic traditions and in political and policy contexts which have since been discredited. We argued that the notions of 'getting into the other's shoes' and 'who pushed the pen' should form part of, or be added to the considerations affecting an assessment of academic work, especially if it is evaluated *ex post facto*.

We conclude that the right to freedom of expression (including academic freedom) existed even before the new constitutional dispensation was initiated in South Africa in 1994 and is now powerfully entrenched as a fundamental right. However, it was and still is limited. We argue (and believe) that, irrespective of who pushes the pen (in the end), authors and co-authors should note that in the field of academic and other scientific endeavour, there are limits to the freedom of expression and academic research is affected, particularly when the reputation of an individual or that of an academic institution.

⁹⁶Trengove 'New remedies for defamation' (2013) 76(1) *Journal of Contemporary Roman-Dutch Law* 70 (Essays in honour of Louis Harms).